

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

*EX TEMPORE JUDGMENT*

<b>Case Title:</b>  Transnamib Holdings Limited  and  Institute of Management Science Close Corporation	Plaintiff/Respondent    Defendant/Applicant	<b>Case No:</b> HC-MD-CIV-ACT-CON-2020/04267	<b>Division of Court:</b> Main Division	<b>Heard on:</b> 18 July 2023
<b>Heard before:</b> Honourable Lady Justice Rakow		<b>Delivered on:</b> 18 July 2023		
<b>Neutral citation:</b> <i>Transnamib Holdings Limited v Institute of Management Science Close Corporation</i> (HC-MD-CIV-ACT-CON-2020/04267) [2023] NAHCMD 563 (12 September 2023)				
<b>Order:</b>				
<ol style="list-style-type: none"><li>1. The plaintiff to pay costs to the defendant on an attorney client scale, such coststo include the costs of one instructed and one instructing legal representative where necessary.</li><li>2. The matter is removed from the roll: Case Finalized.</li></ol>				
<b>Reasons for order:</b>				

RAKOW J :

### Introduction

[1] This is an application for costs in terms of rule 97(3). The Applicant seeks an order for costs occasioned by the Respondent's withdrawal of action on an attorney client scale and for punitive costs of its application in terms of the said rule.

[2] The Respondent/Plaintiff does not dispute the Applicant's entitlement to a cost order and in fact, offered to pay the Applicant's taxed costs on a part-party scale.

[3] The Applicant rejected the tender for cost, as provided in the rule 32(9) engagements, giving rise to this application, with the central issue being the scale of costs to which the Applicant is entitled to.

[4] The plaintiff in the main case will be referred to as the respondent and the defendant as the applicant.

### Legal arguments

#### *Applicant*

[5] On behalf of the applicant, Mrs Morland argued that from the lease agreement on which the respondents rely, it is clear that costs on an attorney and client scale was agreed to by the parties. And that is not simply just for the respondent to reap the benefit of, but for the applicant as well. Mrs Morland submits that yes costs are in the discretion of the court, however, veering away from the maxim of pacta sunt servanda that each party must comply with the obligations that they have in terms of the contract, means that costs on an attorney client scale for the action is almost a given, if I can put it that way. Mrs Morland points out that her colleague has stated that the applicants have not proven that they are entitled to a high costs scale. Mrs

Morland submits in this regard that the court file is evidence in itself:

- a) There were 21 status reports filed in this matter. Three of which were unilateral status reports after the respondent's legal representative withdrew.
- b) There were five court appearances where the respondent was not present in court.
- c) Two sanctions Affidavits filed by the respondent due to non-compliance with court orders.
- d) Two mediations held in this matter, court connected mediations let us put it that way. The first one could not conclude because the respondent did not have authority to settle nor did they have the financial documents with them during the mediation. The second mediation was cancelled due to the respondent's unavailability on three occasions.
- e) There were subsequent informal round table mediations between the parties. And finally a settlement agreement was reached and the parties came to an agreement. That agreement was then reduced to writing by the respondent's legal representative. That settlement agreement never saw the light of day because the respondent once again decided that one of the clauses was not to its liking.
- f) The respondent brought a summary judgement application knowing that their case was fraught with issues. The matter proceeded to hearings and the ruling was against the respondent with a cost order. The applicant drew up bill of costs, had it taxed, received an allocator, requested payment, but had to issue a writ and execute that writ in order to receive payment.
- g) There was an amendment the applicants raised objections to, yet the respondent proceeded therewith. The applicants then raised an exception but the respondents stuck to their guns and the exception was heard. It was decided against the respondents with costs, once again the applicants had to tax the bill, receive an allocator, request payment and attend to a writ of execution. Once again, execute on the respondents property in order to receive payment.
- h) Then the applicant finally proceeded with their pleas, three of them being special pleas and the parties got to the point of filing their heads of argument.

[6] Mrs Morland further submits that for over a year the matter stood still at a point in order for this matter to settle. Mrs Morland argues that as dominis litus, the respondent has drawn out

this matter and delayed this matter and for that reason, the applicant is entitled to costs on an attorney client scale over and above the contract that both parties signed and agreed to.

### *Respondent*

[7] Ms Katjerungu for the respondent submits that the initial action before the court was that of eviction and that there was a lease agreement that the respondent relied on that afforded the plaintiff an opportunity to cancel on notice.

[8] Ms Katjerungu further states that the parties after a few delays then got together and started discussing settlement. Once settlement negotiations started and evolved, it became evident that there was a credit balance in which the defendant has over paid in monthly rentals. That was a new fact to the plaintiff that the plaintiff had to consider in order to determine its position in the matter. Which eventually led to the withdrawal of the matter.

[9] Ms Katjerungu argues that firstly, the applicant must allege and prove in its papers that the respondents conduct was so reprehensible and so disputable that it warrants a punitive costs order. That is the first leg that the applicant is required to satisfy. The second leg is that a cost order on a party-party scale must prove to be insufficient in indemnifying the applicant of its costs. Ms Katjerungu submits that this appears nowhere in the applicant's papers and on that basis alone, the applicant's application stands to fail.

### Conclusion

[10] The court took into account what was said as well as the request to have the cost awarded on a punitive scale which is the centre of the arguments before this court. The dispute however, was based on a lease agreement and notice was given in terms of this lease agreement by the plaintiff to the defendant to vacate the property. The cause of action therefore, is based squarely within the corners of the agreement which then provides for a cost order in terms of an agreement on attorney client costs scale. The parties therefore, agreed when they originally contracted on this cost scale that it will be applicable, should they wish to proceed with court action against one another.

Order

I therefore make the following order:

1. The plaintiff to pay costs to the defendant on an attorney client scale, such costs to include the costs of one instructed and one instructing legal representative where necessary.
2. The matter is removed from the roll: Case Finalized.

<b>Judge's signature</b>	<b>Note to the parties:</b>
RAKOW J Judge	Not applicable
<b>Counsel:</b>	
<b>Applicant:</b>	<b>Respondent:</b>
K Morland Of Lubbe & Saaiman Incorporated, Windhoek	UK Katjerungu Of Koep and Partners, Windhoek