

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING IN TERMS OF PRACTICE DIRECTION 61

Case Title: HENTIES BAY ESTATES CC vs JANNIE GERBER	Case No: HC-MD-CIV-ACT-CON-2018/01651
	Division of Court: High Court (Main Division)
Heard before: Honourable Lady Justice Schimming-Chase	Date of hearing: 17 July 2023
	Date of order: 7 August 2023
Neutral citation: <i>Henties Bay Estates CC v Gerber</i> (HC-MD-CIV-ACT-CON-2018/01651) [2023] NAHCMD 480 (7 August 2023)	
Results on the merits: Merits not considered.	
IT IS HEREBY ORDERED THAT: <ol style="list-style-type: none">1. The defendants must pay the plaintiff's costs of suit from the date of the return of service until 29 July 2022, both days inclusive.2. The matter is regarded as finalised and removed from the roll.	

SCHIMMING-CHASE J:

[1] The plaintiff is Henties Bay Estates CC, a Close Corporation duly registered in terms of the applicable legislation in the Republic of Namibia, having its main place of business at Erf 2033 Jakkalsputz Road, Henties Bay, Republic of Namibia.

[2] The first defendant is Jannie Gerber, an adult male businessman. During litigation, the first defendant sadly passed away on 8 July 2019, and the second defendant (Magdalena Kuhn N.O) was joined as executor to the estate of the first defendant.

[3] The plaintiff instituted action initially against the first defendant in April 2018. Its claim against the first defendant is based on the return of certain goods alleged to be in his possession, alternatively, and if no longer in his possession, that the first defendant disposed of the goods whilst knowledgeable of the plaintiff's ownership. In the further alternative, the plaintiff alleges the conclusion of an oral agreement between the parties during March 2017, in terms of which the first defendant purchased from China and cleared the abovementioned goods as the plaintiff's agent. The first defendant fails, despite demand, to deliver the goods, which included 144 boxes of mosaic tiles.

[4] The first defendant defended the action on 6 June 2018. It is common cause between the parties that when the first defendant filed his plea, he delivered at least three counterclaims.

[5] During the case management of the matter, and on 16 July 2020, the second defendant tendered the delivery of the tiles and a contribution of N\$20 000 to the plaintiff's legal costs. The plaintiff rejected the tender as it fell short of its claim, and costs incurred until that date.

[6] On 23 August 2021, the second defendant once more relayed the same tender. Which was similarly rejected by the plaintiff. On 9 June 2022, the second defendant tendered delivery of the tiles and taxed costs until 23 August 2021.

[7] The crux of the *lis* between the parties is thus, whether the plaintiff is entitled to

its costs after 23 August 2021.

[8] The purpose of an award of costs to a successful litigant is inter alia, to indemnify that litigant for the actual expense to which he or she has been put through in having been unjustly compelled to initiate or defend litigation.¹ The basic rule is that subject to express enactments to the contrary, all costs are in the discretion of the court. Even the general rule, namely that costs follow the event, is subject to this overriding principle. This discretion must be exercised judicially upon a consideration of the facts of each case. In essence it is a matter of fairness to both sides, and 'judicially' means 'not arbitrarily'.²

[9] In *Ongombe Farmers Association v Tjiuro and Others*,³ Heathcote AJ held that:

'Where all the factual and legal issues have not been determined, but the parties nevertheless want the court to determine the issue of costs, the court does so by exercising discretion. It will suffice to refer to *Channel Life Namibia Limited v Finance in Education (Pty) Ltd* 2004 NR 125 (HC) where Damaseb J (as he then was) discussed the relevant case law where a court must determine costs without the merits having been decided. In essence, he made two pertinent points: firstly, there can be no hard and fast rule that a court must never determine the merits to decide the costs. Sometimes it may be necessary to do so, and on other occasions, not; secondly, a factor which should be taken into consideration is that all parties should, as soon as possible, take steps to curtail costs.'⁴

[10] In *Germishuys v Douglas Besproeiingsraad*,⁵ the court held:

'...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

¹ LAWSA Second Edition, Volume 3 Part 2: Civil Procedure and Costs para 289.

² LAWSA Second Edition, Volume 3 Part 2: Civil Procedure and Costs para 291; and the authorities collected there.

³ *Ongombe Farmers Association v Tjiuro and Others* [2011] NAHC 194 (6 July 2011) para 18.

⁴ See also *Erf Sixty-Six, Vogelstrand (Pty) Ltd v Council of the Municipality of Swakopmund and Others* 2012 (1) NR 393 (HC) para 10.

⁵ *Germishuys v Douglas Besproeiingsraad* 1973 (3) SA 299 (NC); Also see *The Prosecutor General v Africa Autonet CC t/a Pacific Motors* (POCA 5/2017) [2017] NAHCMD 265 (13 September 2017) para 26.

entitled to all costs associated with the withdrawing plaintiff's or applicant's institution of proceedings...' (Emphasis supplied).

[11] The defendants in para 12.1 and 14 of their heads of argument accept that they were the unsuccessful party in the litigation, but dig in their heels as to the costs tender of 23 August 2021, and submit further that the plaintiff's action became a profit-making exercise after such date.

[12] The argument by the defendants must be rejected out of hand. On the authorities, it is clear the purpose of a cost order is to indemnify the successful litigant for costs incurred. The argument by the defendants that the tender of costs as of 23 August 2021, which amounted to the tender for the delivery of tiles including N\$20 000 for costs was sufficient to compensate the plaintiff in costs, is without merit.

[13] I say so, keeping in mind, it is not in dispute between the parties that since 23 August 2021, the parties were not in agreement as to costs. The action of the plaintiff was instituted during 2018, and opposed by the first defendant during the same year. The parties litigated the matter to the extent that the first defendant filed a counterclaim, and witness statements, which statements never addressed in any way or form, the counterclaims instituted against the plaintiff.

[14] It follows as a result, that if the first defendant by the date of tender abandoned his counterclaims, and tendered delivery and costs, the plaintiff was out of pocket for costs until at least such date. The plaintiff must thus be reimbursed for all costs associated with the institution of its action, opposition to the counterclaims, and withdrawal of the defendant's counterclaims until such date, and which costs certainly do not amount to N\$20 000.⁶

[15] The only further question the court thus has to determine, accepting that the tender until 23 August 2021 is unreasonable, is whether the plaintiff is entitled to further costs after such date.

[16] What is evident from the record, with reference to the parties' joint status report of 15 October 2021, and after the plaintiff rejected the offer of the defendants; is that

⁶ See *Germishuys supra*.

both parties remained actively engaged in litigating this matter. In their status report the parties canvassed the issues of further discovery and filing of witness statements. The plaintiff as a result filed a discovery affidavit on 13 October 2021, and the defendants on 29 November 2021.

[17] The parties further engaged in settlement negotiations, and on 29 July 2022, the second defendant increased the costs tender to N\$150 000. The plaintiff then in August 2022 sought a postponement to consider a draft bill of costs in anticipation of accepting the offer. On 7 August 2022, the second defendant failed to appear in court, and the matter was postponed for sanctions hearing and allocation of hearing dates. On 7 September 2022, the court accepted the explanation of the second defendant for the failure to appear, and once more postponed the matter for allocation of trial dates to 2 November 2022.

[18] The matter was again postponed to 18 January 2023 for allocation of trial dates, when the matter was set down for trial during the week of 12 – 16 June 2023.

[19] When the parties appeared before me on 12 June 2023, the defendants filed their heads of argument on the same date, and the matter was postponed for the plaintiff to file its heads of argument, and for the parties to address the court on costs, which they did on 17 July 2023.

[20] What is peculiar to me, is the events subsequent to the tender of N\$150 000 on 29 July 2022. Nothing appears to have happened between the parties. It must thus be accepted that the tender fell by the wayside, as it were, as the parties could not reach a compromise.

[21] Having considered the conspectus of this matter, that at the very least, it was incumbent on the parties to consider and pursue the defendants' costs tender of 29 July 2022, and whether such tender was reasonable in the circumstances. Neither party persisted in the prosecution of this tender, nor is there an explanation proffered as to why.

[22] I thus find it reasonable in the circumstances to conclude, had the parties seriously considered the tender of 29 July 2022 that may well and truly have been the

end of the matter. The absence of such consideration and address by the parties on why it was not done, does not place this court in a position to consider whether the tender may have been sufficient to reimburse the plaintiff or not.

[23] Therefore, and in light of the above circumstances, I exercise my discretion and find that the plaintiff does not stand to incur any further costs after the date of the tender of 29 July 2022, , and the second defendant does not stand to be further out of pocket after such date.

[24] In the result, I make the following order:

1. The defendants must pay the plaintiff's costs of suit from the date of the return of service until 29 July 2022, both days inclusive.
2. The matter is regarded as finalised and removed from the roll.

Judge's signature	Note to the parties:
	Not applicable.
Counsel:	
Plaintiff J Oliver Of Jan Olivier & Co. Legal Practitioners, Walvis Bay	First Defendant T Chibwana Instructed by Neves Legal Practitioners, Windhoek