REPUBLIC OF NAMIBIA

CASE NO: I 2759/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

CATO FISHING ENTERPRISES CC **RESPONDENT/PLAINTIFF**

And

LUDERITZ TUNA EXPORTERS (PTY) LTD **APPLICANT/DEFENDANT**

CORAM: **UEITELE, AJ**

Heard on: 27 March 2012

Delivered on: 03 April 2012

JUDGMENT

UEITELE, AJ:

[1] The Plaintiff in the main action is **CATO FISHING ENTERPRISES CC** who is the respondent in this application, but I will for ease of reference refer to it as the plaintiff. The defendant in the main action is **LUDERITZ TUNA EXPORTERS (PTY) LTD** and I will refer to it as **LTE** in this judgment.

[2] During the first part of September 2011 the plaintiff caused summons to be issued out of this court against **LTE.** According to the return of service filed of record, the Deputy Sheriff for the district of Luderitz served the summons on the 'Managing Director of the Defendant' a certain Mr Jose Calasa.

[3] On 23 September 2011 Francois Erasmus & Partners, purporting to act on behalf of the defendant entered a notice of intention to defend the action commenced by the Plaintiff, but the resolution purporting to authorize Ms Botes to defendant the action was taken by members of Luderitz Tuna Exporters CC and the power of attorney was signed by Jose Lois Calaça in his capacity as Managing Member of Luderitz Tuna Exporters CC.

[4] On 04 October 2011 Francois Erasmus & Partners still purporting to act on behalf of the defendant requested Further Particulars as contemplated in Rule 21 of this Court's Rules. The plaintiff's legal practitioners did not provide the further particulars requested but applied for summary judgment.

[5] Francois Erasmus & Partners still purporting to act on behalf of the defendant opposed the application for summary judgment. The grounds on which they opposed the summary judgment were set out in affidavit deposed to by Jose Lois Calaça (the Managing Member of Luderitz Tuna Exporters CC). The grounds of opposition were *inter alia* that no agreement

was concluded between the plaintiff and **LTE** because (to the knowledge of Jose Lois Calaça) no juristic person by the name of **LUDERITZ TUNA EXPORTERS (PTY) LTD** as cited in the combined summons exists.

[6] On the date (i.e. the 11th November 2011) that the application for summary judgment was to be heard the parties reached an agreement and the application for summary judgment was removed from the roll and the 'defendant' was granted leave to defend the action.

[7] On 28 November 2011 the plaintiff gave notice that it is withdrawing the action against the 'defendant'. It is the notice of withdrawal of the action that gave rise to this application.

[8] On 14 December 2011 Francois Erasmus & Partners gave notice that the 'defendant' will on 27 January 2012 apply for an order compelling the Plaintiff to pay the 'defendant's' costs as a result of the withdrawal of the action on 28 November 2011.

[9] The plaintiff opposed the application and the matter was consequently postponed to 27 March 2012 for argument and it came before me on that date.

[10] The ground on which the plaintiff opposes the application is that the defendant is a non entity, making the action unenforceable. The sole issue which I am called upon to determine is thus whether the plaintiff should be

ordered to pay costs of the proceedings up to 28 November 2011 and the cost of this application.

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[11] The plaintiff does not dispute that it brought the wrong party to court. The agreement upon which the plaintiff's litigation was premised was between the plaintiff and a close corporation, namely **LUDERITZ TUNA EXPORTERS CC**. It is further common cause between the legal practitioners for the plaintiff and Francois Erasmus & Partners that the applicant, to wit **LUDERITZ TUNA EXPORTERS** (Pty) Ltd – does not exist.

[12] I now turn to the pivotal issue of costs. The application is brought in terms of Rule 42(1) of the High Court Rules, which Rule provides as follows:

> "42. (1)(a) A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he or she shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs, and the taxing master shall tax such costs on the request of the other party.
>
> (b) A consent to pay costs referred to in paragraph (a), shall have the effect of an order of court for such costs.
>
> (c) If no such consent to pay costs is embodied in the notice of withdrawal, the other party may apply to court on notice for an order for costs."

[13] The basic rule is that, except in certain instance where legislation otherwise provides, all awards of costs are in the discretion of the court. ***Hailulu v Anti-Corruption Commission and Others*** 2011 (1) NR 363 (HC) and ***China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC*** **2007 (2) NR 674.** It is trite that the

discretion must be exercised judiciously with due regard to all relevant considerations. The court's discretion is a wide, unfettered and equitable one. See ***Intercontinental Exports (Pty) Ltd v Fowles*** 1999 (2) SA 1045.

[14] There is also, of course, the general rule, namely that costs follow the event, that is, the successful party should be awarded his or her costs. This general rule applies unless there are special circumstances present. See ***China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC*** **2007 (2) NR 674**

[15] Ms Botes argued that since the plaintiff withdrew its action it was in the same position as an unsuccessful litigant and the opposing party is entitled to the cost associated with the plaintiff withdrawing its claim. She referred me to the case of ***Germishuys v Douglas Besproeiingsraad*** 1973 (3) SA 299 where the headnote reads as follows:

> "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 entitled to all costs associated with the withdrawing plaintiff's or applicant's institution of proceedings."

[16] Ms Botes furthermore argued that 'a party must pay such costs as have been unnecessarily incurred through failure to take proper steps, or through taking wholly unnecessary steps.' And referred me to the cases of ***China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC*** and ***Scheepers and Nolte v Pate*** 1909 TS 353.

[17] Mr Horn who appeared for the plaintiff opposed the application by Francois & Erasmus for costs on the basis that the defendant is a non entity having no legal persona (sic) in law.

[18] I have no doubt about the correctness of the law as stated by Van Rhyn, J in the ***Germishuys's*** case as quoted above in paragraph 15. I furthermore accept the correctness of the legal principles set out in the cases of ***China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC*** and ***Scheepers and Nolte v Pate*** to which Ms Botes referred me.

[19] I am of the view that the case of ***China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC*** does not assist Ms Botes at all. In that case Silungwe AJ said:

> "...where an irregular proceeding is a clear nullity, as in the present case, it is unnecessary for the defendant to enter a notice to defend, on the basis that there is nothing to defend. In all other cases, or when in doubt, it is incumbent upon the defendant, as a matter of *ex abundanti cautela*, to enter a notice of appearance to defend. In my opinion, a party enters an appearance in order to defend a claim made against him or her, but not merely to point out that an irregular proceeding has occurred. In the instant case, the claim is breach of contract with a party completely different from the applicant and, therefore, the applicant would have nothing to defend.

[20] In the present matter the plaintiff caused summons to be issued against **LUDERITZ TUNA EXPORTERS (PTY) LTD,** which does not exists. The power of attorney purporting to authorise Ms Botes was signed by Jose Lois Calaça in his capacity as Managing Member of Luderitz Tuna Exporters

CC. Luderitz Tuna Exporters CC was not a party to the proceedings. It thus follows that in an instance as the present one where a party issue summons against a person (natural or juristic) who does not exists such proceedings are a nullity and it is unnecessary for the defendant to enter a notice to defend, on the basis that there is nobody who must defend the action.

[21] In addition to what I have said in paragraph 20 above, there are two questions that are begging for answers. The first question is, who on behalf of **LTE** instructed Francois Erasmus to oppose the action and to apply for cost? The second question is, if this court orders the plaintiff to pay the defendant's cost who is the defendant who will be entitled to such cost?

[22] I am thus of the view that sound reason exists why the defendant or respondent is not entitled to his costs not and that reason is the fact that the defendant does not exist. I thus not inclined to exercise my discretion in favour of Francois & Erasmus legal practitioners. In the result I make the following order.

1) The application is dismissed.

2) There is no order as to costs.

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UEITELE, AJ

ON BEHALF OF THE PLAINTIFF:	Mr Horn
INSTRUCTED BY:	M B De Klerk & Associate
ON BEHALF OF THE DEFENDANT:	Ms. Botes
INSTRUCTED BY:	Francois Erasmus & Partners