

REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF  
WINDHOEK  
RULING ON COSTS  
PRACTICE DIRECTIVE 61



NAMIBIA MAIN DIVISION,

<b>Case Title:</b> WECA OFF-ROAD CENTRE CC APPLICANT  v  LAUREN SMIT (MILAN) 1 <sup>st</sup> RESPONDENT KANO PROP (PTY) LTD 2 <sup>nd</sup> RESPONDENT	<b>Case No:</b> HC-MD-CIV-MOT-GEN-2023/00071 INT-HC-OTH-2023/00282  <b>Division of Court:</b> HIGH COURT (MAIN DIVISION)
<b>Heard before:</b> HONOURABLE LADY JUSTICE PRINSLOO	<b>Date of hearing:</b> 5 September 2023  <b>Delivered on:</b> 25 September 2023
<b>Neutral citation:</b> <i>Weca Off-Road Centre CC v Smit</i> (HC-MD-CIV-MOT-GEN-2023/00071) [2023] NAHCMD 594 (25 September 2023)	
<b>Results on merits:</b> Merits not considered.	
<b>The order:</b> <ol style="list-style-type: none"><li>1. The application is regarded as moot.</li><li>2. Each party should pay their own costs.</li><li>3. The matter is regarded as finalised and is removed from the roll.</li></ol>	
<b>Reasons for orders:</b>	
PRINSLOO J:  <u>Introduction</u>	

[1] This matter is before me for determination of costs. Generally, the issue of costs can be easily resolved by determining which party was successful. However, the issue is more complex because of how the matter ended. Mr Lochner appeared for the applicant, while Ms Delpont appeared for the first respondent.

### Background

[2] On 14 February 2023, the applicant approached this court with an application seeking the following relief:

- '1. Confirmation of the cancellation of the oral agreement of rent between the applicant and the 1st respondent in respect of Erf 3532 Nathaniel Maxuilili Street Swakopmund.
2. An order evicting the 1st respondent (and any person holding on behalf or through or with the 1st respondent) from the premises known as Erf 3532 Nathaniel Maxuilili Street, Swakopmund.
3. Cost of suit on an attorney and client scale against any party opposing this application.
4. Further or alternative relief. '

[3] The first respondent did not oppose the application within the specified period. On 23 February 2023, the applicant set the matter down on the first motion court roll, seeking the same relief provided for in the notice of motion.

[4] The applicant also filed a draft court order simultaneously with the notice of set down. Oddly, the applicant amended the relief in paragraph 4 of the draft court order wherein it now sought costs against the respondent. This change in stance was made under the circumstances even though the first respondent filed no opposition.

[5] Before the matter could be heard on an unopposed basis, the first respondent, on 28 February 2023, vacated the property, and on 1 March 2023, she handed over the keys to the applicant. The first respondent, however, filed a notice to oppose the application on the same day.

[6] On 15 March 2023, the duty Judge removed the matter from the first motion roll as it had become opposed. For reasons that will be expounded in more detail below, on 22 March 2023,

the first respondent filed her answering affidavit, wherein she denied that the agreement between the parties is a lease agreement and stated that the relationship between the applicant and the first respondent was rather one of sub-lease of a lease agreement. The first respondent submitted that she and Mr Werner Schaap (the sole member of the applicant) entered into a partnership. In terms of the partnership agreement, the applicant would lease the property to the second respondent, who would sub-lease the property to the first respondent.

[7] As a result of the stance taken by the first respondent, she raised several preliminary points in opposition to the application by the applicant. These points were the following:

- a) non-joinder averring that Mr Werner Schaap had to be joined to the proceedings;
- b) that the application was an abuse of motion court proceedings in that various disputes of facts should have been foreseen to preclude the applicant from approaching the court on motion instead of action proceedings.
- c) rectification in that the lease agreement did not accurately reflect her status as a co-lessee, which meant that the lease agreement required rectification.

[8] On 7 July 2023, the parties filed a joint case management report in which they indicated that the merits of the matter had become moot and that the only outstanding issue was costs. The applicant intended to pursue its costs, but the first respondent opposed such an order. The matter was then postponed for the applicant to file its application on cost and same was heard on 5 September 2023.

#### Submissions by the parties

[9] Counsel for the applicant submits that the applicant would still be entitled to its costs as all issues raised by the first respondent became irrelevant when the matter became moot on 1 March 2023. In any event, counsel for the applicant submitted or argued that, although the first respondent denies being a lessee but a sub-lessee, the bottom line is that the first respondent was a party to a lease (whether in partnership or not) renting the building from the applicant. Therefore, the opposition on these grounds was a weak one. Finally, counsel submits that the applicant would be entitled to its costs beyond the point that the matter became moot because it was forced to reply to the various legal issues raised by the first respondent.

[10] Counsel for the first respondent submits that the first respondent should not be mulcted

with costs as the matter was already moot by the time it filed its answering papers. According to counsel, the application was weak considering the preliminary points raised. Counsel for the first respondent finally submitted that it had no choice but to oppose the application on the merits because the applicant sought a cost order in its draft court order without amending the notice of motion served on her.

#### The relevant legal principles and discussion

[11] The principal rule applicable when an application/case has become moot is that a court will decline to determine the merits and will only do so if it involves an important constitutional issue. This is because courts do not decide academic matters serving no practical effect.<sup>1</sup>

[12] A further ground on which a court may proceed to determine a moot matter is when the dispute was still alive at the time when the case was filed, and the parties have not agreed on the costs aspect. For instance, in eviction cases, the vacation of the premises after the application/action is launched would not render the matter entirely academic if a cost order was sought and no agreement has been reached in this regard.<sup>2</sup>

[13] Where a matter has become moot and the court is called upon to decide costs, it will consider the material at its disposal without necessarily deciding the merits. What is also relevant for this enquiry is whether the applicant was justified in approaching the court.<sup>3</sup>

[14] In the present matter, even if the applicant was justified in bringing the application, the court noted that it did not seek costs in its notice of motion against the first respondent. It is trite that a party approaches a court on the papers and is only entitled to the relief sought on the papers. Since the applicant had not sought an order for costs in its papers but did so only in the draft court order without amending the notice of motion, the first respondent's vacation of the premises before the matter was heard on an unopposed basis effectively rendered the entire matter moot, including the issue of costs. As the court is not called upon to determine the merits of the matter, the remaining question is who should bear the costs of subsequent papers filed unnecessarily after the matter took a long journey under case management.

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<sup>1</sup> *Prosecutor General of the Republic of Namibia v Minister of Justice* (SA 62-2013) [2015] NASC (19 August 2015) para 23.

<sup>2</sup> *Fischer v Seelenbinder* (SA 2-2019) [2020] NASC (4 December 2020) para 23.

<sup>3</sup> See *Jordaan v Namibia Civil Aviation Authority* (HC-MD-CIV-MOT-GEN-2020/00505) [2023] NAHCMD 422 (21 July 2023) paras 19 - 22.

[15] During oral submissions, both parties agreed that the application became moot on the day the applicant handed the keys over on 1 March 2023. I am of the view that both parties are equally to be blamed for this matter proceeding unnecessarily. The applicant should not have allowed the matter to be enrolled beyond the point of the key being handed over, especially under circumstances where the merits were effectively settled, and its notice of motion sought no costs against the first respondent. The first respondent can, therefore, not be blamed for opposing the application. However, the first respondent should have indicated to the applicant that she only took issue with the costs order. This would have resolved the matter amicably between the parties. Instead, she raised several points on the merits, which were effectively moot when she handed over the keys.

[16] In the premise, the court is not persuaded to award either party costs herein as both parties share the blame for unnecessarily proceeding with the matter beyond what was necessary.

Order

[17] In the result, I make the order as set out above.

<b>Judge's signature:</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Applicant</b>	<b>First Respondent</b>
L Lochner (assisted by Ms Strauss) Instructed by Kinghorn & Associates Branch Office, Windhoek	A Delport of Delport Legal Practitioners, Windhoek