

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING

Case No: HC-MD-CIV-ACT-CON-2023/03857

In the matter between:

FIRST NATIONAL BANK OF NAMIBIA

PLAINTIFF

and

MAKITI GROUP CC

1ST DEFENDANT

SAM HALUPE

2ND DEFENDANT

LAVINIA NELAO HALUPE

3RD DEFENDANT

Neutral Citation: *First National Bank of Namibia Limited v Makiti Group CC*
(HC-MD-CIV-ACT-CON-2023/03857) [2024] NAHCMD
11 (25 January 2024)

Coram: MASUKU J

Heard: **Determined on the papers**

Delivered: **25 January 2024**

Flynote: Civil Procedure – Costs – Whether a defendant is liable to pay costs of an action where the plaintiff has allegedly delayed the proceedings.

Summary: The plaintiff entered into a written loan agreement with the first defendant, with the second and third defendants signing suretyship

agreements for the first defendant's due and punctual fulfilment of its obligations to the plaintiff. The first defendant failed to comply with its obligations in terms of the written agreement, culminating in an action instituted by the plaintiff for recovery of N\$2 843 936, 48, interest thereon and costs of suit. The parties filed their pleadings and proceeded to case management. After witness statements had been filed, the parties entered into a settlement agreement. The only outstanding issue, was the question of costs, which the defendants declined to pay, alleging that the plaintiff had not painted a true picture of the pace of the proceedings and had informed the court that the matter was being settled even before the defendants had been served with the summons. Because of the delay and inaccurate information imparted to the court, the defendants claimed they were not liable to pay the costs occasioned by the delay of the proceedings by the plaintiff.

Held: That generally speaking, parties are to be held to their undertakings given in agreements they enter into. In the instant case, the parties entered into an agreement in terms of which, the defendants would be liable for costs incurred by the plaintiff in instituting proceedings for breach of contract. It is in rare and exceptional cases that the court would intervene and allow the defendants, in such circumstances, not to pay costs as they had agreed to in a written agreement.

Held that: There is a difference between the duty to pay costs as a result of an agreement and liability for the particular items of costs that may legitimately be included in the bill of costs. The latter is the responsibility of the taxing officer. The court is in this regard, entitled to decide the issue of principle, namely, whether a party is entitled to costs pursuant to a written agreement. The particular items that may be included in the bill of costs prepared thereafter, fall within the jurisdiction of the taxing officer, with the court only having powers of review in terms of rule 75.

Held further: That in line with the principle of *pacta sunt servanda*, the defendants must pay the costs of the action, in line with clause 24 of the agreement. As to what may be properly included in the bill of costs is the

responsibility of the taxing officer, with a dissatisfied litigant approaching the court on review.

The defendants were ordered to pay the plaintiff's costs, including the costs of this application.

ORDER

1. The defendants are adjudged to be liable to pay the costs properly incurred by the plaintiff in the prosecution of this matter up to the stage where the matter was settled by the parties.
2. The defendants are ordered to pay the costs of this application.
3. The matter is removed from the roll and is regarded as finalised.

RULING

MASUKU J:

Introduction

[1] The crisp issue for determination in this matter is whether the plaintiff is liable to be paid costs following the parties reaching a settlement agreement in the *lis* instituted by the plaintiff against the defendants herein.

The parties

[2] The plaintiff is First National Bank of Namibia, a company with limited liability, incorporated and registered in terms of the company laws of this Republic. It is also registered as a financial institution in terms of the applicable banking laws, with its principal place of business situate at 130 Parkside, Independence Avenue, Windhoek.

[3] The first defendant is Makiti Group CC, a close corporation duly incorporated and registered in terms of the Close Corporations Act 26 of 1988, with its principal place of business situated at 52 Brockerhoff Laan, Tamariskia, Swakopmund, Erongo Region. The second and third defendants are Mr Sam Halupe and Mrs Lavinia Nelao Halupe, who are members of the first defendant.

[4] First National Bank Limited will be referred to in this ruling as 'the plaintiff' and Makiti Group CC will be referred to as 'Makiti'. The second defendant, Mr Halupe, will be referred to as 'Mr Halupe', whereas the third defendant will be referred to 'Mrs Halupe'. The first to third defendants will be referred to 'the defendants'. Where reference is made to the parties collectively, they will be called 'the parties'.

[5] The court records its indebtedness to both counsel, who represented the parties, namely, Ms K Angula, for the plaintiff and Ms Haufiku, for the defendants.

Background

[6] The question arising for determination arose in the circumstances that will be briefly adverted to below. The defendants applied to the plaintiff for an overdraft loan. This was granted by the plaintiff, in consequence of which the parties entered into a written loan agreement. In consequence of the said agreement, the Halupes executed a deed of suretyship in favour of the plaintiff and in terms of which they undertook to bind themselves as sureties and co-principal debtors with Makiti for the due and punctual fulfilment of Makiti's contractual obligations to the plaintiff in terms of the loan agreement.

[7] It is alleged that Makiti, for reasons which are immaterial, failed on or about 17 November 2020, to comply with its obligations in terms of the loan agreement. This failure, the plaintiff alleges, manifested itself in the failure by Makiti to settle the monthly installments as and when they fell due. On 21 October 2021, the plaintiff instituted action proceedings seeking payment of

the outstanding amount of N\$2 843 936, 48, interest thereon and costs. The amount was claimed as a result of Makiti's alleged failure to honour its obligations.

[8] It is common cause, however, that the parties eventually signed a settlement agreement in relation to the dispute among them. The parties failed, however, to agree on the question of costs of the action. As intimated above, the question is whether the plaintiff is entitled to costs of the action, considering the terms of the loan agreement and the eventual settlement agreement signed by the parties. The defendants strongly argue that if regard is had to the manner in which the plaintiff prosecuted the matter, the plaintiff is not entitled to the costs it claims against them. Predictably, the plaintiff contends otherwise.

The plaintiff's case

[9] The plaintiff claims that it is entitled to payment of costs for the reason that the parties entered into a loan agreement, which the first defendant breached, thus entitling the plaintiff to sue the first defendant and the second and third defendants in their capacities as sureties and co-principal debtors with the first defendant. In this connection, contends the plaintiff, it is entitled, having regard to clause 24.2 of the agreement, entered into by the parties, to all costs incurred as a result of the breach of the terms of the contract by the defendants.

The defendants' case

[10] The defendants, for their part, argue that the case was infirmed in large measure by inactivity on the part of the plaintiff, which led to the summons lapsing in or about April 2022. The plaintiff did not explain why the inactivity had taken place, so contends the defendants. As a result, the plaintiff had to serve the summons on the defendants in late 2022, whereafter, settlement negotiations amongst the parties ensued, save the issue of the payment of costs.

[11] It is the defendants' case that the plaintiff did not advise the court that the matter had for some time not proceeded for the reason that the summons had not been served on the defendants until 7 October 2022, when the defendants were served and they defended the matter. It is the defendants' case that the matter was postponed from time to time at the behest of the plaintiff and it was only in November 2022 that there were genuine settlement negotiations amongst the parties. This was after service of the summons on the defendants.

[12] In essence, the defendants contend that the court was not being given a true picture of the events that took place in this matter and the court was led by the plaintiff to believe the matter was subject to settlement negotiations, when the defendants had not even been served with the summons. The defendants take issue with any attendances being charged in the bill of costs, it would seem, before the service of the combined summons on them. It is attendances after the settlement of real negotiations in November 2022 that the defendants claim they may be properly charged for by the plaintiff.

[13] At para 9 of their heads of argument, the defendants sum up the essence of their argument in the following terms:

'In conclusion, I submit that costs for the plaintiff's attendances to court for this matter and or postponements from 02 June 2022 till 16 November 2022 including costs for drafting and filing for default judgment against the defendants and the service costs of such application and the service of the summons on the defendants over a month of the action becoming defended should be disallowed including costs of this application. The plaintiff's costs for the said period or attendances to the case for the period in question were unreasonably incurred under the circumstances, and their conduct during the said period amounts to abuse of court process.'

[14] The above paragraph appears, when properly considered, to be the gravamen of the objection to the defendants paying the costs of the action. Properly construed, it appears the defendants deny liability for the costs of the

entire action, due to dilatory conduct of the plaintiff. The remit of the court, in the premises, is to decide whether, even taking into account what the defendants say in the above paragraph, sufficient cause has been made out for them to escape the payment of costs in this matter, when proper regard is had to the case in its entirety. I proceed to deal with that question below.

Determination

[15] The *raison d'être* for payment of costs, has been articulated by the Supreme Court in the following language in *Ashfani and Another v Vaatz*:¹

'Costs are not awarded on a party and party basis as punishment to the litigant whose cause or defence has been defeated or as an added bonus to the spoils of the victor: the purpose thereof is to create a legal mechanism whereby a successful litigant may be fairly reimbursed for the reasonable legal expenses he or she was compelled to incur by either initiating or defending legal proceedings as a result of another litigant's unjust actions or omissions in the dispute . . . It is intended to restore the disturbed balance in the scale of litigation.'

[16] Whilst the above rendering is an accurate summation on the law relating to costs, this case stands on a different footing for the reason that the parties entered into a written agreement that governed their relationships, including on the issue of costs. *Ashfani* deals generally with costs on a party and party scale, after one of the parties has tasted defeat and is served with the desert, being fruits thereof, namely, an adverse order as to costs.

[17] It must be mentioned that in the instant case, it was stated clearly in the agreement, that costs incurred as a result of the failure by the defendants to comply with their undertakings in terms of the agreement, would result in them paying costs on the attorney and own client scale. This is recorded in clause 24, which I will refer to in greater detail below.

[18] That said, the excerpt in *Ashfani* does however correctly convey the reason for payment of costs, namely, to restore the balance disturbed by

¹ *Ashfani and Another v Vaatz* 2007 (2) NR 381 at 390, para 27.

litigation. In view of the fact that the parties entered into an agreement, which regulated the issue of costs, it seems to me that there are few circumstances that would entitle the court to allow a departure from the undertakings made by the parties in writing. This is the essence of what is referred to as the *pacta sunt servanda* principle, which essentially means that parties must be generally held to the undertakings they make or put differently, agreements must be kept.

[19] In view of the provisions of clause 24 of the agreement, quoted in part below, which the defendants agreed to by signing, it is accordingly plain that save something seriously out of the ordinary, they should abide by their undertaking. It must, in this regard be stated, however, that the court does exercise a measure of discretion even in cases where the parties may have entered into a written agreement, to allow a departure therefrom where there is highhandedness, an abuse of the court's processes or other ill-befitting conduct by the *proferens*, the plaintiff in this case.

[20] Whereas the defendants complain bitterly about the delay in the matter and hurl the accusation that the plaintiff did not properly inform the court what was happening in the matter, including the fact that the summons was served belatedly on the defendants, I am of the considered view, that such considerations do not fall within the court's remit.

[21] A difference must be drawn between items that the defendants claim cannot be properly charged by the plaintiff for one or other reason and the principle that the defendants in this case must pay the costs in line with the agreement the parties signed. Whether the defendants can be properly charged for attendances before the service of summons on them, is not an issue for the court to decide. That is an issue that must be placed and argued before the taxing officer. Courts should not ideally concern themselves with whether one or other item is chargeable in any case at this stage of the proceedings. That falls within the jurisdiction of the taxing officer, which is of course subject to review by this court, in terms of the provisions of rule 75.

[22] In addition, the court must consider the fact that the parties entered into a written agreement that makes provision in clause 24, for the following:

‘The borrowers shall be liable for and to pay all costs of whatsoever nature incurred by the Bank in connection with: . . . 24.2 any demand or proceedings for the recovery of any amount owing or due by any Borrower to the Bank under the Facility, including without limitation all legal costs on an attorney and own client scale, and whether incurred prior to or during the institution of legal proceedings, including any arising in connection with the satisfaction or enforcement of any judgment and in realising collateral provided to the Bank.’

[23] It is plain, when regard is had to the above clause that the defendants are liable to pay the costs should the plaintiff be compelled to institute proceedings, resulting from non-compliance with terms of the agreement by the defendants. This appears to be such a case and it follows as day follows night that the defendants must pay the costs, in line with their undertaking made in the agreement with the plaintiff.

[24] It must not sink into oblivion that not only did the plaintiff institute the proceedings in this matter, but it is plain, when regard is had to the papers filed on eJustice, that the matter was defended by the defendants. It is not necessary, in this regard, to recount the defence, its strength or otherwise. In point of fact, the defendants launched a counterclaim to which all the necessary pleadings were filed and later closed. Discovery was done and the matter proceeded to case management, with witnesses’ statements being drawn up and filed by the respective parties. From the record, it appears that the matter settled at pre-trial conference stage.

[25] That being the case, it appears to me that there is no basis on which the defendants can properly resist the payment of costs in this matter. What I have recounted above, seems to fall neatly within the provisions of clause 24 recorded above. It is a different question though what specific items the plaintiff will be entitled to charge and be compensated for in the bill of costs. As indicated above, those are matters that should be dealt with at the stage of

taxation, including any attendances that the defendants complain relate to actions before the summons was served on the defendants.

[26] I am of the considered view, that it would be inappropriate and inopportune for the court, at this particular juncture, to entertain issues relating to the items that will be in the bill of costs. All that the court is required to in the circumstances, is to lay down the principle in this case that the plaintiff is entitled to its costs for the institution and prosecution of the proceedings to the stage where the parties settled the matter. As to the determination of what particular items can be properly included in the bill of costs, is the business of the taxing officer, subject to review by this court, where a party is dissatisfied and the provisions of rule 75 have been followed.

Conclusion

[27] Having regard to what has been stated above, including the conclusions reached thereon, I am of the considered view, that the defendants have not shown or demonstrated any basis upon which they may be able avoid the payment of costs in this matter. I therefor find for the plaintiff regarding the issue of costs of the matter that was settled eventually by the parties.

Order

[28] In the premises, the proper order to issue in the circumstances, is the following:

1. The defendants are adjudged to be liable to pay the costs properly incurred by the plaintiff in the prosecution of this matter up to the stage where the matter was settled by the parties.
 2. The defendants are ordered to pay the costs of this application.
 3. The matter is removed from the roll and is regarded as finalised.
-

T.S. Masuku
Judge

APPEARANCES:

PLAINTIFF: K Angula
Of AngulaCo. Inc., Windhoek

DEFENDANTS: Haufiku.....