NOT REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

A RULING ON COSTS

CASE NO. **A 129/2010**

In the matter between:

HOZE RIRUAKO	**APPLICANT**

And

THE UNIVERSITY OF NAMIBIA	**1ST RESPONDENT**
THE CHANCELLOR OF THE UNIVERSITY OF NAMIBIA	**2ND RESPONDENT**
THE CHAIRPERSON OF THE UNAM COUNCIL	**3RD RESPONDENT**
DR BONIFACE MUTUMBA	**4TH RESPONDENT**
HELENA NAMHILA	**5TH RESPONDENT**

Neutral citation: *Riruako v The University of Namibia & 4 Others* (A 129/2010) [2016] NAHCMD 168 (14 June 2016)

CORAM: ANGULA, DJP

Heard: 27 April 2016

Delivered: 14 June 2016

ORDER

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1. The application is struck from the roll.
2. The applicant is ordered to pay the respondents' costs.

RULING

ANGULA, DJP:

Introduction

[1] At the time the applicant launched this application on 28 April 2010, he was employed by the University of Namibia, the first respondent, as Project Director of UNAM/ISS Master in Public and Policy Administration Program. The first respondent is a well-known public tertiary educational institution, commonly referred to as "UNAM". The second respondent is the Vice-Chancellor of UNAM. The third respondent is the Chairperson of UNAM Council. The fourth respondent was at the time of the institution of the application, employed by UNAM and was appointed by UNAM Council to the position of Pro-Vice-Chancellor: Administration and Finance. The fifth respondent is also employed by UNAM. She was cited for the interest she might have in the matter therefore no relief was sought against her. It was the appointment of the fourth respondent by UNAM Council which triggered the applicant to launch this application. He sought for the decision of UNAM Council to be reviewed and set aside.

[2] The file in this matter was allocated to me as being inactive pursuant to Rule 132. During the inquiry as to why the matter has been inactive, counsel for the applicant informed me that the applicant no longer wished to proceed with the application; that the

applicant proposed that he withdraw the application on the basis that each party should pay his/their own costs. The respondents were not amenable to the proposal that each party pays his own costs and insisted that the applicant should pay their costs. The applicant was not prepared to tender payment of the respondents' costs.

Issues for determination

[3]

1. Whether the applicant's delay in prosecuting the application amounted to an abuse of court process;

2. Whether the application should be dismissed or struck from the roll;

3. Whether the applicant's claim for costs has prescribed; and

4. Whether the applicant should be ordered to pay the first respondent's costs.

Background

[4] It is necessary to set out the history of the matter, as it has bearing on the issue of whether the applicant's delay to prosecute the application amounted to an abuse of court process. The history of this matter may be briefly summarised as follows:

> 1. On 28 April 2010, the applicant brought this application calling upon the first, or alternatively, the third respondent to show cause why the decision to disqualify the applicant from the position of Pro-Vice-Chancellor: Administration and Finance and to appoint the fourth respondent to that position should not be set aside. Thereafter on 24 May 2010 the first and third respondents filed their notice to oppose. The record in terms of the old Rule 53, was filed on the same day. The applicant then filed his

supplementary affidavit on 12 July 2010. The respondents filed their answering affidavit on 5 October 2010 and the applicant his replying affidavit on 17 December 2010. On 17 January 2011, the applicant's legal practitioner called upon the respondents to meet at the Registrar's office on 9 February 2011 to obtain a trial date. It transpired, however, that when the parties met, the applicant could not commit himself to a date as he did not by then have the funds to secure the services of counsel.

2. On 10 May 2011, the matter was scheduled for a pre-conference before Swanepoel J. The applicant's legal practitioner then failed to appear at the conference, which resulted in the Judge issuing an order for the parties to appear before the Registrar on 8 June 2011 to obtain a trial date. No date was obtained pursuant to the court's order. The matter thereafter remained inactive until 8 March 2012, when the parties' legal representatives were summoned to appear before the Managing Judge on 20 March 2012 for a further status hearing. On that occasion, the respondents' legal representative failed to appear, whereupon the respondents' defence was struck from the roll with costs and the applicant was granted leave to proceed on an opposed basis. The order was, however, rescinded on 13 April 2012 and respondents' opposition was reinstated. From that date the matter remained dormant throughout 2013, 2014 and for the better part of 2015.

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3. On 11 November 2015, the respondents' legal practitioner requested the Registrar to allocate the matter to a managing judge in terms of Rule 132 (4), to enable them to seek an order striking the matter from the roll due to the applicant's failure to prosecute the matter. On 20 January 2016, the matter was scheduled for a status hearing before me. The applicant's legal practitioner then informed me that the applicant no longer wished to continue with the application as the application had been taken over by

> events in that the fourth respondent has in the meantime served his five years term as Pro-Vice-Chancellor. The matter was then postponed for another status hearing on 2 March 2016, to give the applicant's legal practitioner an opportunity to obtain instructions from the applicant regarding the issue of payment of the respondents' costs. When the matter was called on 2 March 2016, the legal practitioner for the applicant informed the court that he had been unable to contact the applicant, whereupon I once again postponed the matter for another status hearing on 9 March 2016. This was done in order to afford the applicant's legal practitioner a final opportunity to obtain instructions from the applicant relating to the issue of payment of the respondents costs. On 9 March 2016, the applicant's legal practitioner informed the court that the applicant was not in a position to offer to pay the respondents' costs. It was then proposed that the applicant withdraw the application on the basis that each party bear his/their own costs. The respondents' legal practitioner was not prepared to agree with the proposal and insisted that the applicant should be ordered to pay the respondents' costs. This Court then postponed the matter to 27 April 2016 for the parties to argue the issue of costs.

Whether the applicant's delay in prosecuting the application amounted to an abuse of court process

[5] The respondents are seeking for an order dismissing the application, or alternatively for an order striking the application from the roll and for an order that applicant pays their costs. The reason advanced in support of such orders is that the applicant's delay in prosecuting the application amounts to an abuse of court's processes. In bolstering this argument it is submitted on behalf of the respondents that that the matter has been dormant for almost three years without the applicant having taken any step to bring the matter to finality.

[6] Historically, the approach to litigation was that the applicant or plaintiff was the *dominis litis*; he/she was responsible for driving the pace of the litigation. The applicant bore the responsibility to prosecute the application and the respondent could sit back and do nothing. In countering the respondents' arguments, Mr. Vaatz for the applicant submitted that Rule 96 of the current Rules provides that the assignment of a trial or hearing date is done by order of the managing judge. Furthermore that Rule 96 (6) also states that a party who opposes a proceeding may apply, on notice to all parties, to the managing judge for a special date or dates of the trial or hearing during the term of the court. Therefore, so the submission goes, the respondents have the right or obligation to have approached the managing judge to set the matter down for arguments. Accordingly the blame for lack of prosecuting the matter rests with both parties.

[7] It was pointed out by the court in the matter of Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd[1], that:

> "[82] *There are sound reasons why courts should not sanction the proposition that because the plaintiff is the dominus litis, the defendant may legitimately sit idly by while delays accumulate. In the first place, it is inimical to the public interest in the administration of justice that disputes be brought to trial and be resolved expeditiously, effectively and efficiently. Inordinate delays in the administration of justice undermine public confidence in the administration of justice."*

[8] There is an additional consideration which the court is bound to take into consideration, and that is: public interest. It is in the public interest that litigation should be finalized as speedily as possible. The court's roll should not unnecessarily be clogged with sterile matters which only deprive other litigants of an opportunity to have their matters heard without inordinate delay.

[1] 2012 (2) 697.

[9] I agree with Mr. Vaatz's submission. In terms of the current Rules of court, the applicant was not singly to be blamed for the delay. The respondents also had the right to have taken steps to prosecute the matter. With the introduction of the Judicial Case Management, all the parties and their legal representatives have the obligation to assist the court to prosecute the proceedings. In this respect the court in the Aussenkehr Farms (supra) put the matter as follows:

> *"[90] With the advent of the JCM rules where all parties to the proceedings have the obligation to prosecute the proceedings and assist the court in furthering the underlying objectives, it would be highly relevant to consider any inaction on the part of the parties. And there is no place for defendants to adopt the attitude of 'letting sleeping dogs lie' and for a defendant to sit idly by and do nothing, in the hope that sufficient delay would be accumulated so that some sort of prejudice can then be asserted."*[2]

[10] I do not agree with Ms Mondo's argument, for the respondent' that the delay amounts to an abuse of court process. The word "abuse" used as a verb means 'use improperly' and as a noun means 'improper usage of a thing'. A party's conduct would amount to an abuse of process if the process is used for ulterior motives and not for the purpose such process was meant to achieve. It has been held that the answer to the question whether a delay amounts to an abuse is a question of fact. The inquiry must involve the reason for the delay; the explanation for the delay tendered by the party; the extent to which the opposing party contributed to the delay; whether the court was used for ulterior motives; and whether the party raising the point has suffered prejudice.

[11] The history of the matter, as outlined above, in my view, does not support the respondents' argument. I think, based on the facts, it is fair to say that there had been some conduct on the part of the applicant which could be classified as lackadaisicalness on his part, but in my view it did not amount to an abuse of court process. Other than what the court has been informed by the applicant's legal practitioner, there are no facts upon which an inference can be made that the delay was

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[2] Aussennker supra

intentional, with an underlying ulterior motive. There are no facts to form the basis for the conclusion that the delay was inexcusable. The fact that the reliefs which were sought in the application have lost meaning or purpose to the applicant constituted an excusable reason for the applicant not to have proceeded with the application. I have in any event found that the respondents had the right and indeed an obligation to have taken steps to assist the court to take the matter forward to its finality.

[12] It follows therefore that the respondents in this matter cannot be allowed to derive benefits from the delay in this application not being prosecuted to finality; if anything, the respondents were equally to be blamed for the delay.

Whether the application should be dismissed or struck from the roll

[13] Ms Mondo submits in her heads of argument that in view of the fact that the applicant has indicated through his legal representative that he no longer wishes to proceed with the matter, it would be in the interest of justice that the matter be dismissed, as it will bring the matter to finality. Mr Vaatz on the other hand submits that dismissing the application would not be the correct procedure to follow, because for the court to dismiss the application, it has to first consider whether the correct procedure would be to strike the matter from the roll and in that case the court has a discretion as to the question of costs.

[14] Even in a case where an abuse has been established, the court still has the discretion whether or not to dismiss the matter before it. Furthermore, where the court exercises its discretion in such circumstances, it must bear in mind that dismissing a matter on account of delay is a drastic measure which will interfere with the litigant's right to fully present his/her case in court. In addition, the role of the Rule of Law requires the existence of the courts for the determination of disputes, and the litigants have the right to utilize the courts for that purpose.[3]

[3] See; Aussenkehr supra.

[15] It is common cause in the present matter that there has been an inordinate delay in prosecuting the application. The responsibility for the delay lies with both parties. The respondents did not allege that they suffered any prejudice as a result of such delay. I have found that they were equally responsible for the delay. I have also concluded that the reason why the respondents did not take any step to prosecute the application was because they adopted an incorrect and outdated approach that it was the applicant's responsibility as the *dominis litis* to take the step to prosecute the application. On the other hand, as far as the applicant was concerned, it would appear to me from the facts and by way of necessary inference that the real reason for the delay, that is, for not actively prosecuting the application was not due to ulterior motive, but due to lack of funds. It is common cause that on one occasion when the parties appeared before the Registrar for the allocation of a date for the hearing of the application, the date could not be allocated due to the fact the applicant did not have funds to secure the services of an instructed counsel. It is further common cause that Mr. Vaatz informed the court the applicant was prepared to withdraw his application but was not in a position to tender the respondents' costs and proposed that each party bear his/their own costs. In my view the applicant's stance is not because of obstinacy, but because he would not be able to pay the respondents' costs.

[16] I have already pointed out that the undisputed fact why the applicant could and cannot prosecute the application is that the reliefs sought in the application have gradually been taken over by events with the passage of time. The longer the matter dragged out over the years, the less the outcome became useful to the applicant. In the meantime, the fourth respondent became entrenched in the position and ultimately the fourth respondent has served his five-year term and is no longer occupying the position of Pro-Vice-Chancellor: Administration and Finance. Viewed from the applicant's perspective, the reliefs sought have become academic. For those reasons I cannot agree with the argument that the applicant's conduct amounts to dilatory abuse of the court process. In the exercise of my discretion I have decided not to dismiss the application.

[17] Rule 132 (10) provides that if a case has been inactive and when the parties have been called to appear before the managing judge and the plaintiff or applicant fails to satisfy the managing judge in respect of the reason for the non-activity, the managing judge must strike the case from the roll. This matter was called before court in terms of Rule 132 (10). I have already concluded that both parties were responsible for the inactivity of the matter. In my view the appropriate order under the circumstances of this matter would be to strike the matter form the roll. I should point out that Rule 132 (11) provides that if a case has been struck from the roll in terms of Rule 132 (10), it is considered as having lapsed. This means the matter cannot be resuscitated any more. If the applicant wants to start again with the same issue he /she must start *de novo.*

Whether the applicant's claim for costs has prescribed

[18 I now proceed to consider the novel point raised on behalf of the applicant, namely that in terms section 10 of the Prescription Act 68 of 1969, any debt or claim prescribes after a lapse of three years. It is then argued that a claim for costs in this matter would have arisen on the last date when no further proceedings or steps were taken and if nothing happened for three years, any claim for costs would become prescribed. When this point was argued, I asked counsel for both parties to submit authorities for or against this proposition which counsel undertook to do. Regrettably, I have not heard from any of the counsel.

[19] In the meantime, I have had time to ponder about the point and to conduct my own research.

[20] It is trite law that prescription begins to run as soon as the debt is due. A debt is only due when it is immediately claimable by the creditor and its correlative, and it is immediate payable by the debtor. A debt can only be claimed if the creditor has the right

to immediately institute an action for recovery. In order to institute an action for the recovery of the debt, the creditor must have a complete cause of action[4].

[21] The meaning of the expression 'cause of action' was explained by Watermeyer J in the matter of Abrahamse & Sons v South Africa Railways and Habours[5], which was cited with approval by Corbett JA in the matter of Evins v Shield Insurance Co Ltd[6] as follows:

> '*The proper legal meaning of the expression 'cause of action' is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not 'arise' or 'accrue' until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action*.'

[22] Applying the principle set out above to the matter at hand, it would appear to me that for the cause of action for a claim of legal costs to be complete, the ingredients which must be present are: (a) an order of costs in favour of the plaintiff against the defendant issued by a competent court; (b) a taxed bill of costs with the Taxing Master's *allocatur* evidencing the amount due, thus the quantum; and (c) that the demand for payment has been made by the creditor to the debtor to signify that the debt is due and thus payable. The cause of action for the payment of legal costs would not arise until the last of those ingredients or facts is present or has materialized.

[23] It is common cause that in this matter no order of costs has been made in favour of the respondents. An order of cost is at the discretion of the court, because even if a party has been successful, it does not automatically follow that it would be entitled to an order of costs in its favour. This is due to the fact that the court might, in the exercise of

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[4] LAWSA Vol 21 par 99.
[5] 1933 CPD 626
[6] 1980 (2) SA 814 at 838 F-H

its discretion, decide not to award costs in favour of such successful party. It is further common cause that no taxation of a bill of costs has taken place in this matter because there is no order of costs made by this court in favour of the respondents.

[24] Finally there has been no demand for payment made by the respondents to the applicant because there is no order by the court upon which such demand would be premised and the respondents would not know what amount to demand because the amount of the costs has not been taxed and fixed by the Taxing Master in his/her *allocatur.* It follows therefore from those facts that the applicant's argument that the respondents' right to be awarded a costs order had prescribed during the three years period when no step was taken to prosecute the application, cannot stand.

Whether the applicant should be ordered to pay the first respondent's costs

[25] The only issue remaining for determination is whether the applicant should be ordered to pay the respondents' costs. The decision as to whether or not to award costs to a successful party lies within the discretion of the court. The general rule is that costs should follow the event and the court is entitled to depart from that general rule only where special circumstances exist. The position was dealt with in the following terms in *Germishuys v Doulas Besproeingsraad*[7]

> "*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."*

[7]1973 SA 299 (NC) at 300.

[26] In this application, the applicant has indicated to the court that he no longer wishes to proceed with the application. He is in the same position as an unsuccessful litigant. In consideration of the issue of costs and in the exercise of my discretion, I take the following facts into account: that it is the first respondent who has been pursuing this matter. The third respondent could fairly be said to have been a 'sleeping partner' because it merely rides at the back of the first respondent. In essence, it is the first respondent who has expended money on this application and it is the first respondent who is seeking for the reimbursement of such money through an order of costs. I take into account that the first respondent is a public educational institution which is dependent on funding from public money appropriated by Parliament for educational purposes. The first respondent was obliged to spend public money in defending this matter. It has an obligation to see to it that public money spent in this matter is recovered so that such money is applied for the purpose it was allocated for, namely education.

[27] The application ran its full course and was ready for hearing. The applicant's founding affidavit consisted of about 46 pages including annexures. A record which was requested by the applicant in terms of the old Rule 53 was filed by the respondents and consisted of about 142 pages. Thereafter the applicant filed a supplementary affidavit consisting of about 65 pages. The respondents' answering affidavit was about 87 pages including annexures and confirmatory affidavits. The applicant's replying affidavit was 12 pages. The legal practitioners for the parties appeared once before the Registrar for the purpose of allocating a trial date. No date was allocated on that occasion.

[28] Thereafter the legal practitioner for the applicant failed twice to appear before court on 10 May 2011 and on 20 March 2012 respectively, which dates had been scheduled in advance. On the last non-appearance, the matter was struck from the roll. The applicant thereafter applied for the rescission of the order which was granted on 13 April 2012. After a long slumber without any action from the applicant, the matter ultimately was allocated to me in terms of Rule 132. It stands to reason that all those activities involved legal costs which the first respondent had to incur. Despite the reality facing

the applicant that he could not proceed with the matter, for the reason already stated, he was still not prepared to offer to pay the respondents' costs occasioned by the application.

[29] I have been unable to find any reason or identify any special circumstances to justify deviation from the general rule in this matter and counsel for the applicant did not point out to any such special circumstances justifying a departure from the general rule except the inchoate plea of prescription, which was stillborn. To the contrary, and as the facts outlined above demonstrated, there are compelling reasons why the applicant should be mulcted with costs. In view of all the history of this matter and in the exercise of my discretion, I am of the view that the first respondent should be fully indemnified for all costs reasonably incurred in opposing this application.

[27] In the result I make the following order*:*

1. The application is struck from the roll.

2. The applicant is ordered to pay the first respondent's costs.

H Angula

Deputy Judge President

APPEARANCES

APPLICANT:	**Mr Vaatz** Instructed by Andreas Vaatz & Partners.
1st and 3rd RESPONDENTS:	**Ms Mondo** Instructed by Nixon Marcus Public Law Office