

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING IN TERMS OF PRACTICE DIRECTION 61

<b>Case Title:</b> Dr Anotida Tichaenda Tangawamira Applicant and Betesda Medical Centre Close Corporation Respondent	<b>Case No:</b> HC-MD-CIV-ACT-CON-2021/01627 <b>Division of Court:</b> Main Division <b>Heard on:</b> 17 May 2024
<b>Heard before:</b> Honourable Lady Justice Rakow	<b>Delivered on:</b> 11 October 2024
<b>Neutral citation:</b> <i>Tangawamira v Betesda Medical Centre Close Corporation</i> (HC-MD-CIV-ACT-CON-2021/01627) [2024] NAHCMD 595 (11 October 2024)	
<b>Order:</b> <ol style="list-style-type: none"><li>1. Condonation for the late filing of the answering affidavit is hereby granted.</li><li>2. The applicant is awarded costs of suit on a party party scale.</li></ol>	
<b>Reasons for order:</b>  RAKOW J:	

### The parties

[1] The applicant is Dr Anotida Tichaenda Tangawamira, an adult medical practitioner. The respondent is Bethesda Medical Centre Close Corporation, a close corporation duly incorporated in terms of the relevant laws of Namibia, with its principal place of business at Bethesda Medical Centre, corner of Abraham Mashego Street and Independence Avenue, Katutura, Windhoek, Namibia.

### Background

[2] The applicant, duly acting in his personal capacity, and the respondent, duly represented by Josephine Nelago Angula, entered into an oral agreement on or about August 2017 at Windhoek, Namibia. The relevant terms of the oral agreement were that the applicant will render his services as a medical practitioner at the respondent, Bethesda Medical Centre and the applicant will be remunerated for his aforesaid services at 30 percent of the income generated

[3] Between August 2017 and September 2020, the applicant earned, as remuneration, the amount of N\$4,452,070.15, of which the respondent paid to the applicant the amount of N\$2,040,579.39 as part payment of the remuneration due to the applicant. A balance of N\$2,269,307.71 remains outstanding. On 19 October 2020, the respondent, represented by Josephine Nelago Angula, in writing acknowledged its indebtedness towards the applicant in the amount of N\$2,269,307.71.

[4] The applicant obtained judgment based on the acknowledgement of indebtedness and settlement agreement which followed thereafter. The respondent, however, failed to keep up with the terms of the settlement agreement and a writ of execution for movable goods were issued and a nulla bona return was received. The applicant then proceeded to file the rule 108 application.

[5] In their replying papers to the application which was filed late and condonation is sought, the respondent indicated that the property which the applicant sought to be sold in execution was indeed sold by the applicant. Standard Bank Namibia served a summons on the respondent seeking payment in the amount of N\$748 277.62 together with interest and costs. This was served on 22 June 2023. On 22 March 2024, this application for default judgment was removed from the court roll. The property was sold in the meantime on 22 January 2024 for the amount of N\$1,990,000 and transfer took place on 5 April 2024. The respondent never informed the

applicant of the Standard Bank action against it or that it was selling the property.

[6] The applicant further indicated that given the fact that the debt to Standard Bank was substantially less than the amount for which the property was sold, it must be concluded that the respondent retained a substantial amount of the money from the proceeds of the sale and despite this, did not make any payment to the applicant. Due to the fact that the respondent was fully aware of the judgment against it as well as the rule 108 application which was pending, the applicant is of the opinion that the respondent's actions are unscrupulous and a clear indication of the active steps being taken by the respondent not to pay the debt due to the applicant. He therefore, feels that he is entitled to the costs associated with the rule 108 application.

#### The arguments

[7] On behalf of the applicant, it is argued that the applicant sat out the efforts he made to recover his debt from the respondent. When the respondent had the chance to repay the applicant at least partly, it did not do so. The respondent further preferred another creditor over and above the applicant who did not have a judgment against it. This was all being done whilst being fully aware of the current rule 108 application against it.

[8] On behalf of the applicant, it was further submitted that the respondent's conduct falls squarely within the type of conduct that the authorities indicate should attract a punitive costs order.

[9] On behalf of the respondent, it was argued that the respondent can only be found to have acted in a dishonest manner if the sale agreement pursuant to which the property was transferred to a third party, was concluded on a date after the applicant's application in terms of rule 108 was served on the respondent. The sale agreement between the respondent and the third party was signed on 22 January 2024, while the application was served on the respondent on 13 February 2024.

[10] The applicant further claims that the respondent acted dishonestly by preferring another creditor over him, which is Standard Bank Namibia, which bank held a bond over the property. The claim is baseless and vague as a preference of creditors has no bearing on the applicant's application.

[11] It was submitted on behalf of the respondent, that the grounds provided by the applicant for a punitive costs order do not meet the requirements for such an order to be made by the court, as the applicant has failed to bring forward facts that prove that the respondent acted in a dishonourable, vexatious or vindictive manner.

### Legal Considerations

[12] The general rule dictates that costs should follow the successful litigant. The court can, however, depart from this rule where exceptional circumstances exist.

[13] These exceptional circumstances include, a party's bad faith or reprehensible conduct. In *Obena v The Minister of Police*,<sup>1</sup> the following was said:

'The general rule that costs follow the results is departed from, *inter alia*, where the successful party has acted in bad faith or is guilty of reprehensible conduct. In such instances, the successful party may be ordered to pay the costs of his opponent, or deprived of the whole or part of his costs. The Court may also be fortified in its conclusion on costs by the nature of the conduct of the losing (as opposed to the successful) party.'

[14] In *Dornfontein Safaris (Pty) Ltd v Ellis & Partners Legal Practitioners*,<sup>2</sup> it was held that when a party seeks a punitive costs order, it should prove that the other party has acted in a dishonourable, vexatious, vindictive or other improper manner, unless such behaviour can be deducted from the reading of the papers.

### Conclusion

[15] The court is satisfied that the applicant is entitled to some form of costs, although the court is not satisfied that it should be a punitive costs order. The respondent knew about the rule 108 application which was pending but did not direct any information towards the applicant's legal practitioner that they intend to sell the property. Only when they belatedly filed their answering papers, did they allude to the fact that the property has indeed been sold. Had the applicant known that from the start, he would most probably not have proceeded with the process and rather participated in the division of the sale amount. Clearly the respondent did not wish the applicant to receive any part of the money generated by the sale.

<sup>1</sup> *Obena v Minister of Police and Others* (1182/2021) [2021] ZAECMHC 11 (13 April 2021).

<sup>2</sup> *Dornfontein Safaris (Pty) Ltd v Ellis & Partners Legal Practitioners* (HC-MD-CIV-ACT-CON-2021/00278) [2021] NAHCMD 358 (05 August 2021).

[16] I, therefore, make the following order:

1. Condonation for the late filing of the answering affidavit is hereby granted.
2. The applicant is awarded costs of suit on a party party scale.

	<b>Note to the parties:</b>
E RAKOW Judge	Not applicable
<b>Counsel:</b>	
<b>Applicant:</b>	<b>Respondent:</b>
F Erasmus Of Francois Erasmus & Partners, Windhoek.	L Mutilifa Of Veiko Alexander & Company Incorporated, Windhoek.