REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2022/02397

In the matter between:

HENRED FRUEHAUF TRAILERS (PTY) LTD **PLAINTIFF**

and

LUPOR LOGISTICS CC **FIRST DEFENDANT**
LOUIS PORFIRIO **SECOND DEFENDANT**
RMH LOGISTICS CC **THIRD DEFENDANT**

Neutral citation: *Henred Fruehauf Trailers (Pty) Ltd v Lupor Logistics CC* (HC-MD-CIV-ACT-CON-2022/02397) [2023] NAHCMD 734 (15 November 2023)

Coram: PARKER AJ
Heard: **26 October 2023**
Delivered: **15 November 2023**

Flynote: Costs – Withdrawal of proceedings – Application for costs in terms of rule 97 (3) – First and second defendants incurring unnecessary costs.

Summary: The plaintiff instituted action against the first, second and third defendants on an instalment sale agreement. During the litigation, the plaintiff obtained summary judgment against the first and second defendants. Subsequently,

the first and second defendants launched a successful rescission application to rescind the summary judgment. Upon discovery of documents by the parties, the plaintiff came to the realization that the first and second defendants were not parties to the instalment sale agreement upon which the plaintiff had instituted action. Accordingly, the plaintiff withdrew the proceedings against the first and second defendants but did not consent to pay costs. The first and second defendants have applied in terms of rule 97 (3) for an order for costs. The court granted an order for costs against the plaintiff.

Held, rule 97 (1) and (3) do not provide any qualification or limitation to the right of a party to apply for an order of costs where the other party has withdrawn the proceedings and has not consented to pay costs.

Held, further, the guidelines that courts have proposed to assist courts in determining an application under rule 97 (3) represent views of other judges, and they should not be elevated to the level of statutory provisions, applicable in all situations. As a matter of law and common sense, there must be other factors and considerations which courts may apply.

Held, further, in a constitutional State a person is not entitled to drag another person to court in a litigation to test whether he or she has a right that he or she wishes to vindicate. In a constitutional State, a person is entitled to drag another person to court in litigation to vindicate a right that the other person has allegedly violated or threatened to violate.

ORDER

---

1. The plaintiff shall pay the first and second defendants' costs upon the withdrawal of proceedings.

2. The plaintiff shall pay the first and second defendants' costs in respect of the instant rule 97 application.

3. There is no order as to costs upon the plaintiff amending its pleading.

4. The matter is finalised and removed from the roll.

JUDGMENT

PARKER AJ:

[1] In this application, the first and second defendants, represented by Ms Ndungula, have applied for:

(a) costs occasioned by the plaintiff having amended its pleading ('the amendment costs'); and

(b) a costs order in terms of subrule (1), read with subrule (3), of rule 97 of the rules of court ('the rule 97 costs').

[2] The plaintiff, represented by Mr Du Plooy, has moved to reject the application. I shall consider the amendment costs first.

[3] The plaintiff amended its plea in respect of the third defendant only. That being the case, as Mr Du Plooy submitted, there was no need for the first and second defendants to amend their plea. The amendment did not occasion the first and second defendants costs. At all events, during the hearing of the application, Ms Ndungula conceded and abandoned the amendment costs. I proceed to consider the rule 97 costs.

[4] It is important to make the following crucial point at the threshold of this judgment: The determination of the rule 97 costs turns primarily and solely on the interpretation and application of subrule (1), read with subrule (3), of rule 97. Those provisions are clear and unambiguous. In *Total Namibia v OBM Engineering and Petroleum Distributors CC*, the Supreme Court propounded how interpretation should be approached thus:

'[18] South African courts too have recently reformulated their approach to the construction of text, including contracts. In the recent decision of *Natal Joint Municipal Pension Fund v Endumeni Municipality*, Wallis JA usefully summarised the approach to interpretation as follows:

> "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 on the light of the ordinary rules of grammar ad 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 weighed in the light of all these factors. The process is objective, not subjective. The 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 businesslike for the words actually used".'[1]

[5] In the instant matter, I note that rule 97 (1) and (3) do not provide any qualification or limitation to the right of the party to apply for an order of costs where the other party has withdrawn the proceedings and has not consented to pay costs. The party applying for such costs is not required to establish that the party withdrawing the proceedings acted, for instance, in a frivolous or vexatious manner by instituting, proceeding with or defending, the proceedings, as provided in s 118 of the Labour Act 11 of 2007 for instance.

[6] Thus, in the instant matter the first and second defendants are not required that to succeed they must establish that the plaintiff acted in a frivolous or vexatious manner by instituting proceedings against the first and second defendants or any other manner. Any argument to that effect is baseless ad irrelevant.

[7] I have come to that conclusion upon considering 'the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision

[1] *Total Namibia v OBM Engineering and Petroleum Distributors CC* 2015 (3) NR 733 para 18.

appears; and the apparent purpose to which it is directed'.[2] *Total Namibia* sounds this caveat: 'Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.'[3]

[8] In the interpretation and application of subrule (1) read with subrule (3), what courts have done in the authorities referred to the court by both counsel is to propose – and I use 'propose' advisedly – guidelines to assist courts in deciding when no consent to pay costs is included in the notice of withdrawal of proceedings.

[9] The proposed guidelines should not be elevated to the level of statutory provisions, applicable in all situations, *A priori*, the factors mentioned in the proposed guidelines represent the views of individual judges. They may not apply to all situations as they would if they are statutory provisions. The upshot is that the proposed factors ad considerations should not be seen as a closed list, admitting of no other factors and considerations. As a matter of law and common sense, there must be other factors and considerations that ought to be considered when interpreting and applying subrule 1, read with subrule 3, of rule 97.

[10] In my view the following considerations are equally important and relevant. In a constitutional State, a person does not drag another person to court in a litigation to test whether the first named person has a right which he or she wishes to vindicate. That is exactly what the plaintiff did in respect of the first and second defendants. The plaintiff's action is, therefore, wrongful and unconstitutional. In a constitutional State a person is entitled to drag another person (or an organization) to court in litigation to vindicate a right that that other person has allegedly violated or threatened to violate. That is the law. There is an added requirement that is relevant in the instant mater. In the rules of court, if the right sought to be vindicated is based on a contract, the party in question must comply with rule 45 (7) of the rules.

[11] In the instant matter, the document on which the plaintiff instituted action against the three defendants is an instalment sale agreement ('the agreement'). That is the agreement that was filed in compliance with rule 47 (5) of the rules of court. The defendants and the court were, therefore, entitled to take it that the plaintiff was sure about the identity of the persons with whom it entered into the agreement and

[2] Loc. cit.
[3] Loc. Cit.

against whom it instituted the proceedings. The plaintiff instituted proceedings against the first, second and third defendants.

[12] In their pleas all three defendants denied that they concluded the agreement with the plaintiff. The plaintiff had the golden opportunity to consider its claim against the first and second defendants. The plaintiff did not. Indeed, on 15 July 2022 the plaintiff intimated its intention to proceed with a summary judgment application against all three defendants. On 7 December 2022, summary judgment was granted against the first and second defendants.

[13] In the late hour of October 2023, Mr Du Plooy tells the court boldly that it was only when the plaintiff perused the first and second defendants' bundle of discovered documents that it was realised that 'the true agreement was actually entered into between the plaintiff and the third defendant'. And whose fault was that? To ask rhetorically.

[14] What flows from this belated realization on the part of the plaintiff is the following: The plaintiff misled the court when in compliance with rule 45 (7), the plaintiff filed what Mr. Du Plooy called 'the purported agreement'. What this means is that the so-called 'purported agreement' did not satisfy the statutory requirement prescribed by rule 45 (7). For this reason alone, the court should not come to the aid of the plaintiff. But there are substantial grounds why the court should not come to the aid of the plaintiff which I now consider.

[15] Despite the undisputed facts which I have set out above, Mr Du Plooy submitted:

> '41. Accordingly, it cannot be said that the plaintiff dragged the first and second defendants unnecessarily into this litigation, to say so, would be simply untrue, the plaintiff exercised its right to initiate action against a defaulting party in a contract and cited the third defendant as a cautionary measure.'

[16] I cannot see by what legal imagination Mr Du Plooy could make the foregoing submission. At best the conclusion does not count for the facts, and at worst it is plainly fallacious and self-serving. Granted, 'the plaintiff' exercised its right to initiate action against a defaulting party in a contract'. But by its own admission, the plaintiff

instituted proceedings wrongly against the first and second defendants. Doubtless, that amounts to dragging the first and second defendants unnecessarily into an unnecessary litigation. The confutation of Mr Du Plooy's conclusion quoted above is supported by the facts.

[17] As I said in para 10 above, in a constitutional State, a person is not entitled and is not justified to drag along another person to court in a litigation to test whether he or she has a right that he or she may vindicate. A person is only entitled and justified to vindicate a right that has been violated or threatened to be violated.

[18] In the instant matter, by its own admission, the first and second defendants had not, when they were dragged into litigation, violated, or threatened to violate, the plaintiff's right under a contract. The plaintiff's action was, therefore, unconstitutional and wrongful, as I have held previously.

[19] No number of authorities, referred to the court by Mr. Du Plooy, can rescue the plaintiff from the consequences of its unconstitutional and wrongful act. Those authorities are of no assistance on the point under consideration. One of the consequences is the payment of costs in favour of the defendants in terms of rule 97 (1) and (3) of the rules of court. The plaintiff's unconstitutional and wrongful act has occasioned the defendants costs.

[20] The facts debunk any argument that the first and second defendants misled the plaintiff into litigations was found by the court in *Meusch v The Master of the High Court ad Another*.[4] The plaintiff was not justified in instituting action against the first and second defendants.[5]

[21] Based on these reasons, I conclude that it is fair that the court exercises its discretion in favour of granting costs against the plaintiff.[6] Substantial justice and fairness impel this conclusion.

[22] In the result, I order as follows:

---

[4] *Meusch v The Master of the High Court and Another* [2012] NAHCMD (19 September 2012).
[5] *Erf Sixty-six, Vogelstrand (Pty) Ltd v Council of the Municipality of Swakopmund and Others* 2012 (1) NR 393 (HC).
[6] Ibid.

1. The plaintiff shall pay the first and second defendants' costs upon the withdrawal of proceedings.

2. The plaintiff shall pay the first and second defendants' costs in respect of the instant rule 97 application.

3. There is no order as to costs upon the plaintiff amending its pleading.

4. The matter is finalised and removed from the roll.

_____

C Parker

Acting Judge

APPEARANCES:

PLAINTIFF:	N du Plooy Of Du Plooy Attorneys, Windhoek
1ST & 2ND DEFENDANTS:	A Ndungula Of Nakamhela Attorneys, Windhoek