

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

JUDGMENT

Case no: HC-NLD-CIV-MOT-GEN-2017/00017

In the matter between:

ONGWEDIVA TOWN COUNCIL

APPLICANT

and

JOHANNES SHITHIGONA

1ST RESPONDENT

OSHAKATI PROPERTIES

2ND RESPONDENT

Neutral citation: *Ongwediva Town Council v Shithigona* (HC-NLD-CIV-MOT-GEN-2017/00017) [2018] NAHCNLD 78 (06 August 2018)

Coram: CHEDA J
Heard: 18 June 2018
Delivered: 06 August 2018

Flynote: A party who when advised to rectify an anomaly in its papers but ignores to do so timeously but only to come two days before the hearing of the matter cannot escape being saddled with punitive costs. Matter is postponed with applicant paying costs at a punitive scale.

Summary: Applicant set the matter down for hearing. Respondents filed documents which non-compliance with the rules. Applicant advised them but they ignored to rectify same only to do so two days before the hearing. Respondents sought a postponement with costs on the ordinary scale. Their conduct was not acceptable. Matter was postponed, but, respondents were ordered to pay costs at a punitive scale.

ORDER

1. The application for postponement is granted.
2. Respondents shall pay costs on attorney and client scale.
3. Matter should be set down for the interlocutory application.
4. The parties should comply with the rules of court, relating to filing of documents.

JUDGMENT

CHEDA J:

[1] This is an application for eviction of respondents from a certain piece of land belonging to applicant. Applicant was represented by Mrs Kirsten instructed by Dr. Weder, Kauta & Hoveka Inc., while respondent was represented by Advocate Nekwaya instructed by Kishi Shakumu Inc.

[2] The matter was set down for hearing on the 18th June 2018. The parties representative out of courtesy appeared before me in chambers with a view of raising

preliminary issues. I deliberated on them and the matter was subsequently heard in an open court where the said preliminary issues were raised and argued.

[3] It was applicant's argument that they were ready for their application, but, it appeared that respondents wanted the matter postponed in order for them to properly attend to their counter-application which was not in compliance with the rules. Advocate Kirsten submitted that applicant had filed its papers timeously, but, respondents did not do so. She went further and submitted that;

- a) respondents filed their heads of argument on the 13th June 2018 instead of the 05th June 2018.
- b) the application for condonation for the late filing of heads of argument by respondents does not comply with the rules for such applications.
- c) respondents filed an application for leave to file a Notice to their counter-application and a further application for condonation for none filing of the Notice of Motion on the 13th June 2018.
- d) that the late filing of these documents is highly prejudice to the applicant; and
- e) that in the event that the court grants the application for postponement, respondents should pay wasted costs at a higher scale.

[4] Advocate Nekwaya in response argued that;

- a) applicant had not made out a case for punitive costs;
- b) the court was not called upon to deal with the issue of condonation, but, for postponement;

c) respondent were willing to tender wasted costs as occasioned by the postponement, but, not at a higher scale.

[5] It is clear that in as much as applicant was ready for a hearing, it was however, not averse to a postponement as long as respondents paid their costs at punitive scale. The issue before the court, therefore, is that of the scale of costs as respondents agree that costs for postponement have to be paid by them. Applicant argument is that they had to unnecessary come to court as a result of respondents who were uncooperative regarding progress in this matter. In order to make a proper determination with regards to costs, it is essential to examine respondents' conduct in this matter as applicant argued that they are to blame for the matter's failure to take off on the set down date.

[6] Applicant brought to respondents' attention that there was an anomaly in their application, this was as way back the 18th February 2018. Respondents ignored this advice and only filed an interlocutory application two days before the hearing of this application.

[7] Respondents ought to have known that such an application requires the other party to take instructions and reply to it. It is clear that from February to June that is a period of four months they sat back and did nothing only to be knee-jerked into action two days before the proper application was to be heard.

[8] For the avoidance of doubt the application which was being complained about is not before the court and is only being referred to as a side issue. Both parties agree that this application should be postponed on the instance of respondents as they are obviously not ready to proceed today.

[9] The issue then is, did respondents conduct justify an order of punitive costs against them. The general rule of such costs is that the court does not normally order a litigant to pay the costs of another litigant on an attorney and client basis unless some

special grounds are present. This was the principle adopted and applied in *Conradie v Van Dyk & Another*, 1963 (2) SA 413 (C) 418 E where Corbett AJ stated:

'It is clear that normally the Court does not order a litigant to pay the costs of another litigant on the basis of attorney and client unless some special grounds are present, such as those alluded to in the passage just quoted, viz. that the party has been dishonest or fraudulent, or was transaction under enquiry or in the conduct of the case.'

[10] Respondents were advised to put their house in order as far back as February 2018, they, however, ignored that advice and only to lodge an application two days before the hearing, this in my view is a disturbing attitude which should be condemned. It lacks genuineness, one can only conclude that it was calculated to delay the prosecution of the case, if not, it is an indication of dilatoriness on the party of respondents or their legal practitioner which conduct is reprehensible.

[11] Had respondents been prudent enough, they would have acted on the complaint by applicants and not to wait up to the 11th hour to act. This, conduct has prejudiced application as it is entitled to reply to this late application. Therefore, while, respondents also admit that they are somehow liable, it is that admission based on the reasons stated above that they cannot escape liability for costs at a higher scale.

[12] Accordingly the following is the order of court:

1. The application for postponement is granted.
2. Respondents shall pay costs on attorney and client scale.
3. Matter should be set down for the interlocutory application.
4. The parties should comply with the rules of court, relating to filing of documents.

M Cheda
Judge

APPEARANCES

APPLICANT: H Kirsten
instructed by Dr. Weder, Kauta & Hoveka Inc., Ongwediva

RESPONDENTS: E Nekwaya
instructed by Kishi Shakumu & Co., Windhoek