

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING

Case no: HC-MD-CIV-ACT-MAT-2017/00179

In the matter between:

C S

PLAINTIFF

and

CS

DEFENDANT

Neutral Citation: *C S v C S* (HC-MD-CIV-ACT-MAT-2017/00179) [2018] NAHCMD 236
(9 August 2018)

CORAM: PRINSLOO J

Heard: 30 July 2018

Delivered: 03 August 2018

Reasons: 09 August 2018

Flynote: Practice — Expert evidence — Question on court allowing expert evidence of a South African clinical psychologist — Evidence objected to on grounds

that expert is not registered to practice in Namibia as contemplated in the Social Work and Psychology Act, 6 of 2004.

Summary: This matter was brought about an urgent application wherein the defendant objected to the plaintiff calling a certain Mr. Dowdall as an expert clinical psychologist to provide expert evidence in the main action. The defendant based the objection primarily on the fact that the expert clinical psychologist was a South African national and as a result had to be registered as contemplated in the Social Work and Psychology Act, 6 of 2004 in Namibia.

The plaintiff is however of the view that precedent was set by this court to accept the evidence of experts from South Africa, who testify in our courts on a regular basis and the argument advanced on behalf of the defendant regarding the alleged illegality of a South African psychologist to give expert evidence in a Namibian Court of law, without being registered in Namibia is unmeritorious. He submitted that the legislature drew a distinction between 'practice' on the one hand and 'the performance of any act pertaining to such profession' and that the legislature had no intention of equating the two principles. The court should therefore consider the ordinary meaning of the word 'practice' and having done so, the court should find that Mr. Dowdall will not practice when he testifies in the matter *in casu* as an expert witness.

The defendant on the other hand argued that the plaintiff is seeking an order, which considering the relevant regulatory framework, will sanction/and or condone and/or allow an illegality. The defendant submits that the court is being asked to take over the duties and functions of the Social Work and Psychology Council of Namibia ("the Council"), which registers and regulates clinical psychologists and in view thereof.

The defendant does not take issue with the fact that Mr. Dowdall is duly registered as a clinical psychologist practicing in South Africa but makes the point that, unless Mr. Dowdall is registered, he is not entitled to practice as a clinical psychologist in Namibia.

The defendant further argued that in considering the wording of the definition 'practice', it is not limited to the instance of employment but that on the contrary, the word 'practice' is defined to include any act especially pertaining to such profession, which includes drafting a report and testifying in court as an expert.

Held – it is my considered opinion that the work as a professional (practice) cannot be separated from the scope of the work (practice) to which the clinical psychologist is confined. Practice and scope of practice of a clinical psychologist must be seen in context, having regard to the Act and the Regulations applicable.

Held – ultimately this court is a creature of statute and cannot go beyond the ambit of the relevant statute. Therefore, regardless of whether the parties agreed to the report of the expert witness, the court cannot accept that he testifies and hands in his report if it would mean that this court would act *ultra vires*.

ORDER

- a) The applicant's non-compliance with the rules is condoned, and the matter is heard on an urgent basis.
- b) The objection of the defendant against the expert evidence of Mr. Dowdall is sustained.
- c) Applicant's application as per the Notice of Motion dated 24 July 2018 is dismissed with costs, which cost to include the cost of one instructed and one instructing counsel. Such cost to be limited to the maximum as provided by Rule 32(11).
- d) Matter is postponed to 08 August 2018 at 10:00 for Setting Hearing Date.

RULING

PRINSLOO, J:

[1] The matter before me is an urgent application pursuant to the Defendant's objection to a certain Mr. Dowdall being called as an expert clinical psychologist to provide expert evidence in the main matter.¹

[2] A notice of objection was filed against the expert testimony of Mr. Terence Dowdall on 16 July 2018 wherein an objection was raised conditionally by virtue of the fact that the Plaintiff failed to show that Mr. Terence Dowdall is a registered person as contemplated in the Social Work and Psychology Act, 6 of 2004 ('the Act'). The grounds for the objection sets out the relevant sections of the Act and Regulation² on which the defendant relies to conclude that:

'2. Therefore, by virtue of the provisions of the Act Mr Dowdall would be prevented from practicing as a clinical psychologist in Namibia unless he is registered.'

[3] Based on the objection filed on behalf of the defendant the plaintiff filed a Notice of Motion on 24 July 2018 seeking the following relief:

'1. That leave be granted to the Applicant to bring this Application on an urgent basis and that the non-compliance with the rules of court insofar as time limits and service of process is concerned and as provided for, in the rules of court, be condoned.

2. That leave be granted to the Plaintiff/Applicant to call Mr. Terence Dowdall as an expert witness at the trial of this matter so set down for 6 August 2018.

3. That the said Mr. Terence Dowdall be granted leave to submit his expert report so prepared and compiled for the benefit of the Honorable Court, to this Honorable Court, as and when Mr. Terence Dowdall is called as an expert witness to testify.

¹ For purposes of this ruling I will refer to the parties as they are in the main matter.

² Section 17; 36 and Regulations in respect of scope of practice of psychologist and educational psychologists in terms of sect. 56 of the Act published in Government Gazette 4218 of 06 March 2009.

4. That the Expert Witness Statement so prepared and compiled by Mr. Terence Dowdall and/or on his behalf, be allowed to be utilized as evidence in chief of Mr Terence Dowdall as and when Mr. Terence Dowdall be called to testify at the hearing of this matter.

5. Cost of this Application to be awarded in favour of the Plaintiff against the Defendant and that a special order for costs be made on an attorney and own client scale against the Defendant for reasons set out in the Supporting/Founding Affidavit attached hereto.

6. Such further and/or alternative relief as this Honorable Court may deem fit and/or appropriate.'

[4] The defendant opposed the relief sought by the plaintiff.

Argument on behalf of the Plaintiff/Applicant

[5] In support of the urgent application Mr. Petrus Strauss, legal practitioner acting on behalf of the plaintiff, deposed to a founding affidavit wherein he raises several issues, i.e:

- a) Defendant and his legal representative knowingly consented that Mr. Dowdall be allowed to prepare and submit an expert report and defendant subjected himself to consultation with Mr. Dowdall.
- b) Defendant/his legal representative never before 9 July 2018 raised the issue of Mr. Dowdall and whether he was registered in Namibia to practice as psychologist.
- c) That if one is to have regard to the definition of 'practice' in the Oxford dictionary, Mr Dowdall cannot be said to have practiced in Namibia if he testifies as his services was obtained as a once-off specialized function.
- d) Mr. Dowdall consulted and prepared his report in South Africa from where he received payment for his work.

- e) The Social Work and Psychology Council of Namibia has been dissolved at the end of April 2018 and will only be reconstituted after ten days from the 6th of August 2018.
- f) Had the defendant objected earlier and prior to April 2018 as to the admissibility or allowance of Mr. Dowdall to testify in Namibia, the plaintiff would have applied to the Council to register Mr. Dowdall in Namibia to practice as a clinical psychologist and therefore, the urgency of the current application was self-created by the defendant and thus the plaintiff seeks a punitive cost order against the defendant.

Non-joinder

[6] In argument, Mr. Mouton discussed all the issues set out in the founding affidavit of Mr. Strauss and in addition to this, Mr. Mouton highlighted further issues, namely that in the event that the plaintiff agreed that the Council should be joined, which the plaintiff does not concede to, then it would be an impossibility as the Council was dissolved and therefore no legal entity or juristic person is in existence to serve the current proceedings on. In addition thereto, Mr. Mouton submitted that the Council would not have been or will not be in the position of providing any contribution to the issue at hand. He submitted that it would have been purely academic in nature and of no legal and/or practical consequence to have cited the non-existing Council as a party to the current proceedings, as insisted upon by the defendant.

Precedent

[7] Mr. Mouton argued that precedent was set by this court to accept the evidence of experts from South Africa, who testify in our courts on a regular basis and the argument advanced on behalf of the defendant regarding the alleged illegality of a South African psychologist to give expert evidence in a Namibian Court of law, without being registered in Namibia is unmeritorious. He submitted that the legislature drew a distinction between 'practice' on the one hand and 'the performance of any act

pertaining to such profession' and that the legislature had no intention of equating the two principles. The court should therefore consider the ordinary meaning of the word 'practice' and having done so, the court should find that Mr. Dowdall will not practice when he testifies in the matter *in casu* as an expert witness.

Argument on behalf of the Defendant/Respondent

[8] Mr. Jones argued on behalf of the defendant that Mr. Dowdall is a clinical psychologist and expert witness who should be considered in the context of s 17 of the the Act read with the applicable regulatory scheme.

[9] He argued that the Plaintiff is seeking an order, which considering the relevant regulatory framework, will sanction/and or condone and/or allow an illegality. The defendant submits that the court is being asked to take over the duties and functions of the Social Work and Psychology Council of Namibia ("the Council"), which registers and regulates clinical psychologists and in view thereof, raises the issue that the Council had to be joined to the proceeding as a party having a direct and substantial interest in the outcome of the application.

[10] The defendant does not take issue with the fact that Mr. Dowdall is duly registered as a clinical psychologist practicing in South Africa but makes the point that, unless Mr. Dowdall is registered, he is not entitled to practice as a clinical psychologist in Namibia.

[11] Mr Jones argued that in considering the wording of the definition 'practice', it is not limited to the instance of employment but that on the contrary, the word 'practice' is defined to include any act especially pertaining to such profession, which includes drafting a report and testifying in court as an expert.

[12] It was submitted that from the legislative scheme including the Act (and Regulations) Mr. Dowdall, unless registered, is not entitled to practice as a clinical

psychologist in Namibia as this is prohibited by the peremptory provisions of s 17(1) of the Act. Therefore if Mr. Dowdall were to practice without being registered, he would be committing a criminal offence.

[13] On the issue of joinder, Mr. Jones disagreed that the Council does not exist. He pointed out that the Council was established by s 3 of the Act and the Council is a juristic person which remains established despite not being constituted from time to time. The Council is the custodian of the Act, and specifically with reference to the registration of practitioners and as such have a direct and substantial interest in the outcome of the application and should have been joined as a party to this application. He argued that even if the Council is not currently constituted, it is not relevant to the fact that the argument that Mr. Dowdall could not secure temporary registration as s 15 of the Act confers powers on the Registrar to acquiesce on behalf of the Council or for that matter waive any of the Council's substantive rights.

[14] Mr. Jones further submitted on the issue of costs that the onus demonstrating that the expert is sufficiently qualified to testify in the matter *in casu* lies with the party calling him, i.e. the plaintiff. Therefore the plaintiff should have been aware of the possibility that Mr. Dowdall will not be allowed to testify if he was not registered and any omissions in this regard cannot be now be placed at the door of the defendant. The defendant should therefore not be mulcted with costs for raising an objection, not only in respect of a substantial legal requirement but also in respect of an ethical consideration and in compliance with its duty toward the court in which the matter is being adjudicated upon.

[15] In conclusion the court was invited to interpret the scope, meaning and import of the Act with specific regard to 'practice' by a non-registered person.

Discussion

[16] The Social Work and Psychology Act provides for the establishment and constitution of a professional Council for the social workers profession and the psychology profession and regulates the registration of persons practising such professions as set out by the Act but importantly it also regulates and prohibits the practicing of any of the relevant professions without being registered.³

[17] The professions relevant to the Act is listed in s 17 thereof and deals specifically with the registration prerequisite for practicing and reads as follows:

‘(1) Unless otherwise provided in this Act, no person is entitled to practise within Namibia the profession of-

(a) –(c).....;

(d) clinical psychologist;

(e) – (n).....;

unless that person is registered in terms of this Act for such purpose.

(2) Any person who contravenes subsections (1) is guilty of an offence, and on conviction liable to the penalties specified in section 58 (b).’

[18] It is common cause that Mr. Dowdall is not registered with the Social Work and Psychology Council of Namibia and can therefore not practice in Namibia in the normal course of his profession.

[19] The burning question that this court must answer is whether Mr Dowdall needs to be registered (albeit temporary) with the Council in order to testify as an expert witness in this court.

³ Long title of the Act: To provide for the establishment and constitution of a professional Council for the social workers profession and the psychology profession; to determine the powers, duties and functions of such Council; to regulate the registration of persons practising such professions and of persons practising certain professions allied to such professions; to specify the education, tuition, training and qualifications of practitioners of such professions; to prohibit the practising of such professions without being registered; and to provide for matters incidental thereto.

[20] The operative word in s 17 to consider is 'practice' as no person may practice in Namibia unless registered.

[21] In s 1 of the Act practice is defined as: "'practise",⁴ in relation to a profession to which this Act applies, includes the taking up of employment where any act especially pertaining to such profession is performed;". The Regulations set out the acts specially pertaining to the practice of psychologist in regulation 2 under the heading Scope of practice of psychology. Mr. Mouton submitted that the intention of the legislature could not have equated 'practice' to the 'performance of any act to such profession' but that the legislature rather distinguished between the 'practice' and 'performance of any act to such profession'.

[22] Mr. Jones strongly disagreed with the aforementioned interpretation proposed to court.

[23] The principles of interpretation of statutes and text was set out clearly in the matter of *Claude Bosch Architects CC v Auas Business Enterprises Number 123 (Pty) Ltd*⁵ by Smuts J as follows:

[25] The approach applicable to the construction of text was recently summarised by this court⁶ with reference to an earlier decision of this court which had in turn followed recent trends in both England and South Africa:

"39. This court in *Total Namibia v OBM Engineering and Petroleum Distributors*⁷ recently referred to the approach to be followed in the construction of text and cited the lucid articulation by Wallis JA of the approach to interpretation in South Africa in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.⁸

⁴ US spelling.

⁵ 2018 (1) NR 155 (SC).

⁶ In *Namibia Association of Medical Aid Funds and Others v Namibia Competition Commission and another* 2017 (3) NR853 (SC) at paras 39-41.

⁷ 2015 (3) NR 733 (SC) at paras 17-20.

⁸ 2012 (4) SA 593 (SCA) at para 18.

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used.”

40. In the *Total* matter, this court also referred to the approach in England⁹ and concluded:¹⁰ “What is clear is that the courts in both the United Kingdom and in South Africa have accepted that the context in which a document is drafted is relevant to its construction in all circumstances, not only when the language of the contract appears ambiguous. That approach is consistent with our common-sense understanding that the meaning of words is, to a significant extent, determined by the context in which they are uttered. In my view, Namibian courts should also approach the question of construction on the basis that context is always relevant, regardless of whether the language is ambiguous or not.”

41. To paraphrase what was stated by this court in *Total*, the approach to interpretation would entail assessing the meaning of the words used within their statutory context, as well against the broader purpose of the Act.’¹¹

[24] As in the *Claude Bosch* matter, the context in the matter *in casu* is the Act and its purpose which is clearly set out in the long title of the Act.¹²

⁹ As set out by Lord Hoffman in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912 – 913.

¹⁰ *Total* para 19.

¹¹ At para 42.

¹² *Supra* Footnote 3.

[25] The profession of clinical psychologist is a regulated profession wherein s 17 of the Act prohibits and criminalizes an unregistered person practicing as a clinical psychologist and other relevant professions in terms of the Act in Namibia.

[26] The scope of practice of a clinical psychologist is strictly regulated and defines the acts specifically pertaining to the profession. There is a definite separation between the different professions as is clear from the different regulations relating to the scope of practice.

[27] In terms of the Regulations, the scope of practice of psychology is as follows:

'2. (1) The following acts are regarded to be acts specially pertaining to the practice of psychologists –

(a) professionally assess, diagnose and treat psychological and mental ailments and disorders in humans, and disfunctions in human behaviour;

(b) assist any person, groups of people, couples and families regarding personal wellbeing and relationships, work or professions or occupations, and mental health.'

[28] For the purposes of subregulation (1) and of the application of the Act, a psychologist may perform a number of acts, which I will summarize as follows:

(a) psychological assessment and diagnosis of a patient;

(b) psychological intervention;

(c) career development of a patient;

(d) psycho-education of a patient;

(e) programme development relating to, and the evaluation of, a patient;

(f) reporting on a patient, including –

'(i) the drafting of a report on the condition of a patient and the submission of a report to a person practising a profession under the Act, to a legal practitioner, to a person practising a health or social service profession under any law relating to the practising of

health and social services professions, or to any other person who requires the report; and

(ii) the giving, in a court of law, of expert evidence relating to the psychological assessment and diagnosis of a patient referred to in paragraph (a)'; and

(g) referral of a patient, for further assessment or intervention.

[29] It is my considered opinion that the work as a professional (practice) cannot be separated from the scope of the work (practice) to which the clinical psychologist is confined. Practice and scope of practice of a clinical psychologist must be seen in context, having regard to the Act and the Regulations applicable.

[30] The practice of a clinical psychologist includes reporting and testifying in a court as an expert. Mr. Dowdall drafted the report in question and will base his evidence and opinion on the said report. It is also common cause Mr. Dowdall will be compensated for the services that he rendered within course and scope of his practice, which includes presenting the said report to court. Resultantly, Mr. Dowdall would be practicing when he testifies and produces his report in this court and therefore Mr. Dowdall must be registered with the Council in Namibia.

[31] The Act sets clear requirements for registration in s 19.¹³ The requirements include proof of qualifications, proof of practical training where so prescribed in respect

¹³ 19(2) An application referred to in subsection (1) must be accompanied by-

(a) the certificate relating to any qualification upon which the applicant relies for registration in terms of this Act, or a photocopy or other copy of such certificate duly certified by a commissioner of oaths, to the satisfaction of the registrar, as a true copy of the original;

(b) if any period of practical training is prescribed in respect of the profession concerned, written proof to the satisfaction of the Council that the applicant has satisfactorily completed the period of practical training so prescribed and has met all the requirements prescribed in respect of such practical training;

(c) if the applicant was registered previously in a country other than Namibia to practise the profession in respect of which registration is applied for, or is at the time of such application for registration still so registered, a letter of good standing from the registering authority concerned of each country in which the applicant was registered or practised his or her profession during the five years immediately preceding the date of the application, or is still so registered or practising, which certificate must be issued not more than 120 days before the date of the submission of such application;

(d) such documents and information as may be prescribed in respect of such application;

(e) such additional documents or information as the registrar or the Council may require in respect of such application; and

of the profession, where previously registered in a country other than Namibia a letter of good standing from the registering authority, additional documentation as required by the Council and payment of the prescribed fees.

[32] Section 31¹⁴ makes provision for temporary registration for purposes of educational demonstrations or training. Strict compliance and registration is required in respect any person not permanently resident in Namibia, who intends to teach or train or give educational demonstrations relating to the relevant profession. In this instance as well teaching, training of giving an educational demonstration without being registered constitutes a criminal offence.

[33] If such strict compliance is required from professionals from outside Namibia for purposes of training, how much stricter should the compliance not be in respect of an expert testifying in a court of law in respect of the best interest of the minor child.

[34] As custodians of the Act the Council should ensure that the qualifications of an expert such as Mr. Dowdall is in compliance with the required standards and be satisfied that he is in good standing in his country of registration. The reason is simple, the implications of the evidence of such an expert can have far reaching consequences.

(f) payment of the fees determined by the Council in respect of such application, or written proof of the payment thereof to the Council.

¹⁴ 31(1) Notwithstanding the provisions of this Act, the Council may register, for the purpose of promoting education, tuition or training in respect of, or relating to, any profession to which this Act applies, any person not permanently resident in Namibia to teach or train or give educational demonstrations relating to any such profession for such period of time and subject to such conditions as the Council may determine.

(2) The Council may determine the form of and the procedures relating to an application to the Council for temporary registration in terms of this section, including the form of the certificate of temporary registration to be issued by the Council and the application fees payable, if any.

(3) No person may be registered in terms of subsection (1) unless that person, in terms of the laws of the country in which he or she-

(a) is resident; or

(b) obtained the educational qualification which entitles him or her to be registered to practise his or her profession, is registered to practise his or her profession in such country.

(4) Any person who teaches or trains or provides educational demonstrations referred to in subsection (1), without being registered in terms of that subsection, is guilty of any offence and on conviction liable to the penalties specified in section 58(a).

(5) This section does not apply to registered persons or to persons employed by educational institutions.

[35] It is then also clear that the Council should have been joined to the proceedings as the Council have a substantial interest in the outcome of the application. The point on issue of non-joinder was therefore well taken by the defendant. However, I do not need to make any further rulings on the issue of non-joinder in light of my order that will follow hereunder.

Precedent and the interest of the minor child:

[36] The argument advanced by Mr. Mouton that the court should follow precedent as psychologists from South Africa have testified in our courts previously and their evidence have been accepted without any problems by our courts and it was further argued that the parties agreed to the report of Mr. Dowdall.

[37] Ultimately this court is a creature of statute and cannot go beyond the ambit of the relevant statute. Therefore, regardless of whether the parties agreed to the report of the expert witness, the court cannot accept that he testifies and hands in his report if it would mean that this court would act *ultra vires*.

[38] I accept that the South African expert witnesses in the field of clinical psychology testified in our courts previously but it would not appear that the issue of registration was raised.

[39] I was referred on behalf of the plaintiff to the matter of *JM and Another v SM*¹⁵ where Geier J stated as follows:

[35] There are however certain dicta, emanating from the South African courts, which are to the effect that a court, in determining, what is in the best interest of minor children, when determining the issue of custody, does so as their upper guardian – and - because of this role - have held that the court has extremely wide powers in establishing what is in a particular child's best interest. In this regard the court is apparently not even bound by procedural strictures, or by the limitations of the evidence presented, or even by the contentions advanced by the

¹⁵ 216 (1) NR 27 (HC).

parties. The court may have recourse to any source of information, of whatever nature, which may be able to assist in resolving custody disputes. See for instance *Terblanche v Terblanche*¹⁶ and also *AD v DW (Centre for Child Law as Amicus Curiae; Dept for Social Dev as Intervening Party)*¹⁷, a Constitutional Court decision, at [30], where the court, per Sachs J, approved in general a flexible approach to be followed, in determining what is in a particular child's best interest – and - that this path should not, mechanically ‘... be sacrificed on the altar of jurisprudential formalism.’

[40] Geier J further refers with approval to test set out by the full bench of the Cape Provisional Division, per Justices Cleaver, H J Erasmus and Yekiso in the matter of *J v J*¹⁸, which is set out as follows:

‘As the upper guardian of minors, this court is empowered and under a duty to consider and evaluate all relevant facts placed before it with a view to deciding the issue which is of paramount importance: the best interests of the child.¹⁹ In *Terblanche v Terblanche*²⁰ it was stated that when a court sits as upper guardian in a custody matter —

“... it has extremely wide powers in establishing what is in the best interests of minor or dependent children. It is not bound by procedural strictures or by the limitations of the evidence presented or contentions advanced by the respective parties. It may in fact have recourse to any source of information, of whatever nature, which may be able to assist it in resolving custody and related disputes.”

[41] I fully concur with the test as set out, however it is important to note the court's reference to ‘that facts placed before it with a view to deciding the issue’. In the matter *in casu* nothing is before me as yet. I am currently dealing with the preliminary issue of eligibility of the expert witness to testify without being registered with the Council. I am not deciding the issues relating to the best interest of the minor child as those issues will be considered in the main action.

¹⁶ 1992 (1) SA 501 (W) at 503 I to 504 D.

¹⁷ 2008 (3) SA 183 (CC) (2008 (4) BCLR 359; [2007] ZACC 27).

¹⁸ 2008 (6) SA 30 (C).

¹⁹ *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 (5) SA 184 (SCA) para 32 at 200E; see also para 36 at 201B. See further below para [36].

²⁰ 1992 (1) SA 501 (W) at 504C.

[42] The case *in casu* is distinguishable from the cases I was referred to.

Ancillary issues

[43] A number of ancillary issues were raised during the application which I will not deal with during this ruling as it has limited relevance to the outcome of the application.

Costs

[44] Plaintiff advanced an argument for a special cost order to be awarded against the defendant on a scale as between attorney and own client. The prayer for the special cost order is based on the fact that the defendant/legal practitioners was aware of the fact that Mr. Dowdall was domiciled and living in Republic of South Africa since November 2017 but only raised the objection against his expert testimony on 16 July 2018.

[45] Even if the parties agreed to the calling of Mr. Dowdall, it was ultimately the duty of the plaintiff to ensure the status of the expert she intends to call. To now lay the blame at the door of the defendant in saying defendant should have alerted plaintiff earlier as to the issue of registration of the expert is unreasonable.

[46] According to AC Cillier on Law of Cost²¹ at par 4.13, a punitive cost order requires “exceptional circumstances”. Allegations of “inferred misconduct” are not enough.

[47] In *Hailulu v Anti-Corruption Commission and Others*²² Damaseb JP stated that:

‘The court has an inherent discretion to grant attorney-and-client costs when special circumstances are present arising from reprehensible conduct of a litigant which warrants such an order, and the court considers it just that an innocent litigant adversely affected by such conduct is not put out of pocket in respect of the expense caused by such conduct. The court

²¹ Service issue 22 updated 31 August 2010.

²² 2011 (1) NR 363 (HC) at 377G – 378A.

must be satisfied that a party-and-party costs order will not sufficiently meet the expense incurred by the innocent litigant.'

[48] I cannot find that there are exceptional/special circumstances present in the current matter nor can the court find that there was reprehensible conduct on the part of the defendant and can therefore not accede to the request of the plaintiff.

[49] The general rule is the cost follow the result and I have no reason to depart from this rule. As the application is interlocutory in nature Rule 32(11) would apply.

[50] My order is therefore as follows:

- a) The applicant's non-compliance with the rules is condoned, and the matter is heard on an urgent basis.
- b) The objection of the defendant against the expert evidence of Mr. Dowdall is sustained.
- c) Applicant's application as per the Notice of Motion dated 24 July 2018 is dismissed with costs, which cost to include the cost of one instructed and one instructing counsel. Such cost to be limited to the maximum as provided by Rule 32(11).

JS Prinsloo

Judge

APPEARANCES:

PLAINTIFF:

JP Jones

instructed by Delport Legal Prationers, Windhoek

DEFENDANT:

CJ Mouton

Instructed by De Klerk Horn & Coetzee Inc., Windhoek