REPORTABLE

CASE NO. SA 1/2005

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

DAWN CAROLINE HANDL **APPELLANT**

and

ERNST HANDL **RESPONDENT**

Coram: Shivute, CJ, O'Linn, AJA *et* Chomba, AJA

Heard on: 2005/10/10
Delivered on: 2008/03/31

APPEAL JUDGMENT

SHIVUTE, CJ:

[1] This appeal is a sequel to proceedings in the High Court wherein the Presiding Judge was asked to clarify an order of costs granted by the learned Judge in the following circumstances: the appellant lodged an application in the court *a quo* claiming a contribution from her husband towards her costs of a pending matrimonial action between them. Although evidently the parties attempted to settle the matter, the respondent does not allege that the parties had agreed to stand the filing of the respondent's affidavit over until such time that the

settlement negotiations had failed. On the contrary, it was stated on behalf of the respondent in a letter addressed to the appellant's legal practitioners dated 6 February 2004 that the respondent's papers would in effect be filed in due course. The respondent not having filed the notice to oppose, the application was eventually set down for hearing.

[2] In spite of the neglect to file opposing papers timeously on appellant as foreshadowed in the letter aforesaid, when the matter was called, the respondent's legal practitioner rose to oppose the matter. In the light of this development, the learned Judge stood down the matter until the end of the motion court roll.

[3] At the recommencement of the hearing of the matter, the respondent's legal practitioner attempted to "hand up" the application for condonation for the late filing of the notice of opposition and replying affidavit from the bar, which effort was declined by the learned Judge. Consequently, the respondent's legal practitioner did not play any further role in the proceedings of the day. The matter then proceeded with the appellant's legal practitioner indicating that he was prepared to lower the amount of contribution from the initial figure of N$25 000.00 to N$11 250.00 "as a mark of good faith". That order was granted as prayed for.

[4] However, as far as the costs order was concerned, the appellant's legal practitioner indicated to the Judge that the respondent should pay the costs and that such costs must not be limited "to the fees laid down in the Rules."

[5] Then there occurred the following exchange between the legal practitioner, Mr Bloch, and the learned Judge:

> "Court: And the defendant pays the wasted costs of the Respondent?
>
> Mr Bloch: But not limited to the Rules. My Lady, sub-rule 7 says, unless the Court otherwise directs counsel in case cannot charge more than a fee of so much.
>
> Court: Yes.
>
> Mr Bloch: And I suggest that in this case because of the opposition and what has happened this morning that this be ignored. The court can direct otherwise that it will be normal wasted costs.
>
> Court: Well the respondent is to pay the cost at a normal rate. So, order as amended?
>
> Mr Bloch: As amended, yes.
>
> Court: Yes
>
> Mr Bloch: Thank you My Lady."

[6] When a formal order of Court was ultimately drawn up and signed by the Registrar on the same date, however, the wording of the order in respect of the cost order differed from the order pronounced by the Judge. The order embodied in the document signed by the Registrar simply read:

> "2. That the Respondent /Plaintiff pay the costs of this application."

[7] The appellant launched an application in terms of Rule 44 of the Rules of the High Court[1] wherein he sought a variation of the initial order so as to give

[1] Rule 44 reads as follows:

effect to what he perceived to have been the true intention of the learned Judge.

[8] He prayed that the Court grant an order reading as follows:

> "(i) That the Respondent/Plaintiff pay the costs of these proceedings from the date of institution of the Rule 43 application proceedings until the 23rd February 2004 on a basis of normal party/party costs and for this purpose this Honourable Court directs that Rule 43(7) of the Rules of Court shall not apply to such party/party Bill of Costs."

[9] Having heard argument, the learned Judge dismissed the application with costs. It is against such dismissal that the present appeal is directed.

[10] In this Court counsel for the respondent took the point *in limine* that the order of the High Court was not subject to appeal since, so it was contended, the appeal related to a Rule 43 application which was interlocutory in nature and that the judgment sought to be appealed against was essentially an order as to costs, which in terms of section 18(3) of the High Court Act, No 16 of 1990 was not appealable, save with the leave of the Court. Subsection (3) of section 18 provides:

"(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary –
(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
(c) an order or judgment granted as the result of a mistake common to the parties.

(2)...
(3)..."

> "(3) No judgment or order where the judgment or order sought to be appealed from is an interlocutory order or an order as to costs only left by law to the discretion of the court shall be subject to appeal save with the leave of the court which has given the judgment or has made the order, or in the event of such leave to appeal being refused, leave to appeal being granted by the Supreme Court."

[11] Counsel for the respondent therefore submitted that the appeal should be dismissed on that ground.

[12] I do not agree. It is indeed so that the appellant had neither sought nor obtained leave of the High Court to appeal against the judgment. However, the judgment appealed against is essentially the decision clarifying the order. The application in the High Court was decided on its merits which concerned the question whether or not the costs order granted by the Judge entitled counsel for the appellant in the Court *a quo* to charge a fee higher than the maximum prescribed by Rule 43(7). The appeal concerns the correctness or otherwise of the Court a quo's interpretation of its order. In other words, far from being an appeal against the order itself, the appeal is essentially against the judgment clarifying the order. To that extent, therefore, the appeal does not run foul of section 18(3) of the High Court Act and is properly before this Court.

[13] In any event, for a decision to be a "judgment or order" appealable without leave, it must have three attributes. First, the decision must be final in effect and not susceptible to alteration by the court of first instance. Secondly, it must be definitive of the rights of the parties, i.e. it must grant definitive and distinct relief. Lastly, it must have the effect of disposing of at least a substantial portion of the

relief claimed in the main proceedings.[2] These attributes of an appealable judgment or order have authoritatively been stated by the South African Supreme Court of Appeal and such statement has been adopted by this Court.[3]

[14] It seems to me that all the three attributes are present in the judgment appealed against and for that additional reason, the point *in limine* stands to be dismissed.

[15] It is trite that the order issued by the Registrar must correspond with the order pronounced by the Judge. Since the two orders do not correspond, it becomes necessary in this appeal to determine what the intention of the learned Judge was when pronouncing the order in question.

[16] It is a well established rule of law that the principles involved in the interpretation of a judgment or order are essentially the same as those applicable to the construing of documents.[4] As it was further pointed out in *Firestone South Africa (Pty) Ltd v Gentiruco AG case*:[5]

> "[T]he court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-

[2] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532I–533B; *Guardian National Insurance Co Ltd v Searle NO* 1999 (3) SA 296 (SCA) at B-C.

[3] In *Andreas Vaatz and Another and Klotzsch and Others,* delivered on 11/10/2002. See also *Rossouw v Commercial Bank of Namibia & 3 Others,* delivered on 08/07/2003; *Aussenkehr Farms and Another v The Minister of Mines and Energy and Another* delivered on 5/03/2003. All to be found at www.superiorcourts.org.na and/or www.saflii.org/na/cases/NASC

[4] See *Firestone South Africa (Pty) Ltd v Gentiruco AG 1977 (4) SA 298 (A); Administrator, Cape, and Another v Ntshwaqela and Others 1990 (1) SA 705 (AD) at F-H; Rössing Stone Crushers (Pty) Ltd v Commercial Bank of Namibia & Another 1994 (2) SA 622 (Nm HC) at 631E- F* and the other authorities there cited.

[5] At 304 D - H

> known rules. Thus, as in the case of a document, the judgement or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgement or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the court that gave the judgment or order can be asked to state what its subjective intention was in giving it. Of course, different considerations apply when, not the construction, but the correction of a judgment or order is sought by way of an appeal against it or otherwise. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgment or order may be investigated and regarded in order to clarify it; for example, if the meaning of a judgment or order granted on an appeal is uncertain, the judgment or order of the court *a quo* and its reasons therefor, can be used to elucidate it. If, despite that, the uncertainty still persists, other relevant extrinsic facts or evidence are admissible to resolve it. [Reference to authorities omitted].

[17] The application for a contribution towards costs was instituted in terms of Rule 43 of the Rules of the High Court. Sub-rule (7) of Rule 43 of the Rules of the High Court, as amended, provides as follows:

> "(7) Unless the court otherwise directs counsel in a case under this rule shall not charge a fee –
>
> (a) of more than N$450 for appearance if the claim is defended or N$200 if it is undefended;
>
> (b) of more than N$450 for any other services rendered in connection with the claim."

[18] Counsel for the appellant in the court *a quo* in the interchange with the learned Judge recounted in paragraph [4] above evidently was desirous of the costs higher than the amounts prescribed in the sub-rule. It will be recalled that counsel gave two reasons for the request for the order, namely "because of the opposition and what [had] happened this morning." The real question in this

appeal is whether the learned Judge had acceded to counsel's prayer or not.

[19] In her ruling on the application for clarification of the order the learned Judge held that the intention was not to depart from the normally permissible order in the Rule 43 proceedings and that what the court had in mind was an award of costs that limited counsel's fees in Rule 43 proceedings.

[20] The phrase that calls for interpretation is "costs at a normal rate". To break it up, taking the word "costs" first, the word "costs" when used in a court order does not give any difficulty of interpretation. It means party and party costs. As was pointed out by Searle J in *Francis v Dutch Reformed Church, George, and Another* :[6]

> "When costs are mentioned, generally, party and party costs are meant."

[21] It follows that the scale of the costs in the order is not an issue. It is on a party and party scale. Viewed in this context, therefore, the order as pronounced by the learned Judge essentially reads that "the respondent is to pay the costs on a party and party scale at a normal rate". As previously observed, the party and party scale of an application in terms of Rule 43 is prescribed in the Rule 43(7).

[22] What does "normal rate" as used in the order mean? At best for the respondent, the order can be said to be equivocal: it may mean that the costs are to be paid at the rates prescribed by Rule 43(7); or it may mean that the rates

[6] 1913 CPD 179 at 183

applicable to ordinary opposed applications applied. In the *Administrator, Cape, and Another case (supra),* it was reiterated that where the order is ambiguous, the circumstances leading to the Court granting the judgment or order may be investigated so as to ascertain whether at least a reasonably certain meaning could be given to the judgment or order[7] and that the order must be read as part of the entire judgment and not as a separate document.[8]

[23] To help understand the context in which the order was made and the expression "normal rate" used, it becomes necessary therefore to resort to the discussion that preceded the pronouncement of the order, in particular to the reasons advanced by counsel for the appellant in the court *a quo* for a prayer for the costs order on a scale higher than the prescribed scale as well as to the learned Judge's own impression of the respondent's legal practitioner's attempt to oppose the application.

[24] What counsel summarised as "the opposition and what happened this morning" essentially amounted to the conduct of respondent's legal practitioner wanting to defend the matter when he did not file the necessary papers timeously and for causing the matter that must have surely seemed unopposed to stand down until the end of the roll. The learned Judge had also earlier censured the respondent's legal practitioner, who is not the same counsel who argued the appeal in this Court, when the legal practitioner attempted to oppose the application. When the respondent's legal practitioner attempted to "hand up" the

[7] At 715H
[8] At 716C

application for condonation from the bar the Judge reacted as follows:

> "No, I won't accept it in these proceedings. You should know the Rules or your senior fellow practitioner's instructing attorneys will have drawn your attention to it. I'm afraid there is no application for condonation. So I won't deal with the matter. I will rather accept your attempt to intervene and oppose the application."

[25] When the respondent's legal practitioner tried to explain further, the learned Judge interposed and said:

> "Well it isn't before me and I can't take cognisance of it. It's not there. You haven't sought condonation and you are out of time and you are late sir..."

[26] A reading of the record of proceedings as a whole makes it clear that although not expressly stated, the above concerns expressed by the learned Judge and as summarised by counsel for the respondent in the Court *a quo* were palpably the reasons for an award of costs of an ordinary application, which the learned Judge characterised in the order as "normal rate". The learned Judge appears to have qualified the prescribed scale by ordering that the scale should be on a "normal rate". It may well be that the learned Judge had regarded the application before her to have been an "exceptional one" so as to warrant a costs order on the basis of an ordinary opposed application.[9]

[27] As far as I was able to ascertain, the word "normal" in the context used by the learned Judge does not appear to be a term of art and so it should be given its

[9] *Cf. Gunston v Gunston* 1976 (3) SA 179 (WLD); *Massey v Massey* 1968 (2) SA 199 (TPD)

ordinary meaning. The **Concise Oxford English Dictionary**, 10th edition, defines "normal" as "conforming to a standard; usual; typical, or expected". Understood in this context, therefore, the phrase "normal rate" essentially means that the costs to be paid should be on the usual rate. This obviously refers to the rates usually applicable in other opposed motions. In the view I take of the matter, in all probabilities by employing the phrase "normal rate", the learned Judge agreed with counsel for the appellant that the respondent should be ordered to pay party and party costs and that these costs should not be limited "to the fees laid down in the Rules". The order formulated and signed by the Registrar should have embodied the phrase "normal rate" so as to give effect to the learned Judge's intention not to restrict the costs to rates applicable to Rule 43 applications.

[28] It is undoubtedly so that the order pronounced by the learned Judge could have been stated more clearly; but even in the less than perfect manner in which it has been expressed, its import is clear: it was meant to exclude the limitations placed on costs in Rule 43 applications. It follows then that the appeal should succeed with costs.

[29] In the result, the following order is made:

1. The appeal succeeds.

2. The respondent is ordered to pay the appellant's taxed costs both in this Court and in the High Court.

3. The order of the Court *a quo* dismissing the application is set aside and there is substituted the following order:

> "That the respondent/plaintiff pay the costs of these proceedings from the date of the institution of the Rule 43 application proceedings until 23 February 2004 on the basis of normal party and party costs and for this purpose the court directs that Rule 43(7) of the Rules of Court shall not apply to such party and party Bill of Costs".

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SHIVUTE, CJ

I agree.

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O' LINN, **AJA**

I agree.

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CHOMBA, AJA

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