



'Unreportable'

CASE NO.: A 306/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

**COUNCIL OF ITIRELENG VILLAGE COMMUNITY
(COMPRISING THE MEMBERS LISTED PER
ANNEXURE ABM3)**

Applicant

and

FELIX MADI

1st Respondent

TSHABANG MAKGONE

2nd Respondent

ANNA MOKALENG

3rd Respondent

EUPHAROSINE MBUENDE

4th Respondent

BERHARD MOKALENG

5th Respondent

REINHARTH MORWE

6th Respondent

VICTUS EDWARD

7th Respondent

AUGUSTINUS MOKALENG

8th Respondent

GENVEFA MOKALENG

9th Respondent

JASPER MADI

10th Respondent

MICHAEL KAPENG

11th Respondent

OSWALD TIBINYANE

12th Respondent

LAZARUS SEBETWANA

13th Respondent

ARNOLD MORWE

14th Respondent

ALEXIUS UDIGENG

15th Respondent

BERLINDIS UDIGENG

16th Respondent

RILEU KENE

17th Respondent

CORAM: **PARKER J**

Heard on: (2012 April 12)

Delivered on: 2012 July 17

JUDGMENT

PARKER J: [1] The applicant launched an urgent application on *ex parte* basis and obtained a rule *nisi*. The rule *nisi* was, for one reason or another, not served on all the respondents. In any case, opposing papers were filed, and the applicant filed replying papers. In the course of events, by consent of the parties the rule *nisi* was discharged on account of the fact that the event sought to be interdicted had already taken place. The only issue which the parties have called on the Court to determine in the present proceeding is, therefore, which party should bear the wasted costs of the urgent application; that is, the applicant or the respondents.

[2] As I have found previously, the rule *nisi* was discharged by consent of the parties. It is, therefore, of no moment in the present proceeding as to who capitulated. What is relevant for my present purposes is the only point that by consent of the parties the rule *nisi* has been discharged. It follows that any submission bearing on the merits of the case is really of no assistance on the issue under consideration, namely, costs.

[3] Relying on the authorities, the Court stated in *Central Maintenance Close Corporation v Council for the Municipality of Windhoek* Case No. I 3671/2007 (Judgment delivered on 2 December 2011) (Unreported) that where a litigant withdraws an action or in effect withdraws it, every sound reason must exist why a

defendant or respondent should not be entitled to his or her costs. The plaintiff or applicant who withdraws his action or application is in the same position as an unsuccessful litigant because, after all, his or her claim or application is futile and the defendant or respondent is entitled to all costs associated with the withdrawing of the plaintiff's or applicant's institution of proceedings. In the instant proceeding, the applicant has not withdrawn the application and so he is not in the same boat as an unsuccessful litigant.

[4] In *Channel Life Namibia Limited v Finance in Education (Pty) Ltd* 2004 NR 125 the Court held that where a court is called upon to adjudicate only upon the question of costs, there should not be a hard-and-fast rule whether it would be necessary for the Court to consider the merits of the case: each case must be treated on its own facts. In some cases it would be necessary to consider the merits; in other cases it would not be necessary to do so. On the facts and in the circumstances of the present proceeding, it is absolutely unnecessary to consider the merits.

[5] In *Morris v Government of the Namibia* 2001 NR 51 the Court held that since it was the applicants who had been at fault in not continuing with the action instituted by them (*qua* plaintiffs) against the respondents (*qua* defendants) who in their turn had incurred legal expenses, the respondents were entitled, depending on how far the abortive proceedings had progressed, to set the matter down for costs. In the instant proceeding, it cannot be said on any account that the applicant is at fault for the proceeding respecting the confirmation of the rule *nisi* not continuing. Proceeding was discontinued upon the parties consenting to the discharge of the rule *nisi*.

[6] It is trite law that costs follow the result unless exceptional circumstances exist. In the present proceeding, the result is that by consent of the parties the rule *nisi* was discharged. It follows inexorably and reasonable that no party is entitled to wasted costs: each party should pay its own costs. In the result, I make the following order:

There is no order as to costs.

PARKER J

COUNSEL ON BEHALF OF THE APPLICANT:

Mr T Chibwana

Instructed by:

Government Attorney

COUNSEL ON BEHALF OF THE RESPONDENTS:

Adv. P C I Barnard

Instructed by:

Dr Weder, Kauta & Hoveka Inc.