

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA
RULING
(PRACTICE DIRECTION 61)



MAIN DIVISION, WINDHOEK

Case Title: CHRISTINA ELIZABETH GROENEWALD APPLICANT and JOHANNES CHRISTIAN KOTZE 1 st RESPONDENT STANDARD BANK OF NAMIBIA LIMITED 2 nd RESPONDENT DEPUTY SHERIFF OUTJO 3 rd RESPONDENT DR WEDER, KAUTA AND HOVEKA INC 4 th RESPONDENT THE MASTER OF THE HIGH COURT NAMIBIA 5 th RESPONDENT REGISTRAR OF DEEDS 6 th RESPONDENT	Case No: HC-MD-CIV-MOT-GEN- 2023/00170 Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE ANGULA, DEPUTY JUDGE- PRESIDENT	Date of hearing: 23 JANUARY 2024 Delivered on: 12 FEBRUARY 2024
Neutral citation: <i>Groenewald v Kotze</i> (HC-MD-CIV-MOT-GEN-2023/00170) [2024] NAHCMD 44 (12 February 2024)	
IT IS ORDERED THAT: 1. The application is granted. 2. The applicant is to pay the second respondent's costs on a party and party scale. 3. The matter is finalised and removed from the roll.	

Reasons for the order:Introduction

[1] This is an application in terms of r 97(3) in which, the second respondent seeks an order against the applicant to pay its costs following the applicant's withdrawal of her application she instituted against the second respondent and five other respondents. When the applicant withdrew her application she did not tender the second respondent's costs as required by r 97(1) of the High Court Rules.

[2] The parties are referred to as in the main application.

Background

[3] Most of the facts in this application are common cause and do not require a narration. On 19 April 2023, the applicant launched an application to set aside the deed of sale, in respect of farming property described as Farm Ryneveld No. 367 Registration Division A, Kunene Region, measuring 3488.711 hectares (the 'property'), concluded between the first respondent and the deputy sheriff. The application was premised on the fact that no leave was granted by the Master of the High Court in terms of s 30 of the Administration of Estates Act 66 of 1965, to sell and transfer the property.

[4] On 9 May 2023, the first respondent and the deputy sheriff concluded an agreement, whereby the sale agreement of the property was cancelled and the deputy sheriff undertook to instruct the fourth respondent, being the second respondent's legal practitioners, to repay the purchase price to the first respondent. The applicant alleges that by 18 May 2023, the fourth respondent knew that the cancellation agreement had been concluded. The applicant and the first respondent entered into a settlement agreement on 30 May 2023, whereby, the first respondent confirmed the termination of the conditions of sale and the applicant agreed to withdraw the application against the first respondent only and filed a status report reporting thereon. The applicant stated in the report that the application became moot against the first respondent and that the reason for the withdrawal was for the first respondent not to incur further costs in filing an

answering affidavit.

[5] On 14 June 2023, the second respondent filed a condonation application for the late filing of its answering affidavit, in which it took a point that the applicant did have a *locus standi* and did not make out a case and further took issue with the settlement agreement. The applicant then filed a replying affidavit on 4 July 2023.

[6] On 15 August 2023, the parties appeared in court for a case management conference hearing and the applicant's legal practitioner requested for a postponement, for her to obtain further instructions. The matter was postponed to 12 September 2023, and on that day the applicant's legal practitioner was absent. On 18 September 2023, the parties filed a joint status report in which it was stated that the application has become moot and the applicant withdrew the application without tendering costs. Thereafter, the applicant filed a formal notice of withdrawal of the application against all the respondents. The applicant did however not tender costs, which prompted the second respondent to file the present application.

[7] It is common cause that after she withdrew her application, she issued summons against the respondents in the present matter based on the fact that the second respondent instructed its lawyers, the fourth respondent, to transfer the property to the first respondent. The applicant therefore contends that it would be convenient that the costs in the present matter should stand over pending the finalisation of that action and that the costs of the present application stand over for determination by the court which will hear the action matter.

[8] The applicant argues that that the second respondent unnecessarily incurred costs by filing its answering affidavit while it had knowledge that the application had become moot. Notwithstanding that knowledge, so the argument goes to the second respondent proceeded to file the answering affidavit, with an application for condonation, two weeks later. As I understand, the applicant's complaint in this regard, she intimates that the second respondent should not be awarded costs relating to the late filing of its answering affidavit in the event a costs order is granted in its favour.

[9] Having regard to the foregoing, the crispy issue for determination is whether the applicant should be ordered to pay the second respondent's costs at this stage or whether the costs should be ordered to stand over for determination by the court that will determine the dispute in the

action proceedings.

Applicable law

[10] 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.'

[11] In *Bertolini v Ehlers and Another*¹ the court placed reliance on the matter of *Germishuys v Douglas Besproeiingsraad*² for guidance in a matter 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.

[12] In *Erf Sixty-Six Vogelstrand (Pty) Ltd v Council of the Municipality of Swakopmund and Others*³, Damaseb JP in determining what should be considered when making a cost order, cited in the matter of *Channel Life Namibia Ltd v Finance in Education (Pty) Ltd* 2004 NR 125 at 126F-G where it was held that:

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.

³ *Erf Sixty-Six Vogelstrand (Pty) Ltd v Council of the Municipality of Swakopmund and Others* (260 of 2007) [2012] NAHC 62 (13 March 2012).

'There may very well be cases where the Court will have no other choice but to consider the merits of a matter in order to make an appropriate costs allocation, while there will, doubtless, be others where the Court may make an appropriate costs allocation based on the 'material' at its disposal, without regard to the merits of the case. Each case will be treated on its own facts.'

[13] The applicant's stance, as I understand it, is that she does not refuse to pay the second respondents' costs, but merely asking for the deferment thereof for determination in the action proceedings.

[14] Ms Campbell referred me to *DPP Valuers (Pty) Ltd v Namibia Airports Company Ltd*⁴ matter. In that matter the main application became settled and moot. The applicant lodged an application against the first respondent to claim the costs incurred in the main application as well as the costs of the application for costs. In my view, what happened in the *DPP Valuers* matter is distinguishable from what the applicant is asking. This, because in that case both the main application and the application for costs were determined by the same court. In the present matter the court is asked not to deal with the issue of costs, but to defer it for determination by another court where the action proceedings are to be heard. In my view, *DPP Valuers* is not authority in support of the request by the applicant.

[15] In considering the applicants request, regard should be had to *Rothschild v van Wyk*⁵. In that matter the deputy sheriff had attached the goods of a person who was not the judgment debtor and that person became a claimant in the interpleader proceedings issued by the deputy sheriff. Thereafter the deputy sheriff withdrew the interpleader summons and was ordered to pay the claimant's costs on a party-party scale. The claimant was paid his party-party costs. Subsequent thereto the claimant instituted a damages claim in the magistrates' court, against the judgment creditor. He was awarded damages made up of two items, one for attorney and client bill of costs in the interpleader proceeding and one for personal expenses. The judgment creditor appealed to the High Court. The question before the appeal court was whether the claimant would have obtained such costs in the interpleader proceeding.

[16] The court held that such costs could not have been obtained in the absence of the

⁴ *DPP Valuers (Pty) Ltd v Namibia Airports Company Ltd* (HC-MD-CIV-MOT-GEN-2023/00279) [2023] NAHCMD 798 (6 December 2023).

⁵ *Rothschild v van Wyk* 1916 T.P.D. 270.

allegation and prove of malice. That being the case he could not obtain it in the second action. In the course of the judgment De Villiers, JP said the following:

'As a general principle the right to costs must always be considered as finally settled in the Court where the question is adjudicated to which that right is accessory; so that, if any costs are awarded, nothing beyond the sum taxed, according to the Rules of Court, can be recovered as damages; or, if costs were expressly withheld by an adjudication in the particular case, none would be recovered by suit in any other Court.'⁶

Discussion

[17] Keeping in mind the legal principles outlined above, I proceed to consider the applicant's plea for the deferment of payment of costs.

[18] The application for the cancellation of a deed of sale was set down before this court and the application was withdrawn against the second respondent in this court. The action the applicant has instituted against the second respondent is a separate action from the present application. It is not before this court but serving before another court. As stated in *Rothschild*, the right to payment of costs must always be considered as finally settled in the court where the question is adjudicated to which that right is accessory. I consider this to be a correct statement of the law and will therefore adopt it in the present matter.

[19] No cogent reason, other than convenience, have been furnished why this court should deviate from that well established principle by ordering the applicant to pay the second respondent's costs of this application. I have not been persuaded why the issue of costs should be left to another court for determination. I have therefore decided to consider and determine the issue of costs.

[20] It is a common ground that the applicant cited the second respondent as party to the application proceedings. The second respondent was obliged by the rule and by law to file its opposition, if so advised. It accordingly filed its notice to oppose on 24 April 2023. The applicant was aware when it filed the joint status report on 30 May 2023 that the second respondent was also a party to the proceedings. It is a common ground that the applicant withdrew its application

⁶ Ibid p 271.

against the first respondent only. Therefore, the application became moot against the first respondent only and not in respect of the second respondent. The applicant could have at that stage withdrawn the application against all the respondents and not just the first respondent but did not. It follows thus that the application was live as against the second respondent until it was formally withdrawn.

[21] In my judgment, there is no merit in the applicant's intimation that the second respondent should not have filed its answering affidavit because it was aware or should have been aware that the application has become moot. The reason for holding that view is because after the second respondent had filed its answering affidavit plus a condonation application, the applicant did not file an objection to the condonation but rather filed her replying affidavit to the answering affidavit. In my view, by doing so, the applicant waived her right to oppose to the condonation application.

[22] In the result and taking everything into account and exercising my discretion, it is my considered view that the second respondent's application for costs is well founded in law and is granted. The court has not been persuaded that the second respondent has made out a case for costs on a punitive scale. The applicant shall pay the second respondents costs on a party and party scale.

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

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
APPLICANT	2ND AND 4TH RESPONDENTS
Y CAMPBELL <i>Instructed by</i> Krüger, Van Vuuren & Co., Windhoek	M U KUZEEKO <i>of</i> Dr Weder, Kauta & Hoveka Inc., Windhoek