

[1] This is an application for payment of costs brought by the second respondent against the applicants, pursuant to rule 97(1) of the High Court Rules, following the applicants withdrawing the application for rescission of judgment without tendering costs.

Background

[2] The application for rescission emanated from case number HC-MD-CIV-ACT-CON-2021/03105 in which the registrar issued a writ of execution against the immovable property being Erf No. 214 (A Portion of Erf No. 154) Prosperita, Windhoek (the 'property'), in favour of the second respondent (the 'judgment creditor').

[3] The property was sold at a public auction to the first applicant for N\$17 000 000. On 12 July 2023, the deputy sheriff requested for the cancellation of the sale in execution for the reason that the first applicant failed to comply with the conditions of sale. On 8 August 2023, the court granted an order for the cancellation of the sale.

[4] On 1 September 2023, the applicant approached this court with a rescission application citing six respondents, including the judgment creditor, as the second respondent. The applicants partly blame their non-compliance on the second respondent and the legal representatives of the second respondent amongst others. The second respondent opposed the application and filed an answering affidavit addressing the allegations made against it and its legal representatives and other issues that are not relevant to the issue at hand.

[5] On 13 November 2023, the applicant withdrew the application for rescission of the order which cancelled the sale in execution. The applicants' legal representative suggested from the bar that each party pay its own costs. The second respondent then indicated its intention to apply for an order of costs in terms of rule 97(3).

[6] The second respondent contends that the applicants did not cite them for the interest they might have in the matter or an interested party, but that the applicant blamed them for the failure to comply with the conditions of sale. The second respondent further argued that it is justified to address the allegations made against it.

[7] The applicants on the other hand argued that the cancellation of sale was between the

applicants and the deputy sheriff, who did not oppose the application and that the second respondent's opposition was 'unwarranted and reckless'.

[8] The issue before me is whether the respondent is entitled to costs.

Applicable law

[9] Rule 97 of the High Court Rules provides:

'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.'

[10] In *Bertolini v Ehlers and Another*¹ the court placed reliance on the matter of *Germishuys v Douglas Besproeiingsraad*² for guidance on matters where a party withdraws an action against the opposing party. In the aforementioned matter 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 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.'

Discussion

[11] Whilst it is true that the cancellation of the sale in execution dealt with under case number HC-MD-CIV-ACT-CON-2021/03105 was an issue between the applicant and the deputy sheriff as

¹ *Bertolini v Ehlers and Another* (320 of 2016) [2017] NAHCMD 289 (6 October 2017).

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

submitted by the applicants, the second respondent was cited as a party to the present proceedings. The applicants blamed the second respondents and their legal representatives in their founding affidavit for their non-compliance with the conditions of sale. Second respondent was not cited for the interest they might have in the matter as a party, but allegations were levelled against it which necessitated it to respond thereto and in so doing, filing of the answering affidavit. In the circumstances, I am of the view that the second respondent is entitled to be indemnified against the costs it incurred in opposing the rescission application.

[12] The discretion of granting costs lies with the court and in the exercising of my discretion I can find no reasons why a costs order should not follow the result.

[13] Those are my reasons for the order made above.

| | |
|---|--|
| Judge's signature: | Note to the parties: |
| | Not applicable. |
| Counsel: | |
| APPLICANTS | 2ND RESPONDENT |
| J G W ARNOLS <i>of</i> Sisa Namandje & Co. Inc. | T MARTIN <i>of</i> Dr Weder, Kauta & Hoveka Inc. |