

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
RULING ON COSTS

Case No: HC-MD-CIV-ACT-CON-2022/00382  
INT-HC-AMDPLEA-2024/00097

In the matter between:

**SHAUN BASSON**

**PLAINTIFF**

and

**ONDJABA ENTERPRISES CC**

**1<sup>ST</sup> DEFENDANT**

**RUTHIE THERESIA DIERGAARDT**

**2<sup>ND</sup> DEFENDANT**

**JOHAN DIERGAARDT**

**3<sup>RD</sup> DEFENDANT**

**Neutral Citation:** *Basson v Ondjaba Enterprises CC* (HC-MD-CIV-ACT-  
CON-2022/00382) [2024] NAHCMD 328 (18 June 2024)

**Coram:** MASUKU J

**Heard:** 28 May 2024

**Delivered:** 18 June 2024

**Flynote:** Civil Procedure – Costs – Circumstances in which wasted costs are granted – Considerations taken into account therein – Attorney and client costs – Circumstances in which such costs are granted.

**Summary:** The parties are caught in the throes of litigation. The matter serving before court had reached the pre-trial conference stage and the parties had been ordered to deliver the pre-trial conference report. At that stage, the defendants indicated that they were desirous of amending their pleadings, thus scuppering the pre-trial conference hearing, as it were. The plaintiff applied for costs incurred as a result of the said development. Later in the proceedings, the plaintiff also made application for an amendment of its pleadings and submitted that the defendants unreasonably opposed the application for leave to amend and the court was moved to grant attorney and client costs against them therefor.

*Held:* That the court ordinarily issues an order for costs and it is the responsibility of the taxing officer to deal with the particular items that fall within the rubric of the court order. A party dissatisfied therewith can approach the court in terms of rule 75.

*Held that:* Wasted costs are those incurred and granted when the services, which occasioned them, are no longer of any use to the parties to the action or proceeding, as the case may be.

*Held further that:* Attorney and client costs are granted in situations where there is unbecoming conduct on the part of the party liable for costs and which the court finds it appropriate to censure. This may include vexatious, frivolous or deplorable conduct.

*Held:* That there is no wayward conduct by the defendants in opposing the application for leave to amend and as such, there is no need to mulct the defendants in attorney and client costs.

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**ORDER**

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1. In respect of the 26 October 2023 hearing and related issues, the defendants must pay the wasted costs occasioned thereby.
  2. In respect of the costs occasioned by the amendment of the plaintiff's particulars of claim, the plaintiff must pay the costs occasioned thereby and such costs are not ordered to be in the cause.
  3. The application for the costs mentioned in 2 above, to be paid by the defendants and on the punitive scale, is refused.
  4. Each party is to bear its costs in relation to the argument on 18 April 2024.
  5. The matter is removed from the roll and regarded as finalised.
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**RULING**

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MASUKU J:

Introduction

[1] At issue, and serving for determination in this ruling, are highly contested issues related to costs. In order to understand the context in which the questions for determination arise, it is imperative that a brief rendition of the relevant facts is given.

[2] In this regard, it should be mentioned that there are two separate costs issues that will be dealt with in this matter. The first, relates to costs for appearances on 26 October 2023 and 9 November 2023. The second, relates to costs associated with an application for leave to amend, filed by the plaintiff on 1 March 2024.

[3] In addressing these issues, I propose to deal with each one in turn and to briefly address the relevant facts, the argument presented and the ruling of the court thereon. I proceed to do so presently.

#### The parties

[4] The plaintiff is Mr Shaun Basson, an adult male resident in Windhoek. He sued the defendants Ondjaba Enterprises CC, Ms Ruthie T. Diergaardt and Mr Johan Diergaardt for payment of damages arising out of an alleged breach of contract. The Diergaardts are members of the first defendant Ondjaba Enterprises.

[5] The plaintiff is represented by Ms Katjipuka, whereas the defendants are represented by Ms Mufune. The court records its indebtedness for the assistance the legal practitioners dutifully rendered to the court in addressing the issues for determination in this ruling.

#### The wasted costs of the appearance of 26 October 2023

[6] On 12 September 2023, the court issued an order for the parties to comply with the provisions of rule 32(9) and (10). This engagement was ordered in the light of an application for condonation by the defendants for the late filing of their witnesses' statements. The matter was postponed to 26 October 2023 for a status hearing or if some progress was made regarding the intended application, for the matter to proceed to the pre-trial conference.

[7] It would appear that the parties exchanged draft pre-trial reports in the interregnum. In this regard, it is common cause that the plaintiff sent a draft pre-trial report to the defendants on 3 October 2023. It would seem that at that point, the defendants had intimated that they intended to amend their pleadings and they took the view that the pre-trial conference could not, in the circumstances, proceed. The plaintiff's legal practitioners then sought clarity on the proposed amendments and how they would affect the further conduct

of the matter as they were still of the view that the matter could proceed to the pre-trial conference hearing.

[8] The matter then served before court on 26 October 2023 and the plaintiff had, on 20 October 2023 filed a unilateral status report, with the defendants filing theirs on 25 October 2023. As not much progress was made on the day and due to the proposed amendment of pleadings by the defendants, the plaintiff prayed for wasted costs for that day and which the defendants duly tendered.

[9] The dispute between the parties is what constitutes wasted costs in the present circumstances. The parties take different postures on what this entails in the present matter. I am of the considered view that the order issued by the court or rather, what is plain, is that the defendants offered to pay wasted costs for the appearance on that day.

[10] It appears to me that the parties seek the court's direction on what those costs should and should not include. I say this in view of the contents of para 3.11 of the defendants' notes on argument dated 7 December 2023. They deal with deal with the nature of the items forming the bill of costs and on which the parties appear to have divergent views.

[11] This pertinently raises the question - does it fall within the province of this court to identify items that should constitute what the wasted costs in the instant case? I think not and the reasons therefor appear below.

[12] The court's responsibility in this case, is confined to pronouncing itself as to the order for costs. This was done as the defendants tendered their costs. I understood the defendants, in their heads of argument, to question certain costs that appear to be claimed by the plaintiff in this matter. It seems to me that it falls beyond the scope of this court's call to entertain the various items that should or should not be included in the itemised bill of costs that comprises of wasted costs. It is not the duty of this court to identify what items should be included in the bill of costs.

[13] It would appear to me that the parties should be reminded that the court has adjudicative functions. These are mostly confined to it deciding legal questions that arise, including of course, the question of who should bear costs of proceedings in any case, where that is a disputed issue. What is in issue is what those wasted costs should entail. Is the determination of that question one for the court to determine at this stage of the proceedings? I think not and reasons for returning this answer follow below.

[14] Issues of what items wasted should include, are not matters for the court to determine. The responsibility for doing so, lies with the taxing officer in terms of rule 75. It is where there is a review of the taxing officer's decision that the court becomes seized with determining whether or not certain items were properly included or excluded by the taxing officer.

[15] In the instant case, the bone of contention appears to be whether the defendants should bear the costs wasted, as a result of their tardiness in pushing the matter forward, as it were. I am of the considered view that the hearing of the 26<sup>th</sup> November 2023 did not achieve what it was set to do because the defendants, at the eleventh hour, introduced the issue of the amendment of their pleadings, meaning that the efforts put in by the plaintiff to prepare the pre-trial report, went to nought. Wasted costs in that regard, have to be borne by the defendants for that court appearance.

[16] Secondly, it is my view an elementary principle that a party that seeks the amendment of its pleadings, essentially seeks an indulgence from the court. For that reason, that party should ordinarily pay the costs incurred as a result of the amendment it effects on its pleadings. In this regard, there is no question that the plaintiff would have incurred costs as a result of the matter not proceeding to the pre-trial conference as a result of the issues that the defendant faced, necessitating an amendment and which rendered the matter incapable of proceeding to the pre-trial conference hearing on that day. These are wasted costs on any interpretation, in my considered view.

[17] I agree with the plaintiff's counsel that the tardiness of the defendants resulted in two pre-trial conferences being aborted, namely on 26 October and 9 November 2023. The costs associated therewith, in my considered view, amount to wasted costs and must be borne by the defendants. This is so for the reason that the actions or difficulties faced by the defendants, resulted in the matter not proceeding on course. Wasted costs incurred as a result thereof, must, in my considered view, be borne by the defendants for that reason.

[18] Wasted costs have been defined in many cases. They are defined by the learned author A C Cilliers<sup>1</sup> in the following terms:

'The general rule is that where a party is responsible for a case not being proceeded with on the day set down for hearing, he must pay the costs which are wasted. Such an order was made where an exception had been filed but not properly placed on the roll by the defendant's attorney. In another case where an applicant moved for a final order of sequestration in the absence of sufficient information entitling him to such an order, the court granted an alternative application for a postponement and ordered the applicant to pay wasted costs . . .'

[19] Further down in para 8:11 reasoned as follows:

'In *HillLine Investments (Pty) Ltd v Lamprecht*<sup>2</sup> the usual rule was stated that where a postponement has become necessary because one of the fault or default of one of the parties, the party at fault must pay the wasted costs occasioned by the postponement. Where, however, the postponement became necessary as a result of blameworthy conduct on the part of both parties, the court may refuse to make an order as to the wasted costs occasioned by the postponement.'

[20] It must be mentioned that most of the cases dealt with in this book, relate to hearings, which are formal. That is probably because the author is dealing with the position in South Africa and where they do not have case management hearings that we do in this jurisdiction. These, in my view,

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<sup>1</sup> A C Cilliers, *Law of Costs*, LexisNexis, Durban, 1997, p 8-9, para 8.11.

<sup>2</sup> *HillLine Investments (Pty) Ltd v Lamprecht* [2014] JOL 32683 (ECP) [8].

qualify as hearings and in respect of which a court may, where a party is at fault or in default, make an order for wasted costs to issue accordingly.

[21] I am of the view that the instant case is one that falls neatly within the circumference of the cases mentioned by the writer above. I am of the considered view that the defendants should accordingly bear the wasted costs claimed and there is no reason why those should not be payable immediately.

Costs for amendments sought by the plaintiff to its particulars of claim

[22] It would appear that the shoe is now on the foot. The enquiry in this matter relates to costs incurred as a result of the plaintiff having to amend its pleadings on 1 March 2024. The plaintiff contends that costs that arise in this matter and at this juncture, must be borne by the defendant because it unreasonably opposed the amendment sought. For that reason, the plaintiff claims that those costs must be paid by the defendants on the attorney and client scale. The plaintiff further contends that the costs incurred as a result of its amendment must in any event, be in the cause and not payable immediately.

[23] The defendants, for their part, argue that the ordinary rule applicable to costs, must apply, namely, that a party seeking an amendment of its pleading essentially craves an indulgence from the court and must for that reason, bear the costs associated therewith. It is the defendants' further case that there is no basis upon which the court can properly order them to pay costs on the punitive scale for opposing the amendment proposed by the plaintiff.

[24] What needs to be decided is whether the application for costs on the punitive scale is warranted in this case and also whether the costs incurred should be costs in the cause. I will begin with the first issue immediately below.

[25] Attorney and client costs are not awarded merely for the asking. They fall into a special category of costs that are not generally granted by the



courts. There must be some vexatious, frivolous or deplorable conduct by a party in the proceedings to attract the imposition of these costs.

[26] In dealing with this aspect, it would be helpful to again refer to the learned author Cilliers. The author states as follows at p4-16, para 4.09:

‘The ordinary rule is that the successful party is awarded costs as between party and party. An award of attorney and client costs is not lightly granted by the court: the court always leans against awarding attorney and client costs, and will grant such costs on “rare” occasions . . . An award of attorney and client costs is granted by reason of some special considerations arising either from the circumstances which gave rise to the action, or from the conduct of the losing party. The list is not exhaustive.’

[27] The question is whether there are any special circumstances in the instant case, which would warrant the granting of costs against the defendants on the punitive scale. The plaintiff argues that their opposition to the application for leave to amend was unreasonable and that is why a punitive costs order must be made.

[28] It must be pointed out that the defendants did file a notice to oppose the application for leave to amend. The defendants did not, however, follow through with the opposition. As such, according to my understanding of the papers, there was no actual opposition to the amendments proposed by the plaintiff and which were later effected.

[29] I am consequently of the considered view that there is no reason in law or logic, to mulct the defendants in attorney and client costs in this matter. As previously stated, there is no reason given in this matter that justifies the granting of costs on this special scale. An opposition may ordinarily be filed by a party to reserve its rights, especially in interlocutory or urgent applications whilst the implications of the relief sought are being considered in depth.

[30] It is my considered view that there is no real prejudice shown by the plaintiff to have been suffered by him by the filing of the notice to oppose. The critical stage, where costs may be sought, is when the actual opposition on affidavit is filed and it is plain that the opposition is merely frivolous or vexatious. This is certainly not the case in this matter. I am accordingly of the considered view that the application for costs to be awarded on an attorney and client scale, must be refused. Parties should not be afraid of litigating appropriately and within their procedural rights, fearing that a Sword of Damocles, in the form of punitive costs, may be wielded.

[31] I am further of the considered opinion that the applicable law to costs arising from an application for leave to amend, must be followed. In *Trustco Group International (Pty) Ltd v Atlanta Cinema Capital CC and Others*<sup>3</sup> the court reasoned as follows:

‘The normal rule that applies is that a party which moves an application for an amendment craves an indulgence from the court. The upshot of this position is that the ordinary order that follows is for the applicant for leave to amend should pay the costs. The exception may be in circumstances where the court is of the view that the opposition was nothing more than an abuse of the court’s processes and that the opposition to the application was obstructive and unreasonable in all the circumstances.’

[32] In the instant case, as stated, the amendment was not really opposed, beyond filing a notice to oppose, which was not followed through with bases for the opposition. In fact, it became apparent and was recorded that the amendment was not opposed and same was effected in that spirit. There is no basis for ordering the defendants to pay the costs of the amendment and less so, on the punitive scale. The ordinary rule must apply in this case in the same manner it was applied when the shoe was on the other foot and it was the defendants, who applied for an amendment. They were ordered, as the law directs, to pay the costs therefor.

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<sup>3</sup> *Trustco Group International (Pty) Ltd v Atlanta Cinema Capital CC and Others* (I 370/2012) [2016] NAHCMD 297 (30 September 2016), para 39.

[33] I am of course alive to the fact that depending on the circumstances of a case, the court may order the one or other party, for reasons furnished, to pay the costs. In the instant matter, there is nothing, in my considered view, that can be described as sinister, gravely irregular or untoward, committed by the defendants that would prompt the court to order them to pay the costs occasioned by the plaintiff's application for leave to amend its particulars of claim.

[34] I am of the considered view that in the present circumstances, the plaintiff must pay the defendants' costs incurred as a result of its amendment. It would not be a proper exercise of the court's discretion, to treat similar matters in a dissimilar fashion. What is sauce for goose, must be sauce for the gander as well. One cannot, in the absence of material considerations, seek to apply different standards to the same litigants on similar issues.

[35] In the premises, the costs occasioned by the amendment of the plaintiff's particulars of claim, must be paid by the plaintiff immediately and will not be in cause. That is the same order the court issued in respect of the costs incurred by the defendants. A feeling that the parties are treated differently when the circumstances are by and large similar must be avoided at all costs, as I hereby do.

[36] In closing, I need to echo the sentiments that are expressed by the second defendant in her affidavit resisting costs on the punitive scale. She posits that the battle appears to be more among their legal practitioners than the parties themselves. There may be need on the part of the legal practitioners to self-introspect in this wise and I make no finding on this poignant remark. A much smoother progression of the litigation in this matter would serve all the parties well, the court included. A stitch in time saves nine.

Order

[37] In the premises, and having proper regard to the discussion above, it seems to me that each party has succeeded in some measure but also failed in some other measure. That being the case, it seems to me that each party must bear its own costs in respect of the two applications for costs.

[38] In view of above considerations, it seems that the each party should bear its costs. I say so for the reason that each party has had a measure of success. I accordingly issue the following order:

1. In respect of the October 2023 issues, the defendants must pay the wasted costs occasioned thereby.
2. In respect of the costs occasioned by the amendment of the plaintiff's particulars of claim, the plaintiff must pay the costs occasioned thereby and such costs are not ordered to be in the cause.
3. The application for the costs mentioned in 2 above, to be paid by the defendants and on the punitive scale, is refused.
4. Each party is to bear its costs in relation to these interlocutory proceedings, including the costs of the argument on 28 May 2024.
5. The matter is removed from the roll and regarded as finalised.

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T S MASUKU  
Judge

## APPEARANCES

PLAINTIFF: U Katjipuka  
Of Nixon Marcus Public Law Office, Windhoek

DEFENDANT: L Mufune  
Of Ueitele & Hans Incorporated, Windhoek