REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-OTH-2023/05317
(INT-HC-SUMJUD-2024/00034)

In the matter between:

INDONGO AUTO (PTY) LTD TRADING AS INDONGO TOYOTA **PLAINTIFF**

and

HILARIUS MANU IIPINGE **DEFENDANT**

Neutral Citation*: Indongo Auto (Pty) Ltd Trading as Indongo Toyota v IIpinge* (HC-MD-CIV-ACT-OTH-2023/05317) [2024] NAHCMD 163 (10 April 2024)

Coram: SIBEYA J
Heard on: **14 March 2024**
Delivered on: **10 April 2024**

Flynote: Civil law – Costs – Section 18 of the Legal Aid Act, 29 of 1990 – Meaning of "further and alternative relief" – Whether a party may claim costs when it was not pleaded – *Ratio decidendi* v *obiter dicta.*

Summary: The cause of action arose from a labour case. The defendant was employed by the plaintiff. The defendant was dismissed and the matter was referred to the Office of the Labour Commissioner for unfair dismissal. The arbitrator then made an award on 17 September 2021, in favour of the defendant. The plaintiff then lodged an appeal against the award in the Labour Court. The parties simultaneously entered into an agreement to stay certain portions of the award and that the plaintiff will pay the defendant an amount of N$7560 per month, until the defendant finds new employment or until the outcome of the appeal in Labour Court, whichever occurred first.

The agreement entered into between the parties had an additional clause that the monies paid to the defendant would be repayable if the outcome in the Labour Court was in favour of the plaintiff. On 27 April 2023, the plaintiff's appeal was upheld and the award by the arbitrator was set aside in its entirety. At that point the plaintiff had already paid an amount of N$211 147,70 to the defendant in terms of the agreement entered into.

The plaintiff sued the defendant for the money paid to him while the appeal was pending. The matter was defended. The plaintiff, subsequently, filed an application for summary judgment. The defendant opposed the summary judgment application but failed to file the answering papers. On 22 February 2024, the defendant withdrew the opposition to the summary judgment application. The defendant then conceded to his indebtedness to the plaintiff and agreed to comply with the prayer as per the particulars of claim. The plaintiff however, did not include the prayer for costs in the particulars of claim. The court, therefore, had to determine whether or not costs may be awarded to the plaintiff in light of there being no specific prayer for costs as well as consider the fact that the defendant is represented by someone instructed by the Directorate of Legal Aid.

Held: that the *Sing v Sing* 1911 T.P.D. 1034 decision makes it plain that even if a prayer for costs is not included in the particulars of claim, a successful party can still be awarded costs, particularly where the matter was defended and the other party appeared and contested the suit.

Held that: *ratio decidendi* has been defined as the reasons for the decision, while *obiter dicta* are the incidental statements or opinions expressed by judges in a judgment. Not every statement made by a superior court is binding on the subordinate court

Held further that: affording s 18 an expansive meaning to the effect that it shields any person who was granted legal aid in terms of the Legal Aid Act from an adverse costs order, has the capacity to breed ground for reckless litigation with impunity and thus causing other parties involved to incur unnecessary legal costs with no possibility of fair reimbursement in sight.

Held: section 18 should not be utilised by any person, other than the State, as a shield against an adverse costs order, as to do so would defeat the principle of reimbursement, and may also result in an abuse of court processes by legally aided persons with unwarranted dispensation.

Held that: the plaintiff is entitled to summary judgment.

Held further that: although not specifically prayed for in the particulars of claim, the plaintiff could have been awarded costs but for the decision of *Mentoor v Usebiu* (SA 24/2015) [2017] NASC 12 (19 April 2017) para 21.

ORDER

Summary judgment is granted in favour of the plaintiff against the defendant in the following terms:

1. Payment in the amount of N$211 147,70;
2. Interest thereon from date of judgment at a rate of 20 percent per annum until date of full and final payment.
3. There is no order as to costs.
4. The Registrar is directed to bring this judgment to the attention of the Registrar of the Supreme Court.
5. The matter is finalised and removed from the roll.

JUDGMENT

SIBEYA J:

Introduction

[1] Presently submitted to this court for determination is an opposed application for costs. The application is brought by the plaintiff after the defendant opposed a summary judgment application brought by the plaintiff and later abandoned the opposition.

Parties and representation

[2] The plaintiff is Indongo Auto (Pty) Ltd trading as Indongo Toyota, a company duly incorporated and registered in terms of the applicable laws of the Republic, with its principal place of business situated at 65 Rehobother Road, Windhoek.

[3] The defendant is Mr Hilarius Manu Iipinge, a major male and erstwhile employee of the plaintiff who resides in Windhoek.

[4] The plaintiff is represented by Mr Quickfall, while Mr Ikanga appears for the defendant.

Background

[5] The cause of action arose from a labour case. The defendant was employed by the plaintiff. The defendant was dismissed and the matter was referred to the Office of the Labour Commissioner for unfair dismissal. The arbitrator then made an award on 17 September 2021, in favour of the defendant. The plaintiff then lodged an appeal against the award in the Labour Court. The parties simultaneously entered into an agreement to stay certain portions of the award and that the plaintiff will pay the defendant an amount of N$7560 per month, until the defendant finds new employment or until the outcome of the appeal in Labour Court, whichever occurred first.

[6] The agreement entered into between the parties had an additional clause that the monies paid to the defendant would be repayable if the outcome in the Labour Court was in favour of the plaintiff. On 27 April 2023, the plaintiff's appeal was upheld and the award by the arbitrator was set aside in its entirety. At that point, the plaintiff had already paid an amount of N$211 147,70 to the defendant in terms of the agreement entered into.

[7] The plaintiff then issued summons against the defendant for:

a) Payment in the amount of N$211 147,70;
b) Interest thereon from date of judgment at a rate of 20% per annum until date of full and final payment.
c) Further and/or alternative relief.

[8] The matter was defended. The plaintiff, subsequently, filed an application for summary judgment. The defendant opposed the summary judgment application but failed to file the answering papers. On 22 February 2024, the defendant withdrew the opposition to the summary judgment application. On the papers filed, summary judgment ought to be granted.

[9] One issue that remained under a cloud of uncertainty is the plaintiff's claim for costs when the particulars of claim are as silent as a church mouse on such relief.

[10] The parties were ordered to file notes on argument to address the issue of costs and they dutifully obliged. The court extends its appreciation to both counsel for the helpful notes filed and their oral arguments presented.

[11] The defendant contended that he was prepared to adhere to the prayers sought by the plaintiff in its particulars of claim and no other. As stated, the plaintiff did not include the prayer of costs in the particulars of claim. The question, therefore, that looms large is whether or not the plaintiff is entitled to an award of costs despite its failure to pray for same?

[12] I must mention in particular that Mr Ikanga appears for the defendant on the instructions of the Directorate of Legal Aid. It is thus necessary that if the first question is answered in the affirmative, namely that costs should be awarded to the plaintiff, then the court should consider whether or not an unsuccessful defendant who is represented on the instructions of Legal Aid can be mulcted with costs.

The plaintiff's case

[13] It is common cause that the plaintiff failed to include the prayer for costs in its particulars of claim. Mr Quickfall argued that considering that the defendant did not pursue his opposition to the application for summary judgment, same should be granted with costs, as such costs although not specifically prayed for, are covered within the prayer of further and/or alternative relief.

[14] Mr Quickfall further argued on the strength of *Sing v Sing,*[1] that the failure to include the prayer for costs in the particulars of claim was not a train smash, as by virtue of being successful in contested litigation entitles the successful party to costs.

[1] *Sing v Sing* 1911 T.P.D. 1034 at 1039.

[15] In respect of whether or not an adverse costs order can be made against a legally aided person, Mr Quickfall submitted that s 18 of the Legal Aid Act 29 of 1990 does not shield the defendant from an adverse costs order. The said section, he argued, prohibits making a costs order against the State only.

The defendant's case

[16] Mr Ikanga argued that the defendant was only prepared to answer to the relief set out in the particulars of claim, which does not include an order for costs.

[17] Mr Ikanga, however, centred the majority of his arguments on the provisions of s 18 of the Legal Aid Act. He argued that the defendant is represented by a legal practitioner that was instructed by the Directorate of Legal Aid, therefore, s 18, which is mandatory, prohibits making a costs order against a legally aided person. Mr Ikanga submitted further that s 18 provides in peremptory terms that no costs order shall be made in connection with any proceedings in respect of which legal aid was granted. He laid great store on *Mentoor v Usebiu,*[2] where the Supreme Court remarked that s 18 prohibits the award of a costs order against persons who had been granted legal aid.

Analysis

Further and/or alternative relief

[18] It is well established in our law that a litigant must plead material facts that are necessary to support his or her right to judgment. This legal position resonates with the principle that a defendant must be informed of the case he or she has to meet and plead thereto. A question that lingers in one's mind is this: can a plaintiff rely on the relief of further and/or alternative relief for the prayer that is not specifically mentioned or sought in the particulars of claim?

[2] *Mentoor v Usebiu* (SA 24/2015) [2017] NASC 12 (19 April 2017) para 21.

[19] It is necessary that the prayers sought in the particulars of claim must be set out with precision, and other parties and the court should not be subjected to second-guessing the nature of such prayers. I can safely state that the prayer of further and/or alternative relief is indiscriminately included in the majority of civil processes in our jurisdiction with reckless abandon. It begs the question whether the insertion of the said prayer is appreciated or its inclusion has become mechanical with no meaning attached to it.

[20] The High Court of South Africa in *Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd,*[3] Coetzee J had occasion to consider the meaning of the words 'further and/or alternative relief' and remarked that:

'the prayer for alternative relief as (is) being 'redundant and mere verbiage' in modern practice adding that whatever a court can vividly be asked to order on papers as framed, can still be asked without its presence and that it does not enlarge in any way the terms of the express claim…

The applicant's counsel misconceived his position in thinking that the original notice of motion could possibly suffice. This was probably based on a mistaken view of the effect of the prayer for alternative relief. The law regarding the necessity for an appropriate amendment of the claim under such circumstances and the limits of a prayer for alternative relief, is contained in the following passage from the judgment of Tindall JA in *Queensland Insurance Co Ltd v Banque Commerciale Africaine*[4]*, at* 286:

"In regard to the judgment for £2 450, in my opinion, the plaintiff was not entitled to claim it on the action as framed. The action is based on the policy; the claim for £2 450 is based on the compromise arising from the acceptance of the tender in the alternative pleas. The prayer for alternative relief does not help the plaintiff over the difficulty. It is unnecessary to consider whether the practice of including such a prayer is derived from the Roman-Dutch or the English

[3] *Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd* 1984 (4) SA 87 (T). *Geza v Minster of Home Affairs and Another* (1070/2009) [2010] ZAECGH 15 (22 February 2010).
[4] *Queensland Insurance Co Ltd v Banque Commerciale Africaine* 1946 AD 272 at 286.

practice. In the Roman-Dutch practice according to *Van Leeuwen* RDL5.15.8, this prayer (the so-called *clausule salutaire* asking for such other relief as the court may deem best for the plaintiff) is of such effect that every right to which the plaintiff may in any way be entitled upon the allegations in his claim, is thereby considered to be included in the prayer. See also *Voet* 2.13.13 and *Van der Linden Jud Pract* 2.3.7 vol 1 at 147. The effect of the prayer for 'such further or other relief as the nature of the case might require' in the English practice seems to be the same. See *Cargill v Bower* 10 ChD502 at 508, in which Fry LJ pointed out that the prayer for alternative relief is limited by the statement of fact in the declaration and by the terms of the express claim, and that a plaintiff cannot get, under the prayer for alternative relief, anything that is inconsistent with those two things.

The fact, however, that the plaintiff could not properly get judgment for £2 450 on his action as framed does not necessarily entitle the defendant to have the judgment set aside. Mr Horwitz contended that if an application for an amendment of the declaration had been made at the trial, the learned Judge should have and would have granted it, and he asked that, if this court upheld the defendant's point based on the form of the action, it should now allow the necessary amendment. The terms of the reasons of Blackwell J in addition to what I have stated above, also lead one to infer that the point that the form of the action disentitled the plaintiff from getting judgment for £2 450 was not taken before him. Be that as it may, I can find nothing in his reasons which bears out the argument on behalf of the defendant that, if an amendment had been applied for, the learned Judge would have refused it. And I think that in the interests of justice this court should now allow the necessary amendment, which would take the form of an alternative claim alleging that, if the chemicals in question were not harmless, but dangerous and liable to catch fire spontaneously, and in consequence the policy was voidable and the defendant elected to avoid it, any concealment or misrepresentation by the plaintiff as to the nature of the goods insured was innocent and the plaintiff is entitled to a refund of the premium paid; and a prayer for judgment for £2 450. It seems to me that such an alternative claim would validly have been included in the original declaration."'

[21] The Supreme Court of Appeal of South Africa in *National Stadium South Africa (Pty) Ltd and Others v Firstrand Bank Ltd,*[5] considered the prayer for alternative relief and stated as follows:

[5] *National Stadium South Africa (Pty) Ltd and Others v Firstrand Bank Ltd* 2011 (2) SA 157 (SCA).

‘‘The court below justified its approach on the ground that in joining the managers in the proceedings and supporting them the City became a co-wrongdoer and had to be restrained. This, however, does not dispense with the required prayer for relief against the City. The court also relied on the prayer for alternative relief. It erred because this superfluous prayer does not entitle a court to grant relief that is inconsistent with the factual statements and the terms of the express claim...’

[22] Whatever the nature and extent of the prayer for further and/or alternative relief may be, it is not to be granted for the asking. It may only be granted if its basis is substantially set out in the particulars of claim and it is consistent with the primary relief sought. In *casu*, I am of the view that the costs sought under the umbrella of further and/or alternative relief can better be addressed with a consideration of the authority of *Sing v Sing (supra).*

[23] The plaintiff, during arguments, contended that the failure to include the prayer for costs was not a train smash and, in my view, correctly referred to the old but very relevant decision of *Sing v Sing*[6], where it was held that:

‘These authorities justify the conclusion that the failure to pray for costs is not sufficient reason per se for depriving a successful litigant of his costs where the other party has appeared and contested the claim; it might be different where the latter has not appeared and has no notice that costs will be claimed.’

[24] The *Sing* decision makes it plain that even if a prayer for costs is not included in the relief in the particulars of claim, a successful party can still be awarded costs, particularly where the matter was defended and the other party appeared and contested the suit.

[25] It is settled law that costs follow the result but it must, however, be remembered that the decision of whether or not to award costs is in the court’s discretion.

[6] *Sing v Sing (supra)* at 1039. See also *Afrisum Mpumalanga (Pty) Ltd v Kunene NO* 1999 (2) SA 599 (T) 632-633.

[26] There is one obstacle that stands in the way of the award of costs to the plaintiff and it is the consideration whether or not s 18 of the Legal Aid Act prohibits the making of a costs order against a legally aided person. I consider it opportune to address the said provision and I do so below.

Section 18 of the Legal Aid Act

[27] As stated earlier, counsel locked horns as it were on whether or not s 18 of the Legal Aid Act prohibits the making of a costs order against a person who was granted legal aid.

[28] Section 18 of the Legal Aid Act is titled "State not liable for costs" and it reads as follows:

'18. (1) No order as to costs shall be made against the State in or in connection with any proceedings in respect of which legal aid was granted and neither shall the State be liable for any costs awarded in any such proceedings.'

[29] The Supreme Court in the matter of *Mentoor v Usebiu*[7] held that:

'On the issue of costs, we have been informed that the appellant has been granted legal aid. Section 18 of the Legal Aid Act 29 of 1990 prohibits the making of a costs order in proceedings in respect of which legal aid had been granted. In the circumstances, no order as to costs will be made.'

[30] The State was not a party to the proceedings in *Mentoor*. The decision of *Mentoor* that s 18 of the Legal Aid Act applies where legal aid was granted resulted in divergent views by the High Court on the interpretation and approach to the said s 18. This is particularly so as this court is subordinate to the Supreme Court and by virtue of

[7] *Mentoor v Usebiu* (SA 24/2015) [2017] NASC 12 (19 April 2017) para 21.

the doctrine of precedent and Article 81 of the Namibian Constitution, the decisions of the Supreme Court are binding on all other courts and all persons in Namibia.

[31] A brief research revealed several decisions where s 18 of the Legal Aid Act and the decision of *Mentoor* were considered where the State was not a party.

[32] In *Maiba v Commissioner General Raphael Hamunyela: Namibian Correctional Service*,[8] Masuku J cited *Mentoor* in declining to award costs against a legally aided person ad remarked as follows at para [34]:

> 'The provision quoted above has been held by the highest court in the land to mean that no order as to costs shall be made against the State in or in connection with any proceedings in respect of which legal aid was granted. This has been interpreted to mean that in a matter before court, where legal aid was granted to a party thereto and such fact is common cause between the parties, no costs order may be granted against the legally aided litigant. I am bound by that precedent and will not order costs against the applicant although he was unsuccessful in his application at the end of the day.

[33] In *Clayton v Williams,*[9] Usiku J relying on *Mentoor*, declined to make a costs order and remarked that the legal position appear to be that a legally aided person is shielded from an adverse costs order.

[34] In *Sitler v Pupkewitz Motors,*[10]Parker AJ remarked, based on *Mentoor,* that where legal aid in terms of the Legal Aid Act has been granted, the court is not competent to make a costs order. The court declined to make a costs order on that basis.

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[8] *Maiba v Commissioner General Raphael Hamunyela: Namibian Correctional Service* (HC-MD-CIV-MOT-GEN-2019/00463) [2023] NAHCMD 175 (6 April 2023) para 33-34.
[9] *Clayton v Williams* (HC-MD-CIV-ACT-DEL-2021/01779) [2023] NAHCMD 510 (18 August 2023) para [30].
[10] *Sitler v Pupkewitz Motors* (HC-MD-CIV-ACT-DEL-2022/02711) [2023] NAHCMD 505 (17 August 2023) paras [2] and [3].

[35] In *First National Bank Namibia Limited v Amuaalua*,[11] Parker AJ granted summary judgment but declined to award costs on the basis that legal aid in terms of the Legal Aid Act was granted to the defendant.

[36] In *Lukato v Katima Mulilo Town Council and Another,*[12] Masuku J cited para 21 of *Mentoor* and remarked that:

'[22] The section quoted above is clear that no order as to costs shall be made against the State in or in connection with any proceedings in respect of which legal aid was granted. This has, however, been widely interpreted to mean that in a matter before court, where legal aid was granted to a party thereto and such fact is common cause between the parties, no costs order may be granted against the legally aided litigant. This interpretation is equally evident from the Supreme Court case of *Mentoor.'*

…

[24] I am not certain if the interpretation of the provision in question is that no costs can be levied against a legally aided person. I say so for the reason that the provision in question appears to refer to the State and not to a legally aided person. That is also a view expressed in one of this court's judgments.[13] I am, however, bound by the *Mentoor* case above.

[25] I have difficulty with the plaintiff's position. He instituted proceedings and subsequently decided to withdraw same. There is, generally speaking, no cogent reason why he should not be ordered to pay the costs occasioned by the withdrawal of the action. It would be tantamount to abuse of the court's process for parties who receive legal aid, to be allowed willy-nilly, to withdraw proceedings resting on the forlorn hope that they will not be required to pay costs occasioned by the withdrawal in reliance on s 18 aforesaid. This view notwithstanding, I remain bound by the *Mentoor* judgment discussed above.'

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[11] *First National Bank Namibia Limited v Amuaalua* (HC-MD-CIV-ACT-CON-2023/01526) [2024] NAHCMD (17 January 2024) para 15.

[12] *Lukato v Katima Mulilo Town Council and Another* (HC-MD-CIV-ACT-OTH-2021/03381) [2022] NAHCMD 592 (28 October 2022) paras [23]-[25]. Similar remarks were expressed in *Jabu Logistics (Pty) Ltd v Doyle* (HC-MD-CIV-MOT-EXP-2022/00255) [2022] NAHCMD 535 (06 October 2022 paras [15]-[16].

[13] *New Creations Printing and Design CC v Quantum Insurance Limited* (HC-MD-CIV-ACT-CON 2019/02486) NAHCMD 567 (19 November 2019).

[37] In *New Creations printing and design cc v Quanta Insurance Limited,*[14] Rakow J considered s 18 of the Legal Aid together with the *Mentoor* decision and remarked as follows at para [9]:

'On my interpretation of Section 18 I find that it does not prohibits *(sic)* the making of a cost order in proceedings in respect of which legal aid has been granted, but provides that a cost order cannot be made against the State and neither shall the State be held liable for any costs awarded in proceedings where legal aid was granted. Section 18 thus does not prohibit a cost order being made against the litigant who received legal aid assistance.'

[38] In *Mandume v Minister of Safety & Security,*[15] Ueitele J also considered s 18 of the Legal Aid Act together with the *Mentoor* and stated that:

'[36] In my view section 18 of the Legal Aid Act, 1990 simply insulate the State against a costs order and not a litigant who is legally aided. My reading is fortified by the fact that section 18 of the Legal Aid Act, 1990 when it provides the *(sic)* State shall not be liable for any costs awarded in any proceedings in respect of which legal aid was granted, does contemplate an award of costs against a legally aided litigant.'

[39] The above decisions reveal different approaches to s 18 of the Legal Aid Act on the authority of *Mentoor*. Some of the decisions considered *Mentoor* to be outright binding on this court and, therefore, to be followed to the letter; others doubted the correctness of the interpretation accorded to s 18 by *Mentoor* but nevertheless considered *Mentoor* to be binding and thus to be followed; and the others disagreed with the interpretation of *Mentoor* and departed from it.

Mentoor: Ratio decidendi or obiter dicta?

[40] A r*atio decidendi* has been defined in several authorities as the reasons for the decision, while *obiter dicta* are the incidental statements or opinions expressed by judges in a judgment. Not every statement made by a superior court is binding on the

[14] *New Creations printing and design cc v Quanta Insurance Limited* (HC-MD-CIV-ACT-CON-2019/02486) [2019] NAHCMD 567 (19 November 2019) para 9.
[15] *Mandume vs Minister of Safety & Security* (HC-MD-CIV-ACT-DEL-2019/02007) [2021] NAHCMD 118 (19 February 2021) paras [34]-[36].

subordinate court. The Supreme Court in a recent decision of *Digashu* considered the doctrine of precedent and remarked as follows at para 62:

'[62] The doctrine of precedent and Art 81 require and bind not only subordinate courts but also this Court to its own decisions.[16] Courts, including this Court, can depart from their own previous decisions only when satisfied that the decisions were clearly wrong. The binding authority of precedent is however confined to the *ratio decidendi* (rationale or basis of decision) – the binding basis – of a judgment and not what is subsidiary, termed *obiter dicta* – ('considered to be said along the wayside').[17]

[41] At paras [64] to [67], the Supreme Court in *Digashu* made reference to the English law on the doctrine of precedent and remarked that:

'[64] The leading judgment which has been consistently followed concerning the means of distilling the distinction as to what is binding in a previous judgment and that which is said by the way or along the wayside, is that of Schreiner JA in *Pretoria City Council v Levinson*[18] where he explained:

> ". . . [W]here a single judgment is in question, the reasons given in the judgment, properly interpreted, do constitute the *ratio decidendi*, originating or following a legal rule, provided (a) that they do not appear from the judgment itself to have been merely subsidiary reasons for following the main principle or principles, (b) that they were not merely a course of reasoning on the facts . . . and (c) (which may cover (a)) that they were necessary for the decision, not in the sense that it could not have been reached along other lines, but in the sense that along the lines actually followed in the judgment the result would have been different but for the reasons."[19]

[65] The exposition of the doctrine of precedent in English law, as set out in S*alsbury's Laws of England*, cited by counsel for the appellants, is also instructive in distilling what constitutes

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[16] *S v Likanyi* 2017 (3) NR 771 (SC).
[17] *True Motives 84 (Pty) Ltd v Mahdi & others* 2009 (4) SA 153 (SCA) para 101.
[18] *Pretoria City Council v Levinson* 1949 (3) SA 305 (A) at 317.
[19] *Turnbull-Jackson* para 61; *True Motives* paras 103 to 107 where *Levinson* and its application is lucidly explained. See also *Fellner v Ministry of the Interior* 1954 (4) SA 523 (A) per Greenberg JA at 537.

the *ratio decidendi* and *obiter dicta* in a judgment. *Ratio decidendi* is thus explained in *Halsbury's*:

> "The use of precedent is an indispensable foundation upon which to decide what is the law and its application to individual cases; it provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for or orderly development of legal rules. The enunciation of the reason or principle upon which a question before a court has been decided is alone binding as precedent. This underlying principle is called the '*ratio decidendi*', namely the general reasons given for the decision or the general grounds upon which it is based, detached or abstracted from the specific peculiarities of the particular case which gives rise to the decision. What constitutes binding precedent is the *ratio decidendi*, and this is almost always to be ascertained by an analysis of the material facts of the case, for a judicial decision is often reached by a process of reasoning involving a major premise consisting of a pre-existing rule of law, either statutory or judge-made, and a minor premise consisting of the material facts of the case under immediate consideration."[20]

[66] On the other hand, *dicta*, are thus explained in the following para in *Halsbury's*:

> "Statements which are not necessary to the decision, which go beyond the occasion and lay down a rule that is unnecessary for the purpose in hand are generally termed "*dicta*"; they have no binding authority on another court, but they may have some persuasive efficacy. There are *dicta* and *dicta*, however, and three types may be distinguished:
>
> > (1) mere passing remarks of a judge are known as '*obiter dicta'*, recognised legal term of art that is not readily reproduced by an English phrase and is used to describe judicial statements which are peripheral to the reason for the decision, the *ratio decidendi*;
> >
> > … [21]

[20] *Halsbury's Laws of England* 5 ed (2008 updated) vol II para 25.
[21] *Op cit* para 26.

[67] As approved by Lord Denning in *Close v Steel Company of Wales Ltd,*[22] Lord Denning said with reference to the doctrine of precedent:

> "Judicial authority belongs not to the exact words used in this or that judgment, nor even to all the reasons given, but only to the principles accepted and applied as necessary grounds of the decision."[23]
> (Emphasis supplied).'

[42] Does the decision in *Mentoor* on s 18 of Legal Aid Act constitute a *ratio decidendi* or *obiter dicta*? To answer this question, regard should be had to the above authorities including *Levinson*. It should, therefore, be determined whether or not the Supreme Court's statements were merely subsidiary reasons for following the main principle; or they were merely made in the course of reasoning on the facts; and whether or not they were necessary for the decision in that the result would have been different but for the reasons.

[43] The concerned statements of the Supreme Court in *Mentoor*[24] cited earlier are the following remarks:

> 'On the issue of costs, we have been informed that the appellant has been granted legal aid. Section 18 of the Legal Aid Act 29 of 1990 prohibits the making of a costs order in proceedings in respect of which legal aid had been granted. In the circumstances, no order as to costs will be made.'

[44] *Mentoor* concerned an appeal where the appellant, in an appeal from the Magistrate's Court to the High Court, had his application for condonation for late filing of heads of argument dismissed by the High Court and struck the appeal of the roll. Disgruntled by the decision of the High Court, he launched an appeal to the Supreme Court without seeking leave from the High Court. The Supreme Court found that s 18(2)

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[22] *Close v Steel Company of Wales Ltd* [1961] 2 All ER 953 (HL).
[23] *Close v Steel Company of Wales Ltd (supra)* at 960E-G.
[24] *Mentoor v Usebiu (supra)* para 21.

(b) of the High Court Act 16 of 1990 effectively provides that a judgment or order of the High Court sitting as a court of appeal is not appealable as of right as leave must first be sought and obtained from the High Court, and if such leave is refused, an appeal to the Supreme Court is only possible after the Supreme Court itself grants leave. On the basis of the above finding, the appeal was decided and the Supreme Court ultimately struck the appeal from roll. Only after addressing the merits of the appeal did the Supreme Court make the remarks regarding s 18 of the Legal Aid Act.

[45] I find that it is clear as day from the reading of the above cited para 21 of *Mentoor*, that the remarks made on costs were not the reason for the determination of the appeal, they were merely statements made incidental to the appeal. I further find that the aspect of costs was also not an issue for determination in the appeal at Supreme Court, and therefore in my view, the remarks on costs could without breaking a sweat be categorised as *obiter dicta* (by the wayside). I find as a result, that the statements made by the Supreme Court that s 18 of the Legal Aid Act prohibits the making of a costs order in proceedings where legal aid had been granted constitute *obiter dicta*.

[46] As stated above, the heading of s 18 of the Legal Aid Act is titled: “State not liable for costs”. The reading of the content of the provision reveals that the legislature intended to prohibit the making of a costs order against the State where legal aid was granted and the State shall not be liable for any costs awarded in such proceedings.

[47] I hold the view that the legislature, in s 18 of the Legal Aid Act, intended to protect the State from liability for costs where legal aid was granted, hence the heading of the section: “State not liable for costs”. The content of the provision, in my view, does not extend the protection against adverse costs orders to private persons, whether such persons were granted legal aid in terms of the Legal Aid Act or not.

[48] I further find that the legislature was alive to the fact that an award for costs forms an integral component of our civil processes, and that ordinarily, the court, in the

exercise of its discretion, would award costs to a successful litigant. It is against this background, in my view, that s 18 is couched in such a manner that it only prohibits an award of costs against the State where legal aid was granted. It is further the reason why the legislature did not restrict the heading to 'liability for costs' and contents of s 18 to prohibit the making of a costs order against any person in proceedings where legal aid was granted. Simply puty, s 18 shields the State, and not individuals, against adverse costs orders.

[49] I am further of the view that affording s 18 an expansive meaning such as to shield any person who was granted legal aid in terms of the Legal Aid Act from an adverse costs order, has the capacity to be breeding ground for reckless litigation with impunity and thus causing other parties involved to incur unnecessary legal costs, with no possibility of fair reimbursement in sight.[25] In my view, where for example a plaintiff unnecessarily institutes civil proceedings where the parties cited engage counsel and prepare to defend themselves, file pleadings, attend to trial, and when all is said and done judgment is granted in favour of the defendants, the court, in the exercise of its discretion, should be competent to award an adverse costs order against the plaintiff even if such plaintiff had been granted legal aid in the same proceedings.

[50] Section 18, in my view, should not be utilised by any person, other than the State, as a shield against an adverse costs order as to do so would defeat the principle of reimbursement, and may also result in abuse of court processes by legally aided persons with unwarranted dispensation. That, in my view, could not have been the intention of the legislature.

[51] On the basis of the above findings and conclusions, I hold the view that the interpretation accorded to s 18 of the Legal Aid Act by the Supreme Court in *Mentoor*, in so far as it was stated that where a person was granted legal aid, s 18 prohibits the making of a costs order in such proceedings, other than against the State, needs to be revisited.

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[25] *Afshani and Another v Vaatz* 2007 (2) NR 381 (SC) para 27.

[52] The Supreme Court in *Digashu (supra)* advised that the proper approach that a subordinate should adopt where a binding decision should change is the following:

'[63] As was emphasised in *Camps Bay Ratepayers' and Residents' Association*,[26] unwarranted evasion by subordinate courts of a binding decision undermines the doctrine of precedent and the rule of law. Where judges believe a decision binding upon them should change, it is open to them to formulate their reasons for their belief, showing due respect to the high court (superior court), as was cogently done by the Full Bench of the High Court in this matter.'

[53] Out of respect for the Supreme Court, I hold the view that the above-mentioned findings and conclusions provides a fertile ground for *Mentoor* to be revisited on the aforesaid limited issue of s 18 of the Legal Aid Act.

Conclusion and costs

[54] After considering the above, I find that the plaintiff is entitled to summary judgment, which shall be granted accordingly. In respect of costs, I find that although not specifically prayer for in the particulars of claim, the plaintiff could have been awarded costs but for the *Mentoor* decision.

[55] After a careful consideration of *Mentoor* and other decisions cited herein, and in the exercise of my discretion, I have reached a conclusion that there will be no order as to costs in this matter. This is primarily made out of respect for the Supreme court which found in *Mentoor* that the making of a costs order against a person who is granted legal aid is prohibited by s 18 of the Legal Aid Act, and which decision for reasons cited above needs to be revisited by the Supreme Court.

Order

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[26] *Camps Bay Ratepayers' and Residents' Association & another v Harrison & another* 2011 (4) SA 42 (CC) paras 28-30.

[56] Summary judgment is granted in favour of the plaintiff against the defendant in the following terms:

1. Payment in the amount of N$211 147,70;
2. Interest thereon from date of judgment at a rate of 20 percent per annum until date of full and final payment.
3. There is no order as to costs.
4. The Registrar is directed to bring this judgment to the attention of the Registrar of the Supreme Court.
5. The matter is finalised and removed from the roll.

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O S SIBEYA

Judge

APPEARANCES:

FOR THE PLAINTIFF: D Quickfall

Instructed by Köpplinger Boltman, Windhoek

FOR THE DEFENDANT: M Ikanga

Of M. Ikanga & Associates Inc, Windhoek