KENNETH MORRIS & 1 OTHER vs GOVERNMENT OF NAMIBIA & 10 OTHER

A. 87/2000

Levy. AJ

2000-11-22

Settlement between applicant and first and fourth respondents. Sixth and ninth respondent claiming costs from applicants alternatively the aforesaid respondents. Applicant ordered to pay costs of sixth and ninth respondents while the sixth and ninth respondents to pay costs of first to fourth respondents in respect of application for costs.
Question of waiver considered.

Case No.: A. 87/2000

IN THE HIGH COURT OF NAMIBIA

In the matter between:

KENNETH MORRIS	**FIRST APPLICANT**
BYSEEWAH HUNTING SAFARIS (PTY) LTD	**SECOND APPLICANT**

and

GOVERNMENT OF NAMIBIA	**FIRST RESPONDENT**
THE MINISTER OF ENVIRONMENT AND TOURISM	**SECOND RESPONDENT**
THE DIRECTOR OF RESOURCE MANAGEMENT OF THE SECOND RESPONDENT	**THIRD RESPONDENT**
THE PERMANENT SECRETARY TO THE SECOND RESPONDENT	**FOURTH RESPONDENT**
MR D. MANUSAKIS	**FIFTH RESPONDENT**
DR F. REINHARDT	**SIXTH RESPONDENT**
MR H.J. PIENAAR	**SEVENTH RESPONDENT**
MR. G. UTZ	**EIGHTH RESPONDENT**
MR D. REISENHAUER	**NINTH RESPONDENT**
MR J.H. BRIEDENHANN	**TENTH RESPONDENT**
MR P. NAVARRO	**ELEVENTH RESPONDENT**

CORAM: LEVY, AJ

Heard on: 2000-11-13

Delivered on: 2000-11-22

JUDGMENT

LEVY, AJ: In an urgent application dated 15th March 2000, first and second applicants sought interim relief pending certain review proceedings regarding hunting concessions sold by the first to fourth respondents.

All respondents of whom there were eleven and which included the sixth and ninth respondents (who are the "virtual applicants" in the present proceedings) were called upon to show cause on 24"' March 2000 why an order should not issue;

> "1 . . . . . .
> 2. Restraining and/or prohibiting all the respondents from taking any steps, either directly or indirectly consequent upon and/or in implementation of the sale of concession in regard to trophy hunting sold by auction, under the auspices of second respondent, on 9 March 2000, pending the determination of the main application for review.
> 3. Directing that the costs of the urgent application be costs in the application for review.
> 4. That the relief sought in paragraph 2 above shall serve as an interim interdict pending the final determination of the main application for review."

The Notice of Motion of the applicants proceeded to ask for further relief against "all respondents" who were, in this part of the Notice of Motion, called upon to show cause on 14th April 2000 why:

> "1 . . . . . .
> 2 . . . . . .
> 3. The auction held under the auspices of second respondent on 9 March 2000 should not be set aside.
> 4. Any agreements entered into between any or all of fifth to eleventh respondents on the one hand and the first and fourth respondents on the other hand, subsequent to the auction being held, not be set aside.
> 5.

6.

7. First, second, third and fourth respondents and in the event of any other respondent opposing the application, also such respondent(s), jointly and severally should not be ordered to pay the costs of the application."

In the light of the relief claimed by first and second applicants, they were obliged to join sixth and ninth respondents. Those respondents had a direct and substantial interest in any order the Court might make in those proceedings.

Amalgamated Engineering Union v Minister of Labour 1949(3)SA 637 (A)

Henri Viljoen (Pty) Ltd v ***Awerbuch Brothers*** 1953(2) SA 151 (0) at 165-171

Sixtli and ninth respondents entered appearance to defend and were involved in substantial legal expenses in preparing such defence.

Applicants had set the matter down for hearing but on the morning of the 24th March 2000, prior to the matter being called, applicants and first to fourth respondents started negotiations to settle their dispute and the application was postponed to 31st March 2000. On that date Advocate Vivier who appeared for applicants moved and was granted the following order:

1. That the matter is postponed ***sine die.***
2. That no order as to costs is made.
3. That the 5th to the 11th Respondents reserve their right to set the matter down in future to hear arguments on costs.
4. That those Respondents who wish to dispute costs shall agree on a date so that the matters can be heard simultaneously."

On 29th June 2000, sixth and ninth respondents acting in terms of the aforesaid order served the following notice on applicants:

> "Be pleased to set down the above matter for hearing on Monday, the 11th day of September 2000 at 10:00 o'clock and in the forenoon or so soon thereafter as the matter may be heard in the above Honourable Court, when the 6th and 9th Respondents will apply for an order for costs against the 1st' and 2nd Applicant, alternatively 1st. 2nd. 3rd and 4th Respondents." (My emphasis)

It is clear from this that sixth and ninth respondents did not waive or abandon their rights to a claim for costs at that date.

For one reason or another this notice was not pursued and on 14'" September 2000, a fresh notice was issued and served and the same relief was claimed, namely:

> "the 6th and 9th Respondents will apply for an order for costs against 1st and 2nd Applicant, alternatively 1st, 2nd, 3rd and 4th Respondents."

This is the matter which has finally been set down for hearing.

Ms A-M Engelbrecht appears for applicant. Mr R Totemeyer appears for first to fourth respondents and Mr C Mouton appears for sixth and ninth respondents.

All the parties filed Heads of Argument.

The Court was informed that the application instituted by applicants had been settled by first to fourth respondents and that neither sixth nor ninth respondents were parties to that settlement. Furthermore neither sixth nor ninth respondents had been paid for the costs which were incurred.

It was held in ***Behm*** v ***Ord*** 1953(4) SA 96 (C) that where papers are prepared for an application to the High Court but the application is not issued because a demand concerning the matter in

dispute was complied with by the other party subsequently to expiry of the date of the demand but before the completion of the papers relating to the application, the correct procedure to be followed by an applicant desirous of obtaining an order for costs, is to continue with the application in regard to costs only and obtain an order in regard thereto.

This case was followed in ***First National Bank of South Africa Ltd t/a Wesbank v First East Cape Financing (Pty) Ltd*** 1999(4) SA 1073.

(cf. Rule of Court 42 which provides that a plaintiff/applicant can only withdraw a case where such plaintiff/applicant pays the defendants/respondents costs. In the instant case, of course, the applicants did not withdraw against respondents.)

In the present case, it is the applicants who are at fault in not continuing the action instituted by them against respondents who in their turn have incurred legal expenses. Where this happens, it has been held that the respondents are entitled, depending on how far the abortive proceedings have progressed, to set the matter down for costs, if necessary, by Notice of Motion.

On 31st March 2000, at the instance of applicants this Court granted respondents the right to come to Court for decision on the question of costs and this with one variation is what sixth and ninth respondents have done. The variation is that sixth and ninth respondents have asked for costs against first to fourth respondents albeit in the alternative.

In the light of the aforesaid decisions it is abundantly clear that applicants who brought sixth and ninth respondents to Court and did not proceed for an order against them although they certainly asked for relief against them, (as illustrated above) are obliged to pay the costs of these respondents.

Ms Engelbrecht argues that if that be the case, Mr Mouton both in his heads of argument and in his address to Court waived and abandoned the claim against applicant in favour of first to fourth respondents.

In ***Benjamin v Gurewitz*** 1973(1) SA 418 at 428 E, Van Blerk, J.A. said;

> "According to the prevailing practice in our Courts a litigant is bound by the decision of his counsel."

The learned judge quoted ***R v Matonsi*** 1958(2) SA 450 (AD) where the Court ***inter alia*** said;

> "Once the client has placed his case in the hands of counsel the latter has complete control and it is he who must decide whether a particular witness including the client is to be called or not."

Quite obviously therefore the legal advisers of a litigant can waive and abandon rights of the litigant.

However, a Court does not lightly assume that a party to litigation has waived his right.

There is no express waiver by Mr Mouton of his client's rights. It is true that there is a convoluted argument why first to fourth respondents should be liable for costs but in the notice which brought this matter before Court costs were clearly asked for against applicants in the first instance and only alternatively against those respondents.

In ***Bay Loan Investments (Pty) Ltd v Bay View (Pty) Ltd*** 1971(4) SA 538 at 540 E-H Van Winsen, J. said;

> "In ***Hlatshwayo v Mare and Deas,*** 1912 A.D. 242 at p. 249, Lord DE VILLIERS remarks as follows in regard to a claim by a judgment debtor that, despite his payment of two instalments on account of a judgment debt after the issue of a writ of execution, he had not waived his right to appeal against the judgment:
> 'Where . . . . . a person seeks to deprive another of the benefit of a right conferred by law on the ground that the right has been waived or renounced, it lies upon the person relying upon such waiver to prove that there has been some unequivocal act wholly inconsistent with the intention to appeal.'
> In the same case DE VILLIERS, J.P., said (at p. 259) that
> '... before a person can be said to have acquiesced in a judgment, and thereby to have lost the right of re-opening a case or of appeal, a right which he clearly has or at all events had, the Court must be satisfied upon the evidence that he has done an act which is necessarily inconsistent with his continued intention to have the case re-opened or to appeal.'
> See, too, ***Martin v de Kock,*** 1948(2) S.A. 719 (A.D.) at pp. 732, 733. To constitute waiver the Court must be satisfied that the holder of right knew of his right and intended to surrender it. Where his intention to surrender is to be derived by implication from his conduct, his conduct must be such that it is necessarily inconsistent with an intention to maintain his rights."

It is quite clear from his Heads of Argument that the legal advisers of sixth and ninth respondents, (and therefore those respondents themselves) did not know that sixth and ninth respondents had a right against applicants for payment of their costs. They therefore could not have waived their claim as contended by Ms Engelbrecht. In any even t the Heads of Argument are essentially as the document itself suggests "argument" and there is no statement therein which constitutes a waiver. Frequently a lawyer fails to deal in argument with the point in issue. This does not mean that the law adviser, has waived or abandoned such claim.

The Court finds therefore that first and second applicants are liable to pay the costs of sixth and ninth respondents and that Mr Mouton did not waive and abandon his client's rights.

The aforesaid notwithstanding, while applicants were originally obliged to join fourth and sixth respondents in their application, and while fourth and sixth respondents subsequently were

obliged to join applicants, as they were asking for an order of costs against them, they were certainly not obliged to join first to fourth respondents but if they felt obliged to do so, they certainly had no claim against them. Having brought them to court, sixth and ninth respondents are obliged to pay their costs but only such costs are involved in this particular costs application.

The Order of the Court therefore is:

1. First and second applicants shall pay the costs of both sixth and ninth respondents in respect of the application instituted by applicants and dated 15th March 2000, jointly and severally the one paying the other to be discharged.

2. First and second applicants shall pay the costs of sixth and ninth respondents in respect of the application for costs brought by sixth and ninth respondents to Court on 13th November 2000, jointly and severally.

3. The costs incurred by first to fourth respondents in respect of the application heard on 13th November *2000* shall be paid by sixth and ninth respondents jointly and severally, the one paying the other to be discharged.

LEVY, AJ

For the 6th and 9th Respondent:	Advocate C Mouton
Instructed by:	Messrs A Vaatz & Partners
For the 1st to 4th Respondent:	Advocate R Totemeyer
Instructed by:	Messrs Lorentz & Bone
For the 1st and 2nd Applicant:	Advocate A-M Engelebrecht
Instructed by:	Messrs Theunissen, Louw & Partners