REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: A 269/2011

In the matter between:

TANJA MEUSCH **Applicant**

and

THE MASTER OF THE HIGH COURT **First Respondent**

URSULA MONTERMANN N.O. **Second Respondent**

Neutral citation: *Meusch v The Master and another* (A 269/2012) [2012] NAHCMD (19 September 2012)

Coram: VAN NIEKERK J

Heard: 26 July 2012

Delivered: 19 September 2012

Flynote: **Practice** – Applications and motions – Application for costs in terms of rule 42(1)(c) – Applicant launching application under section 35(10) of Administration of Estates Act, 1965 (Act 66 of 1965), subsequently withdrawn – Second respondent or her agents misled applicant to litigate and latter acted reasonably in instituting proceedings – Second respondent failed to curtail costs - Second respondent deprived of her costs – Judicial case management requires

more vigorous application of principles that successful party may be deprived of costs in cases where unnecessary costs caused to other party.

Summary: The applicant had launched an application under section 35(10) of the Administration of Estates Act, 1965 (Act 66 of 1965), to set aside the Master's refusal to sustain applicant's objection in terms of section 35(7) of the Act. The objection was based on certain conduct by the second respondent and her agents which gave rise to the reasonable suspicion that she was hiding the valid will of the deceased and which was the basis on which the applicant applied for the second respondent to be declared unworthy to inherit from the deceased. Before the application was instituted the second respondent and her agents never explained her conduct. In her answering affidavit the second respondent for the first time stated that she had already shortly after the deceased passed away, provided the valid will to her agent with instructions to take all necessary steps in regard to the administration of the estate. No explanations was given why the valid will was not lodged with the Master until a very late stage and only after the applicant had repeated lodged objections to the various liquidation and distribution accounts. No confirmatory affidavits by her agents were filed. The second respondent eventually filed a supplementary affidavit by one of her agents confirming that the valid will was indeed forwarded to him at an early stage, but giving no further explanation why it had not been lodged with the Master.

Thereupon the applicant withdrew the application without consenting to costs. The second respondent applied for costs in terms of rule 42(1)(c). The court declined to consider the merits, but dealt with the issue on the basis of the conduct of the parties and the contents of the affidavits filed.

The court found that the second respondent and her agents misled the applicant into litigation and that the latter acted reasonably when she instituted application proceedings. The court held further that the second respondent failed to curtail costs

and that since the introduction of judicial case management the principle of depriving such a party from her costs should be more vigorously applied. On this basis the second respondent was deprived of her costs and each party ordered to pay her own costs in the main application. The rule 42(1)(c) application was refused with costs.

ORDER

The second respondent's application for an order on costs is refused with costs. In respect of the main application each party shall pay her own costs.

REASONS FOR JUDGMENT

VAN NIEKERK J:

[1] This is an application for costs in terms of rule 42(1)(c) of the rules of the High Court by the second respondent arising from the withdrawal of the main application. I shall refer to the parties as in the main application.

[2] The applicant, who resides in Germany, on 29 April 2011 lodged an objection in terms of section 35(7) of the Administration of Estates Act, 1965 (Act 66 of 1965), to the liquidation and distribution account dated 3 February 2011 and lodged in the estate of the late Karl Heinz Jakob Montermann ("the deceased"). The Master of the High Court, the first respondent herein ("the Master"), refused to sustain the objection on 23 September 2011.

[3] The second respondent is the widow of the deceased and cited in her nominal capacity as the duly appointed executrix in the estate and in her personal capacity as heir to the estate of the deceased.

[4] On 21 October 2011 the applicant filed the main application in terms of section 35(10) of Act 66 of 1965 in which she claimed, *inter alia*, the setting aside of the Master's decision and a declaration that the second respondent is unworthy to inherit or obtain any benefit in respect of the estate, "whether under the most recent and valid will and testament, any revoked will or intestate". The applicant further sought a direction to the Master to sustain and give effect to the applicant's objection by requesting the second respondent and/or her agents to remove any reference to the second respondent as heir in the liquidation and distribution account to be filed. The applicant also sought a direction to the Master to sustain and give effect to the applicant's objection by requesting the second respondent and/or her agents to reflect the applicant as the sole heir of the estate.

[5] Only the second respondent opposed the application. She filed an opposing affidavit to which the applicant replied. Thereafter the parties each filed a further affidavit. After the last affidavit, which was filed by the second respondent on 18 June 2012, the applicant withdrew the application on 27 June 2012 without consenting to pay any costs. The second respondent now applies in terms of rule 42(1)(c) for an order for all costs incurred. The applicant opposes this application and filed an affidavit in which the position taken is, in essence, that the second respondent should be deprived of her costs and that each party should be ordered to pay her own costs because, if the second respondent had already at the time of the applicant's objection given the explanation which was only given in second respondent's further and last affidavit filed on 18 June 2012, the application would never have been instituted.

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[6] Mr *Vaatz* on behalf of the second respondent submitted that the second respondent is entitled to her costs as the main application has been withdrawn. He further submitted that, regardless of the second respondent's belated explanation, the applicant never had *locus standi* to institute the main application and that, in any event, that application was entirely misconceived, as there was no basis on which the second respondent could have been declared unworthy to inherit. For reasons to follow, I prefer not to dwell on the merits of the application.

[7] In a matter like this the general principle is that –

> "[w]here 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."

(*Germishuys v Douglas Besproeiingsraad* 1973 (3) SA 299 (NC) at 299C-D, quoted with approval in *Erf Sixty-Six, Vogelstrand (Pty) Ltd v The Council of the Municipality of Swakopmund and others* High Court, Main Division, Case No. A 260/2007 – unrep. del. 13 March 2012); see also *Reuben Rosenblum Family Investments (Pty) Ltd and Another v Marsubar (Pty) Ltd (Forward Enterprises (Pty) Ltd and Others Intervening)* 2003 (3) SA 547 (C) at 550C – D; *Waste Products Utilisation (Pty) Ltd v Wilkes and Another (Biccari Interested Party)* 2003 (2) SA 590 (W) 597A).

[8] In *Germishuys (supra)* at 303H it was held that it is not necessary to go into the merits of the case where the proceedings are withdrawn. However, I do not understand the case to state that the merits may never be considered. In this

jurisdiction the approach is followed that the Court has a discretion to consider the merits. In *Channel Life Namibia Ltd v Finance in Education (Pty) Ltd* 2004 NR 125 at 126F-G DAMASEB J (as he then was) stated:

> "In my view there can be no hard-and-fast rule. 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."

[9] Although this was stated in a matter where the application was settled as opposed to being withdrawn, this *dictum* was applied in a matter where, as in the instant case, an application was withdrawn, namely the *Erf Sixty-Six, Vogelstrand* case *(supra)* at paragraph [10]. In the latter case the Court declined to consider the merits in the exercise of its discretion (at paragraph [21]), but rather considered the conduct of parties in the litigation. I intend doing the same. In order to consider counsel's arguments properly it is necessary to refer in some detail to the contents of the affidavits and the history of the litigation.

[10] The second respondent and the deceased were married under German law. On 24 February 1976 the executed a joint will ("the 1976 will") in which they appointed each other as sole and universal heir of the estate of the first dying. The children born of the marriage were appointed heirs of the survivor and also their joint heirs in the event of the testators' simultaneous death. In the event that there were no common children, the deceased's parent(s) would be the heir(s).

[11] The 1976 will was revoked by a second joint will executed on 4 March 1996 ("the 1996 will"). In terms of this will the testators appointed each other as the sole and universal heir of the first dying. In terms of clause IV of the will they

further jointly appointed the applicant as heir of the survivor and as heir in the event of their simultaneous death.

[12] The deceased passed away on 10 June 2006. On 15 December 2006 the second respondent was appointed executrix in the deceased estate. She initially appointed Mr Etzold of the law firm Etzold-Duvenhage to be her agent. Although it is not entirely clear on the papers, it seems that during about August 2007 the first liquidation and distribution account was lodged with the Master. Only the first page of this account forms part of the papers. On this account it is recorded that the movable assets in the estate are awarded to the second respondent in terms of the rules of intestate succession. When the applicant got notice of this fact, she provided the Master with a copy of the handwritten joint 1996 will and lodged a written objection with the Master on 12 May 2008 via her legal representatives, who are also her legal practitioners of record, indicating her concern that the second respondent had not apprised the Master of the existence of this will. A copy of the objection was forwarded to the second respondent's agent.

[13] On 27 March 2009 the second respondent signed a new first and final liquidation and distribution account, which recorded that the estate was being administered in terms of the 1976 will. On 11 May 2009 the applicant again objected to the Master and again attached a copy of the 1996 will. By this time the second respondent had appointed Mr de Koning of A Davids & Company as her agent to assist her in her tasks as executrix. The objection was also brought to the agent's attention and a copy of the 1996 will provided. Applicant in turn requested a copy of the 1976 will. Mr de Koning responded by letter stating that they have requested the Master to provide them with a copy of the will accepted by her and that he would revert in due course. He also attached a copy of the 1976 will.

[14] Since then various correspondence was exchanged between the parties until the Master on 21 December 2009 requested the applicant to provide the original will. To this applicant's lawyers responded on 16 February 2010 that the original will seems to be registered at a German court, but that enquiries would be made. It was further pointed out, quite correctly, in my view, that the second respondent as executrix should be the person knowing the whereabouts of the will and it was suggested that she be approached in this regard. On 12 May 2010 the Master indeed requested second respondent's agent to provide the original will, if available, while the applicant also addressed a letter in this regard. On 20 May 2010 Mr de Koning replied "We are not in possession of the will, as same is in your client's possession. Kindly lodge same without delay."

[15] To this the applicant's lawyers responded:

> "Referring to your letter of 20 May 2010 we advise our instructions being that out client is not in possession of the will.
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> She is however an heir in such Will and has a copy which was submitted to the Master some time ago.
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> We have also requested the court in Germany where the Will has been lodged, to furnish us with a certified copy, since it is obvious that the executrix refuses to submit the original will which must be in her possession."

[16] On 28 May 2010 the applicant's lawyers notified the Master that they have requested the German court to provide an authenticated copy of the duplicate original of the 1996 will. They eventually provided this document on 30 June 2010.

[17] On 8 July 2010 the Master notified the applicant's lawyers that, in her view, the applicant has no claim in relation to any assets as she is, in terms of the 1996 will, only an heir in the event that both spouses died simultaneously. This

interpretation was based on an inaccurate translation of the will, which was later rectified. The applicant continued to object to any liquidation and distribution account which did not reflect that the assets were distributed subject to clause IV of the 1996 will. Eventually after several letters on behalf of the applicant, the liquidation and distribution account was amended and signed on 3 February 2011 to reflect this information.

[18] The applicant nevertheless lodged a further objection on 29 April 2011 (which is the objection which is the primary subject of the main application) in which part of the history of the matter is set out and the point is made with reference to that history that the second respondent was unwilling to disclose the valid 1996 will to the Master in spite thereof that she must have known of the will, *inter alia*, because she signed it. The allegation is further made that she had concealed or intentionally failed to mention and submit the 1996 will and retained this will, instead lodging the revoked 1976 will. It was pointed out that this conduct constituted criminal conduct by virtue of section 102(1)(a) of Act 66 of 1965. Applicant's lawyers stressed that they had to approach the German court to obtain an authenticated copy of the 1996 will, which demonstrates second respondent's unwillingness to provide the valid will. In the premises it was submitted that the second respondent is unworthy to inherit from the deceased. A copy of this objection appears to have been faxed to the second respondent's agents.

[19] On 18 May 2011 the Master forwarded the applicant's objection to the second respondent's agents and requested their comments to it. The papers in this application do not disclose any comments or their contents. However, the Master on 23 September 2011 responded that she had considered the objection and the comments, but refused to sustain the objection in the basis that the liquidation and distribution account was drawn up in terms of the 1996 will, which

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the Master had examined and accepted. Regarding the allegation of criminal conduct, it was pointed out that the applicant could lay a complaint with the Namibian Police. The applicant then lodged the main application in terms of section 35(10) of Act 66 of 1965.

[20] In the second respondent's opposing affidavit dated 8 November 2011 she discloses for the first time that already on 27 September 2007 she had forwarded a letter to her erstwhile agent, Mr Etzold, with the instruction to take all necessary steps in regard to the administration of the estate. In the letter she refers to a closed envelope bearing the seal of the German court and on which there is a reference to the "Original Certificate of a Last Will and Testament" and an inscription that the said envelope contains the 1996 will. She also mentioned that she was attaching several other listed documents, including the revoked 1976 will. She states in paragraph 9 of her affidavit that, in view of all the information provided to her agent she is "at a loss to understand on what basis he could possibly have recorded in the first page of the original account drawn that the estate would be wound up on an intestate basis." In paragraph 8 she states:

> "As I see from the annexures [to the founding affidavit] it appears that the first [liquidation and distribution] account was dealt with on an intestate basis. I do not know why that it and can give no explanation. I will have to take up the matter with the legal practitioners who acted for me at the time." [my insertions]

[21] In paragraph 11 of her opposing affidavit he second respondent states:

> "I do not know why the legal practitioners engaged to administer the estate used and relied on the testament of the 24th of February 1976. It is for them to explain that eventually. As indicated in the letters attached hereto, I did furnish to Mr Etzold, who was originally engaged in this matter, with all relevant documentation."

[22] In her replying affidavit the applicant makes the point that the second respondent's explanation is unsatisfactory in light of the long history of the matter, that she does not attach copies of the annexures to the letter of 27 September, that the existence of this letter has never been disclosed before, and that there is no confirmatory affidavit by Mr Etzold as one would have expected. A further important point is made and this is that the second respondent signed the liquidation and distribution account which refers to the 1976 will, for which the second respondents does not provide any explanation.

[23] In a further affidavit the point is made that the German court only opened and read the 1996 will on 28 September 2006 and sent it to the second respondent on 24 October 2006. The question is posed how it was possible to already provide the 1996 will to Mr Etzold under cover of the 27 September 2006 letter. As a result of these inconsistencies and lack of proper explanation, the applicant makes the allegation in her replying papers that the second respondent has not provided adequate proof that she had indeed provided the 1996 will to her agents.

[24] To this the second respondent countered by filing the June 2012 affidavit by Mr Etzold in which he confirms that that he was appointed by the second respondent to assist her with the reporting of the deceased estate and the winding up. Although he does not mention the date on which he was appointed and makes no reference to the 27 September 2006 letter, he confirms having received certain documents, some of which are the same as those listed in the letter, including the 1976 will and the 1996 will and a receipt of the German court relating to the 1996 will. He does not explain how it came about that the first liquidation and distribution account referred to an intestate estate. He merely states that when he withdrew (mentioning no date) he overlooked to return the documents to the second respondent. He also did not forward them to the new

agents as he did not know who was then dealing with the estate. He was never approached to hand the documents over to anyone. When second respondent's current legal practitioner directed a letter (he does not state the date of this letter) at him enquiring whether he had any further documents relating to the estate he looked at the file again and found the documents forwarded to him. On 6 December 2011 he forwarded these documents to the second respondent's legal practitioner.

[25] The upshot of all this is that there is ultimately no case to be made out that the second respondent was unworthy to inherit from the deceased as she never concealed the 1996 will. What is clear is that the 1996 will, and, it seems, the 1976 will were at least initially not provided to the Master. Who signed the first liquidation and distribution account is not known on the papers, but the second respondent signed the account which referred to the 1976 will. Why she did so is not explained. There is also no explanation why she did not say from the start when the applicant initially lodged objections with the Master that she had forwarded the valid will to Mr Etzold. On the second respondent's papers it would seem that none of her agents ever conveyed the objections to her. There are no explanations by her agents about the matter. The comments provided to the Master also do not form part of her papers.

[26] Mr *Vaatz* suggested during argument that all this could of course be explained by the fact that the second respondent is German speaking, not fully conversant in English and that she may not have understood everything presented to her for her signature and may not have understood the complaints lodged by the applicant. However, this appears to be speculation as it is not stated anywhere by the second respondent in her papers. Mr *Vaatz* also submitted that the second respondents should not be blamed if any of her agents did not deal with the estate according to the valid will and failed to obtain her

instructions on any of the objections and the correspondence and that she is entitled to her costs. I do not agree. If the second respondent's agents are to blame, applicant should not be required to pay for the remissness of second respondent's agents. I agree with Mr *Stritter* that the objections could and should have been dealt with properly before the application was instituted, and if this had been done, there would not have been the need for any application. Mr *Vaatz* submitted that the applicant could have made enquiries with Mr Etzold after the opposing affidavit was filed and then all would have been confirmed. However, I do not think that in the normal course it would have been appropriate for the applicant to approach second respondent's erstwhile agent and lawyer to establish whether she indeed gave certain instructions.

[27] In *Pretoria City Council v Lombard, NO* 1949 (1) SA 166 (T) the court said at p197:

> " ..... there is a considerable amount of authority for the proposition that where one party is responsible for misleading his opponent into embarking on an unsuccessful lawsuit the Court's discretion may well be exercised by leaving each party to pay its own costs and in certain cases the Court may go even further in penalising the successful party. Certain of the authorities are cited in the case of *Chetty v Louis Joss Motors* (1948 (3), S.A.L.R. 329) and I might add thereto cases such as *Palmer and Another v Kimberley Town Council* (1 Buch. A.C. 227) and *Eastwood v Shepstone* (1902, T.S. 294).

[28] There is also authority that deprivation of costs may occur if the successful litigant has misled the unsuccessful party to litigate and the latter acted reasonably in instituting proceedings *Chetty v Louis Joss Motors* 1948 (3) SA 329 (T) at 333; *Rainbow Chicken Farm (Pty) Ltd v Mediterranean Woollen Mills (Pty) Ltd* 1963 (1) SA 201 (N) at 206A-C; *Nxumalo v Mavundla* 2000 (4) SA 349 (D)). In my view this is the case in this matter.

[29] A further example is to be found in *Annear, Trustee of Nel & Kennerley* (1880) 1 EDC 7 which is a case in which the court deprived the successful party of his costs because, had an explanation been given to the plaintiff trustee, the action would have been avoided. (See also *Bonn v Watson* (1906) 16 CTR 534 at 536).

[30] Mr *Stritter* also submitted that the second respondent failed to limit or curtail proceedings and costs by her conduct and/or the conduct of her agents, and as such was negligent, on which further basis she should be deprived of her costs. In this regard the following was stated in the *Channel Life* case (*supra*) at 132E-133B:

> "It is settled law that costs unnecessarily incurred must be paid by the party who has occasioned them. Everything which increases litigation and costs and which places a burden on a respondent, which he ought not to bear on account of that litigation, is perfectly good cause for depriving a successful applicant of such costs. (*Scheepers and Nolte v Pate* 1909 TS 353.) In this case Wessels J stated:
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> 'It is the duty of a litigant to take the most expeditious course to bring the litigation to a conclusion. He should take such exceptions *in limine* as will dispose of the dispute or bring the proceedings instituted to a conclusion. If he does not adopt this course it does not necessarily under our rules preclude him from *raising in the court of appeal an objection which was not raised in the court below; but in that case he increases the litigation and the costs, and should not, as a general rule, be entitled to get from his opponent the extra costs caused by his omission.*'
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> (My emphasis.)
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> Innes CJ was even more strident when he said:
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> 'I think it is the duty of a litigant to avoid any course which unduly protracts a lawsuit, or unduly increases its expense. If there is a legal defence which can be effectively raised, by way of exception or otherwise, at an early

> stage, he ought at that stage to raise it. If he only takes it later on it may still be effective, but the fact that it came late, and that considerable expense was unnecessarily incurred in consequence, seems to me an element which may well affect the mind of the court in apportioning the costs.'
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> (at 356.)
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> The ratio discernible here is that a party should at the earliest opportunity that presents itself take all such steps as would end the litigation or curtail the costs associated with it. A party would be denied of costs it would otherwise have been entitled to if its conduct has unnecessarily occasioned, encouraged or prolonged litigation. Compare: *Ottawa (Rhodesia) (Pvt) Ltd v Highams Rhodesia* (1969) (Pvt) Ltd 1975 (3) SA 77 (R) at 80D."

[31] I might add that since the introduction of judicial case management rules in this jurisdiction, the application of the principles in these cases ought to be applied with greater vigour.

[32] In the result the following order is made:

> The second respondent's application for an order on costs is refused with costs. In respect of the main application each party shall pay her own costs.

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K VAN NIEKERK

Judge

APPEARANCE

For the applicant in the rule 42(1)(c) application

(second respondent in the main application): Mr A Vaatz

A Vaatz & Partners

For the respondent in the rule 42(1)(c) application

(applicant in the main application): Mr A Stritter

Engling, Stritter & Partners