

The matter is removed from the roll and is regarded as finalised.

Reasons for orders:

Introduction

[1] The applicant is Mr Johannes Erasmus Van Wyk, an adult Namibian male who resides in Windhoek.

[2] The respondents are as follows:

a) The first respondent is Windhoek Renovations CC, a close corporation duly incorporated in terms of the close corporation laws of the Republic of Namibia. Its place of business is situated at 161 Mandume Ndemufayo Street, Windhoek.

b) The second respondent is LH Equipment CC, a close corporation also incorporated in terms of this country's close corporation laws. Its registered place of business coincides with that of the first respondent.

c) The third respondent is Mr Robert Douglas Wirtz, an adult male businessman whose address is the same as that of the first and second respondents.

Background

[3] The applicant and the third respondent are co-members of the first and second respondents. The court handed down a judgment on 7 September 2022 wherein the court had to determine whether the applicant made out a case for the court to issue a winding-up order, in terms of the provisions of s 68(d) of the Close Corporations Act 26 of 1988 ('the Act'). The court, however, on the date of the hearing, only dealt with the point in limine raised by the third respondent and made a ruling on the issue of whether the applicant's application was vexatious in nature and whether the applicant was guilty of abusing the court's process.

[4] On 7 September 2022, the court made the following order:

1. The applicant's application is stayed pending the finalisation of the proceedings in case number HC-MD-CIV-ACT-OTH-2020/02046.

2. The applicant is ordered to pay the costs of this application consequent upon the employment of

one instructing and one instructed legal practitioner.

3. The matter is postponed to 23 February 2023 for a status hearing regarding the action proceedings mentioned in paragraph 1 above.'

The review application

[5] Following the court's judgment on 28 October 2022, the matter was set down for taxation. The taxation was finalised, and subsequently, an allocatur was issued by the taxing master.

[6] The applicant, dissatisfied with the allocatur, filed a notice in terms of rule 75(1) requesting the taxing master to state a case for the decision of a judge. The taxing master, in her stated case in terms of rule 75(2), postulates that on the day of the taxation, she was implored to rule on a point in limine which was raised by the applicant.

[7] The point in limine raised by the applicant was premised on whether the respondents are entitled to the costs of the whole (main and vexatious proceedings) application, although the judgment handed down by Masuku J did not finalise the main dispute between the parties, but only dealt with the issue of whether the applicant's application was vexatious in nature and the abuse of court process.

The applicant's contentions

[8] The applicant contends that the taxing master acted on the wrong principle when finding that the whole application was argued (both the main and vexatious and abuse of court process proceedings) and that she was wrong when finding that the respondents were entitled to the entire costs of the application. The applicant is further of the view that the taxing master was wrong in finding that the court order of 7 September 2022 is clear and unambiguous and grants the respondents all their costs. The applicant argues that the court order did not finalise and remove the matter from the roll, it simply stayed the application for the winding-up of the second respondent, pending the outcome of the action proceedings under case number HC-MD-CIV-ACT-OTH-2020/02046.

[9] Mr Steinbach, for the applicant, submits that given that the main application pending before the court is yet to be finalised, the respondents are only entitled to certain of the costs until such time that the main application is finalised. The applicant contends that the

respondents' bill of costs should only reflect the following items:

- a) Consulting and drafting fees relating to the vexatious and abuse of the process of court point raised by the respondent as per the respondent's answering affidavit;
- b) Fees relating to the vexatious and abuse of the process of court point raised by the respondent as per the Joint Case Management Report filed;
- c) Fees relating to the preparation and attendance of the hearing of the matter on 4 April 2022; and
- d) Fees relating to the noting of the judgment on 7 September 2022.

[10] In closing, the applicant contends that the remainder of the costs for work done is not lost to the respondent, as these costs are taxable in future once the matter is finalised and judgment is handed down depending on which party is successful. The applicant further prays that the matter be referred back to the taxing master to determine the reasonable fees resulting from the vexatious and abuse of court process application.

The respondents' contentions

[11] In contrast, Ms Kuzeeko, for the respondents, contends that the applicant's abortive liquidation application was stayed pending the finalisation of the pending action for the liquidation of the first and second respondents. Respondents are of the view that "there is no guarantee" that the abortive liquidation application would be further pursued by the applicant. If its liquidation action were to be successful, there would be no reason for the applicant to further pursue the stayed liquidation application. Even if the liquidation action were to be unsuccessful, there is still "no guarantee" that the applicant would further pursue the liquidation application. He (the applicant) may decide that it does not make financial sense to do so, and abandon the application. There may be other reasons why the applicant may decide not to pursue the application further.

[12] The respondents further submitted that the taxing master was correct in taxing all the costs of the respondents and that the allocatur is not flawed. They further submitted that costs of the applicant's review should be paid upon the scale as between attorney and client given the ongoing, persistent and relentless vexatious conduct of the applicant, which resulted in unnecessary trouble and expense which the respondents ought not to bear. The applicant's review application should therefore be dismissed with costs.

The taxing master's stated case

[13] The taxing master is of the view that the court dealt with the whole application (both the main and vexatious and abuse of court process proceedings applications) on the date of the hearing (4 April 2022), and as such, the respondents are entitled to their costs as per the judgment handed down. It is further her position that the order handed down by the court on 7 September 2022 is clear and unambiguous, and the court granted the respondents their costs pertaining to the whole matter. It is for that reason that all of the respondents' costs in respect of the application had to be taxed and not only specific portions thereof, so her reasoning goes.

Discussion

[14] In the court's judgment handed down on 7 September 2022, the court made the following remarks at paras 77 - 79:

[77] It would appear that there are presently two proceedings before court in relation to the same parties and the seeking basically the same relief. These are the action and this application, the counter-application having been withdrawn by the applicant. In the circumstances, it seems to me that the proper order, having regard to the proper approach stated by the learned authors above, would not be to dismiss the present application but rather, to stay it, pending the finalisation of the action, which is afoot.

[78] Having regard to what is stated immediately above, it has become unnecessary for the court to deal with the rest of the issues that were raised by the parties in argument, especially the question whether this is a proper case in which the first respondent should be liquidated on the grounds that it is just and equitable to do so.

Costs

[79] The ordinary rule applicable is that costs should follow the event. It is clear that the respondents have been successful in staying the current application and they should therefor be awarded their costs. It must be recalled that the applicant was aware of the pending action, but still went ahead to launch the current proceedings.¹ (my emphasis)

¹ *Van Wyk v Windhoek Renovations CC* (HC-MD-CIV-MOT-GEN-2021/00128) [2022] NAHCMD 467 (7 September 2022).

[15] The question before me is whether the taxing master applied her mind, bearing in mind the discretion she had in terms of rule 75 of the High Court rules, and whether she was correct to allow all the costs of the main application, knowing that the merits were not adjudicated upon.

[16] From the reading of the above-stated paras it is clear that the court did not hear the merits of the intended winding-up application but merely heard and determined the point in limine raised by the third respondent. In my view, the court did not hand down a final judgment, and the third respondent cannot, at this stage, prematurely, claim all its costs incurred in the preparation of the application which stayed the matter pending the finalisation of the action.

The applicable legal principles

[17] In *Bindco (Pty) Ltd v AC Ce Brindpro*,² an urgent application was removed from the roll for lack of urgency and the applicant was ordered to pay the respondent's costs. On review, the court held that:

'1) The fact that the urgent application was removed from the roll and not dismissed indicates that the merits have not been adjudicated.

2) The application is still alive and can still be set down on the roll at any time for hearing.

3) The costs order can only apply to wasted costs incurred due to setting the matter down on the urgent roll; and

4) As the matter had not been finalized the merits should still be adjudicated. Should the applicant fail to set the matter down, the respondents have remedies to finalize the matter. Only after a final set down the party who obtains the relevant cost order may tax all the costs with regard to the merits.'

[18] From the contents of the court order dated 7 September 2022, it is clear that the court stayed the applicant's application for winding up pending the finalisation of the proceedings under

case number HC-MD-CIV-ACT-OTH-2020/02046. The court further ordered that the applicant pays the costs of this application consequent upon the employment of one instructing and one instructed legal practitioner. The court order nowhere makes reference to the costs in the preparation of the main application. The court makes reference to "this application" which I can interpret as the application dealing with the vexatious conduct of the applicant and the abuse of process proceedings. The taxing master could not vary this order by accepting the merits were moot. It is clear that the action under case number HC-MD-CIV-ACT-OTH-2020/02046 is very

² *Bindco (Pty) Ltd v AC Ce Brindpro* TPD case number 19055/2000.

much alive.

Order:

[19] In the result, I make the order as set out above.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Applicant	Respondents
R Steinbach Of Cronje Inc., Windhoek	M Kuzeeko Of Weder, Kauta & Hoveka Inc., Windhoek