

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
RULING

Case No: HC-MD-CIV-MOT-REV-2020/00153  
INT-HC-VARJDGORD-2023/00201

In the matter between:

<b>HALLIE INVESTMENTS NUMBER FIVE HUNDRED AND EIGHTY TWO (PTY) LTD</b>	<b>1<sup>ST</sup> APPLICANT</b>
<b>SUSAN MARGARET VAN DER MERWE</b>	<b>2<sup>ND</sup> APPLICANT</b>

and

<b>MUNICIPAL COUNCIL FOR THE DISTRICT OF WINDHOEK</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>PROSECUTOR GENERAL</b>	<b>2<sup>ND</sup> RESPONDENT</b>
<b>GUNTHER HENLE</b>	<b>3<sup>RD</sup> RESPONDENT</b>
<b>RUN HENLE</b>	
<b>SIGRUN HENLE</b>	<b>4<sup>TH</sup> RESPONDENT</b>
<b>MINISTER FOR REGIONAL AND LOCAL GOVERNMENT</b>	<b>5<sup>TH</sup> RESPONDENT</b>

**Neutral Citation:** *Hallie Investments Number Five Hundred and Eighty Two (Pty) Ltd v Municipal Council for the District of Windhoek (HC-MD-CIV-MOT-REV-2020/00153) [2023] NAHCMD 751 (17 November 2023)*

**Coram:** MASUKU J

**Heard:** Decided on the papers filed by 3 November 2023

**Delivered:** 17 November 2023

**Flynote:** Civil Procedure – Variation of court orders and judgments – Rule 103 – Whether a variation of an order for costs must only be in terms of rule 103(1)(b) – The meaning to be attributed to the word ‘argued’ occurring in rule 103(1)(b) – Circumstances in which a court can vary its judgment or order.

**Summary:** The applicant approached this court seeking review relief, together with certain declaratory orders against the first respondent. The court upheld the review application but declined to grant the declaratory relief. In the order for costs, the court ruled in favour of the applicant and ordered that the respondent pays the applicant’s costs. In the notice of motion and during the hearing, including in the heads of argument, the applicant had prayed for costs of one instructing and two instructed legal practitioners, which the court did not include in the order. The applicant then brought an application in terms of rule 103, for the variation of the order on costs, to include the costs of one instructing and two instructed legal practitioners. The respondent opposed the application, contending that the court had made an order that was appropriate and that in any event, even if the court may take the view that it erred in issuing the order it did, it has become *functus officio*, with the matter falling for resolution by the Supreme Court.

**Held:** That ordinarily, once a court has pronounced itself on a matter in final fashion, it does not have the right to alter its order or judgment unless it is the supplementation in respect of accessory or consequential matters, which the court overlooked or it inadvertently omitted to include.

**Held that:** Rule 103 deals with the powers of the court to rescind or vary its order or judgment. In respect of costs, the rule allows the court to rescind or vary the order if the costs issue has not been argued.

*Held further that:* The concept of a case being argued within the meaning of the rule, contemplates that there must be statements made by the legal practitioners in attempt to persuade the court to find one way or the other, to the point of analysing and pointing out or repudiating a desired inference for the assistance of the court.

*Held:* That proper regard had to the transcript of proceedings, the parties did not argue the issue of costs except to make perfunctory statements which were not, in any event contested and examined in oral argument. As such, the issue of costs could be revisited by the court in the instant matter.

*Held that:* Application for rescission or variation of costs orders is not confined to rule 103(1)(b). As such, a party can apply for the variation of an order for costs where it is alleged that the court issued an order relating to costs inadvertently or overlooked certain pertinent issues relating thereto.

*Held further that:* In the instant case, the applicant had applied for costs of one instructing and two instructed legal practitioners in its notice of motion and the heads of argument filed. The failure to include that portion in the costs order, was nothing more than out of inadvertence on the part of the court.

Application for variation of judgment on costs granted as prayed, with costs.

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### **ORDER**

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1. Prayer 6 of the court's order dated 11 April 2023, is varied to read as follows: 'The first respondent is ordered to pay the costs of the application consequent upon the employment of one instructing and two instructed legal practitioners.'
2. The first respondent is ordered to pay the costs of this application.
3. The matter is removed from the roll and is regarded as finalised.

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## JUDGMENT

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MASUKU J:

### Introduction

[1] The question for determination in this matter is whether this court is entitled, in terms of rule 103, to vary its order for costs granted at the end of the proceedings, to include costs of one instructing and one instructed counsel.

[2] The first respondent alleges that the court, in making its award for costs, declined to award costs for one instructing legal practitioner and two instructed legal practitioners and granted ordinary costs. Having made that order, so further contends the first respondent, the court, has fully and finally exercised its jurisdiction and has thus become *functus officio*. This is such that even if it occurs to the court that it erroneously did not grant the costs of instructing counsel and the instructed counsel, the matter has passed the court's remit and can only be determined on appeal.

### Background

[3] The matter served before me as an opposed motion and in which the applicants sought relief that can be classified as review and declaratory relief.<sup>1</sup> It is common cause that at the end of the proceedings, the court granted the review relief but refused the declaratory relief, considering that the latter is after all, discretionary.

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<sup>1</sup> *Hallie Investments Number Five Hundred and Eight Two (Pty) Ltd v Municipal Council for the District of Windhoek* HC-MD-CIV-MOT-REV-2020/00153 [2023] NAHCMD 179 (3 April 2023).

[4] In its notice of motion, the first applicant, in relation to costs, prayed for the granting of costs for one instructing and two instructed legal practitioners. It is this part of the relief granted that the applicant approaches the court to vary in terms of rule 103. As indicated above, the first respondent opposes the relief for the reasons stated in para 2 above.

[5] For purposes of this ruling, I should mention that the live parties are the first applicant and the first respondent. I will accordingly refer to them as 'the applicant' and the 'respondent', respectively.

[6] As indicated above, the question is whether the application for the variation of the costs order, in terms of rule 103 is permissible in the present circumstances.

[7] The said rule reads as follows:

'In addition to the powers it may have, the court may of its own initiative or on the application of any party affected brought within a reasonable time rescind or vary any order or judgment -

- (a) erroneously sought or granted in the absence of a party affected hereby;
- (b) in respect of interest or costs granted without being argued;
- (c) in which there is an ambiguity or patent error or omission, but only to the extent of that ambiguity or omission; or
- (d) an order granted as a result of a mistake common to the parties.'

[8] Ms Klazen, for the applicant, argued that the matter falls within the rubric of the above rule, particularly sub rule (b). It was her argument that the issue of costs was not argued by the parties. That being the case, it was her submission that the court is at large to revisit the costs order and allow the applicant's costs for the instructing and two instructed legal practitioners as prayed for in the notice of motion.

[9] Mr Narib, for the respondent, on the other hand, argued quite forcefully that this is a matter that was fully argued before court and when one has regard to the court's order, it is implicit, if not clear that the court refused the granting of the costs for instructing and two instructed counsel. In this regard, he further argued, if the court adopts the position that it erred in that regard, namely, not granting costs for both the instructing and instructed legal practitioners, then it has become *functus officio* and the order it issued is not amenable to being varied or corrected by the court itself. It is a matter that must be resolved by the Supreme Court.

#### The law applicable

[10] It is plain, from reading the above-mentioned rule that although ordinarily, the court ceases to exercise jurisdiction in matters in which it has pronounced itself in final fashion, there is a reservoir of power available for the court to alter, correct or vary an order or judgment it has issued. In this regard, the court may act of its own motion, or it may do so having been spurred by a party affected by the said order. In this regard, the rule makes it clear that the said application must be brought within a reasonable time.

[11] What a reasonable time constitutes is a question that has to be determined on a case-by-case basis, having regard to factors attendant to the matter. These may include factors such as when the judgment or order was issued; when the parties became aware of it; steps, if any, taken to deal with the error; when and the effect of the delay in launching the application, if any, on the implementation of the judgment and the issue of course of prejudice both to the applicant, and the party affected by the order.

[12] In the instant case, I am happy to state, without fear of contradiction that the applicant brought the application on notice within a reasonable time. The respondent does not, as far as I can fathom its case, argue otherwise. The judgment was issued on 11 April 2023 and the application is dated 21 June 2023. I accordingly find and hold that the application was brought within a reasonable time, as it was some two months after the delivery of the

judgment and there is no prejudice on either the parties' side regarding the time of the launch of the application. In this regard, I should point out that neither is the court, in any shape or form, prejudiced by the timing of the application, as there is no inordinate delay in the present circumstances.

[13] Before I deal with the question confronting the court, I should refer to the judgment of Trollip JA in *Firestone South Africa (Pty) Ltd v Genticuro AG*,<sup>2</sup> where the following is recorded:

'The general principle, now well established in our law, is that, once court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that it thereupon becomes *functus officio*: its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased. . . There are, however, few exceptions to that rule which are mentioned in the old authorities and have been authoritatively accepted by this Court. Thus, provided the court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter, or supplement it in one or more of the following cases:

- (i) The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, which the Court overlooked or inadvertently omitted to grant (see *West Rand* case, *supra*). This exception is inapplicable to the present case, for Firestone does not seek any such supplementation.
- (ii) The Court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "the sense and substance" of the judgment or order.'

[14] This case, it must be remembered, was applicable to this country at the time and I am of the view that it fairly represents the law of this country even at this time. In the instant case, if I properly characterize the order sought, the

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<sup>2</sup> *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (AD) at 306 F- 307 A.

court is not required to clarify its judgment but rather, to alter and correct it due to inadvertence or overlooking of certain pertinent facts by the court.

[15] Having dealt with the applicable law, at a general scale, I now zero in and consider the question by considering the rules of this court. In this regard, what must be determined is whether an application for variation or rescission under this rule, may only be brought in terms of subrule (1)(b) if it relates to costs. I will delay the determination of that particular issue and proceed to deal with the subrule in question first, namely, whether rule 103(1)(b) applies.

[16] In this particular regard, the question is whether the issue of costs was argued during the proceedings. Mr Narib argues that the question of costs was argued during the hearing, whereas Ms Klazen, for her part, argues contrariwise.

[17] In order to determine that issue, it is necessary to have regard to the excerpts from the record of proceedings helpfully filed by the parties to assist the court. At p 52 of the transcript of proceedings, Mr Töttemeyer, who represented the applicant during the proceedings, stated the following at the tail end of his address:

'Then lastly costs my Lord. We submit that costs of the application should succeed with costs, and it should include the cost of one instructing and to (sic) instructed counsel. We submit the nature and complexity of the matter to justify the inaudible). I believe my first respondent also has two instructed counsels (sic). My Lord these are our submissions.'

[18] When the turn for Mr Narib came to address the court on costs, he submitted the following as seen from p 76 of the transcript of proceedings:

'In view of these submissions your Lordship we will ask the Court to dismiss the application with cost, such cost include cost of one instructing and two instructed counsel. And if the Court is minded to review and set aside the decisions as I have



said, your Lordship, your Lordship should in any event decline the declaratory reliefs that are sought.'

[19] I should state for the record, that in reply on points of law, Mr Töttemeyer did not respond to the issue of costs as raised by Mr Narib. He did not deal with the perfunctory response returned by Mr Narib in response to his submissions on costs. The question to determine, in the circumstances, is whether it can be said that costs in this matter, were argued, as envisaged in subrule (1)(b) above?

[20] What becomes clear from my reading of the record again, is that it is clear that the parties had equality of arms. There was, on each side, an instructing legal practitioner and two instructed legal practitioners. Mr Töttemeyer merely recorded and I may say in perfunctory manner, that costs should be awarded in his client's favour for one instructing and two instructed legal practitioners. He added that the costs prayed for were justified because of the nature and complexity of the matter. Mr Narib responded in kind and urged the court to dismiss the application with costs of one instructing and two instructed legal practitioners, without more.

[21] I am of the considered opinion that the issue of costs was not really argued by either party. The parties seem to have been of the same mind that if the applicant succeeds, it will be entitled to costs of one instructing and two instructed counsel and on the other hand, if the application is dismissed, the respondent would be entitled to the same order as to costs. No argument was raised regarding what Mr Töttemeyer stated as being uncontested that the issue was by its nature and gravity, one that required the number of counsel employed. Mr Narib, as indicated, did not contest that position at all should the court have been minded to find in the applicant's favour.

[22] It may be necessary, at this juncture, to explore what the rule maker would have intended by employing the word 'argued' in the text. I can do no

better than to refer to the ever-reliable Bryan A Garner.<sup>3</sup> He deals with the word 'argument' as follows:

'1. A statement that attempts to persuade; esp., the remarks of counsel in analyzing and pointing out or repudiating a desired inference, for the assistance of a decision-maker. 2. The act or process of attempting to persuade.'

[23] In dealing with 'oral argument', the learned author states that it is, 'An advocate's spoken presentation before a court (esp. an appellate court) supporting or opposing the legal relief at issue.' I hasten to add that in our case, argument applies equally in the High Court, even sitting as a court of first instance.

[24] I am of the considered view that when proper regard is had to the excerpts from the transcript of proceedings, it become clear that whereas the parties locked horns on the main relief sought, adopting contesting positions thereon, when it came to the issue of costs, there was no real argument. Each party contended for the order sought in relation to costs without contending that the other was not entitled to the order for costs sought and providing reasons therefor. There was no statement or presentation made in relation to costs that was desired to assist the court to reach a particular conclusion on costs, especially one adverse to the position advocated by the adversary thereon.

[25] Where a matter is argued, this contemplates each party not merely stating what may be regarded as a perfunctory statement of law or practice but to seek, by statements of law, with authorities, if necessary, to establish the position advocated for. In that regard, there must be an intimation or a direct challenge by the opposite party that places the other on notice that the particular issue or case is placed in issue and needs to be directly debated to and fro, before the court can make a decision on it. This is not the impression I gained when argument was presented on costs. That impression is not, in

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<sup>3</sup> Brian A. Garner, *Black's Law Dictionary*, 3<sup>rd</sup> Pocket Edition, 2006, p 43.

any way, shape or form, changed when I have regard to the transcript supplied.

[26] In the premises, I find that this is a matter in respect of which this court is at large to revisit the issue of costs, as it is clear that the issue was dealt with in a perfunctory manner by all the parties. There was no argument presented that needed the court to split hairs and deal with that issue separately in the judgment, taking into account the disparate positions taken by the parties on each other's entitlement to one type of costs or the other. Each party submitted, as I have said, in a perfunctory manner, its entitlement to costs without challenge.

[27] It would seem to me that each party would be at ease with the costs it prayed for, or even against it, depending on the outcome of the application - whether it was granted or refused. In the former case, the respondent appeared settled to have the costs of one instructing and two instructed counsel. Mr Töttemeyer appears to have been set on the contrary course if the court dismissed the application.

[28] This is not however, to mean that either party would have not been entitled, for any reason, to question the order of costs on appeal, particularly the question whether the costs should have been granted or not. In this regard, Mr Narib, argued during the current application that in view of the fact that the *declarators* sought by the applicant, were dismissed, the costs should not have entirely been in the applicant's favour. That is a question for the Supreme Court to determine, this court having fully and finally exercised its jurisdiction in that regard.

[29] I need to mention one issue before bringing this application to a close. It is this: in my considered opinion, the provision relating to costs, discussed above, does not appear to be the only leg relating to costs that is permissible for the court to consider. It seems to me that there may be cases relating to costs, which do not, however, fit hand in glove with the provisions of rule 103(1)(b). There may well be cases where the issue of costs may arise in

terms of subrule (a), in which case an order for costs may be granted in the absence of a party or in a case, such as the present, where there is an ambiguity or patent error or omission.

[30] I should debunk any inclination towards the view that all matters of costs pursued in terms of this subrule, must perforce be done in terms of subrule (1)(c). In my considered opinion, the omission to include the costs of the instructing and instructed legal practitioners, in the instant case, which had been clearly applied for, was an error that actually falls within the rubric of subrule (1)(c), where the court committed what appears to be a patent error. There is no other reason or justification for the court having declined the costs of the instructing and instructed legal practitioners. To err, after all, is human.

[31] To borrow from the *Firestone* judgment, I can state without fear of contradiction that the omission to include the scale of costs prayed for was the result of the court having overlooked the prayer sought and was purely out of inadvertence and nothing else. I did not expect that this is an issue that would have degenerated to these levels, where this application was vigorously opposed, necessitating that extensive heads of argument be filed and the court sits to hear argument as envisaged in rule 103(1)(b), so to speak. Less still, that the court would be required to write a ruling on this matter.

[32] In the premises, I incline to the view that the applicant has made out a good case for the variation of the costs order, to include the costs of one instructing legal practitioner and two instructed legal practitioners.

### Conclusion

[33] It will have been plain, from what has been stated above, that in the instant matter, I have found that the court is entitled to consider and revisit the issue of costs, as raised by the applicant. This is because of the provisions of rule 103(1)(b), namely, that the parties did not argue the issue of costs. Furthermore, it is also plain, from the conclusion reached above, that in any event, there was a patent error or omission on the part of the court in not

including the costs of the instructing and instructed legal practitioners in its order for costs, which it is common cause had been applied for by the applicant and confirmed during the hearing.

### Costs

[34] It is apparent that the applicant has succeeded in its application, which as I have said, was vigorously opposed but was argued in the true traditions of the profession, eschewing any acrimony. The applicant is therefore entitled to costs of the application as it has evidently succeeded in its application.

[35] In view of the foregoing discussion and conclusions, I come to the view that the following order is appropriate:

1. Prayer 6 of the court's order dated 11 April 2023, is varied to read as follows: 'The first respondent is ordered to pay the costs of the application consequent upon the employment of one instructing and two instructed legal practitioners.'
2. The first respondent is ordered to pay the costs of this application.
3. The matter is removed from the roll and is regarded as finalised.

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T S MASUKU  
Judge

## APPEARANCES

APPLICANTS: K. Klazen  
Of Ellis Shilengudwa Inc. Windhoek

1<sup>ST</sup> RESPONDENT: G Narib

Instructed by: Dr Weder, Kauta & Hoveka Inc. Windhoek