REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No A 101/2011

In the matter between:

ALEX KAMWI	**APPLICANT**

and

STANDARD BANK NAMIBIA LTD	**FIRST RESPONDENT**
MANFRIED HARTMUT HENNES	**SECOND RESPONDENT**
BANK WINDHOEK NAMIBIA	**THIRD RESPONDENT**

Neutral citation: *Kamwi v Standard Bank Namibia Ltd* (A101-2011) [2015] NAHCMD 8 (30 January 2015)

Coram: VAN NIEKERK J

Heard: 10 April 2012

Delivered: 30 January 2015

Flynote: **Practice** - Costs – Award of costs in favour of lay litigant, such costs limited to disbursements reasonably incurred – Costs not argued before award made – Lay litigant applying in terms of rule 44(1)(b) for order to be amended because of alleged ambiguity to word "disbursements" – Meaning of 'costs' and 'disbursements' discussed - No ambiguity found – Application on basis of rule 44(1)(b) misplaced – Although application brought under label of rule 44(1)(b) it is proper and just to consider application on basis that applicant an aggrieved lay litigant who had not previously been heard on costs – Other bases on which application brought discussed and rejected – Application dismissed.

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ORDER

The application is dismissed with costs.

JUDGMENT

VAN NIEKERK J:

[1] On 13 May 2011 I made the following order after hearing argument by the applicant, who appeared in person, and the first respondent in an urgent application to stay a

warrant of execution obtained by the first respondent in respect of an attachment of the applicant's salary which had been paid into a bank account held at a branch of the third respondent and after having obtained a report by the taxing master:

> "1. That the taxation on 4 August 2010 of the 1st respondent's bill of costs is set aside.
>
> 2. That the warrant of execution dated 4 August 2010 is set aside.
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> 3. That the attachment in 21 April 2011 of the amount of N$11 000.00 in the applicant's bank account held with the 3rd respondent is set aside.
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> 4. That the 1st and 2nd respondent are interdicted from attaching any of the applicant's current or future salary, earnings or emoluments other than by way of Rule 45(12)(j) of the Rules of Court.
>
> 5. That the 1st respondent pays the costs of this application, such costs to be limited to disbursements reasonably incurred."

[2] In the notice of motion in the urgent application, the applicant prayed that the respondents pay "the costs of this application separately and individually." However, the second and third respondents did not oppose the application and as the first respondent indicated in its answering affidavit that the second respondent had acted upon its instructions, the Court, in the exercise of its discretion, made a costs order only against the first respondent.

[3] Subsequently the applicant filed an application in terms of rule 44(1)(b) in which he prays that paragraph 5 of the order dated 13 May 2011 be "rescinded or varied as follows: 'That the 1st Respondent is ordered to pay costs of this application'." The applicant further prays for an order for "Costs of this application, only if opposed."

[4] The applicant states in his supporting affidavit that his bill of costs was considered by the taxing master on 16 September 2011, but that there was disagreement about the meaning of "disbursements". When the argument became heated, the taxing master postponed the matter pending the applicant's appeal, as I understand it, against the costs order made on 13 May 2011. However, when the applicant researched the matter

he came to the conclusion that relief by way of rule 44(1)(b) may be sought, hence the present application. Although this is not included in the prayer, the applicant requests in his supporting affidavit that the Court should, in the alternative, "interpret the term 'disbursements' to give its true meaning as defined by courts and dictionaries."

[5] The applicant did not attach his bill of costs, but the first respondent did so as part of its answering affidavit. From the bill of costs it is apparent that the applicant described the costs as 'costs limited to disbursements of time, labour, money or resources spent'. In the bill of costs the applicant includes items for costs in relation to photocopies made of various court documents with which the first respondent does not take issue. However, the applicant also includes items comprising his fees for "drafting and preparing" of the notice of motion, affidavits, the certificate of urgency, the return of service and various other court documents at a rate of N$1 900 per hour; for 'perusing' of various court documents at a rate of N$200 per hour; for 'appearance in Court' at a rate of N$3 750.00 per hour. He also claims for drawing the bill of costs and attending the taxation.

[6] A motley combination of reasons for the variation of the costs order sought are set out in the applicant's supporting affidavit as being, in summary and in chronological sequence: (i) the order is unconstitutional as it violates the applicant's dignity and subjects him to cruel, inhuman and degrading treatment, and also discriminates against the applicant because he is not an admitted legal practitioner; (ii) according to various international human rights instruments which form part of Namibian law he is entitled to 'just and favourable' remuneration for, it seems, the work the applicant has done; (iii) that disbursements includes fees, which he is entitled to charge, based on a decision of the Namibian Supreme Court; (iv) a reliance on the Competition Act, 2003 (Act 2 of 2003); (v) the practice of limiting the applicant to costs limited to disbursements "has scourges of apartheid and racists (sic) practices" which are prohibited by the Constitution; (vi) the 'fundamental principle is that, as a general rule, the applicant should be awarded his costs in full to indemnify him from all expenses of time, effort, money and resources he spent in defending himself from the respondent's action.'

[7] The first respondent opposes the application. Its stance is that there is no ambiguity, patent error or omission that requires any variation or rescission by the Court in terms of rule 44, but that the applicant is in fact seeking is to appeal against the costs order.

[8] The parties before me are in agreement that the Court heard no argument on costs when the urgent application was heard on 13 May 2011 before the above order was made.

[9] Mr *Phatela*, who appeared on behalf of the first respondent, raised a point *in limine* that the replying affidavit is not in order as it is not signed. However, it became clear during the hearing that the original is indeed signed, although all the pages of the affidavit are not initialled by the applicant and the commissioner of oaths. This is, of course, irregular, but in the interests of moving the matter towards finality the irregularity is condoned and the replying affidavit is accepted. I am swayed to deal with the objection in this manner because of two main reasons. Firstly, because of the time that has passed since the hearing of the application. Secondly, because the deponent appeared in person to argue on his own affidavit, which was served and filed on the same day that it was commissioned. The first respondent did not point out any discrepancies between the original affidavit filed and the copy of the affidavit served on it, which means that the affidavit before me is, in all probability, the affidavit which was presented to the commissioner of oaths, but which both he and the applicant neglected to initial.

[10] The applicant launched this application under the banner of rule 44(1)(b). However, the applicant also refers in his heads of argument to certain "exceptions to rule 44(1)(b)" and poses the question whether the costs order may be amended in terms of what he describes as "the well recognized exceptions to Rule 44(1)(b)." In oral argument he explained this by referring the Court to the commentary by Erasmus, *Superior Court Practice*, B1-309 where the author states:

> "The general principle is that once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that it thereupon becomes *functus officio*: its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased."

[11] The author then states that the (South African) Appellate Division has, however, recognised a number of exceptions to this rule, which he sets out. These are the exceptions listed by Trollip JA in *Firestone SA (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306H-8A as follows:

> “There are, however, a few exceptions to that rule which are mentioned in the old authorities and have been authoritatively accepted by this Court. Thus, provided the court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter, or supplement it in one or more of the following cases:
>
> (i)The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, which the Court overlooked or inadvertently omitted to grant (see the *West Rand* case, *supra*) ………………….
>
> (ii) The Court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "the sense and substance" of the judgment or order (see the *West Rand* case, *supra* at pp. 176, 186 - 7; *Marks v Kotze*, 1946 AD 29).
>
> …………………..
>
> (iii) The Court may correct a clerical, arithmetical or other error in it judgment or order so as to give effect to its true intention (see, for example, *Wessels & Co. v De Beer*, 1919 AD 172; *Randfontein Estates Ltd. v Robinson*, 1921 AD 515 D at p. 520; the *West Rand* case, *supra* at pp. 186 - 7). This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance. KOTZÉ, J.A., made this distinction manifestly clear in the *West Rand* case, *supra* at pp. 186 - 7, when, with reference to the old authorities, he said:
>
>> "The Court can, however, declare and interpret its own order or sentence, and likewise correct the wording of it, by substituting more accurate or intelligent language so long as the sense and substance of the sentence

> are in no way affected by such correction; for to interpret or correct is held not to be equivalent to altering or amending a definitive sentence once pronounced."

> ……………………………

> (iv) Where counsel has argued the merits and not the costs of a case (which nowadays often happens since the question of costs may depend upon the ultimate decision on the merits), but the Court, in granting judgment, also makes an order concerning the costs, it may thereafter correct, alter or supplement that order (see *Estate Garlick's* case, *supra*, 1934 AD 499). The reason is (see pp. 503 - 5) that in such a case the Court is always regarded as having made its original order "with the implied understanding" that it is open to the mulcted party (or perhaps any party "aggrieved" by the order - see p. 505) to be subsequently heard on the appropriate order as to costs.

> But, of course, if after having heard the parties on the question of costs, either at the original hearing or at a subsequent hearing (as happened in the present case), the Court makes a final order for the costs, there can then be no such "implied understanding"; and such an order is as immutable (subject to the preceding exceptions) as any other final judgment or order."

[12] From the passage in *Superior Court Practice* and the extract from *Firestone SA (Pty) Ltd v Genticuro AG (supra)* it is clear that the applicant is mistaken in his understanding that the exceptions he refers to are exceptions to rule 44(1)(b).

[13] Rule 44(1)(b) provides that 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 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." The declared basis on which the applicant is seeking to vary the costs order because there is an "ambiguity" in the order, which, he submitted, lies in the "misinterpretation" of the term "disbursements". The "misinterpretation" occurred, it seems during the taxation, when counsel for the first respondent and, it would seem, the taxing master, interpreted the term differently to the applicant's interpretation. I shall return to this aspect at a later stage.

[14] Mr *Phatela* submitted that there is no ambiguity to the word “disbursements” as used in the costs order of 13 May 2011 and that the applicant’s reliance on rule 44(1)(b) is misplaced. For reasons which will hopefully become clear later in this judgment, I agree with this submission. However, the first respondent had no quarrel with the rule set out by Trollip JA in (iv) quoted para. [11] above. (See also *Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others* 2008 (2) NR 753 (SC) at 773F). Clearly such an application need not be brought in terms of rule 44(1)(b). As the parties are in agreement that this Court did not hear argument on costs before making the order of 13 May 2011, the applicant would ordinarily be entitled to bring an application to be heard on the matter (and for the costs order to be amended) as an “aggrieved party”, because although he prayed for costs in the first application, he was granted only costs limited to disbursements reasonably incurred, an aspect about which he, rightly or wrongly, feels himself aggrieved.

[15] In light hereof I think it would be proper and just to also consider whether there is merit in the application while ignoring the label of “rule 44(1)(b)” which the applicant attached to it. In doing so there can be no prejudice to the first respondent as it did not limit its opposing allegations and arguments solely to a rule 44(1)(b) context.

[16] It seems to me that the main source of the applicant’s discontent with the costs order lies in his interpretation of para. [41] of the Supreme Court judgment in *Nationwide Detectives & Professional Practitioners CC v Standard Bank of Namibia Ltd* 2008 (1) NR 290 (SC) (also reported at 2008 (6) SA 75 (Nm)). In this regard the applicant’s submission is that “disbursements” include “fees” and not only out of pocket expenses and further, that he is entitled to be indemnified for the fees he charges for the work he did as litigant to accomplish victory over the first respondent. The applicant relies on a statement made by Shivute CJ when he stated in the aforesaid paragraph that “disbursements are but a genus of costs, the other being fees” (at 303F-G). The applicant went further and submitted that the Supreme Court disagreed with the judgment of the Court *a quo* in which it was held that when dealing with an award of costs in favour of a lay litigant, a court should specify that such costs are limited to disbursements.

[17] In my respectful view the applicant completely misunderstands and misinterprets the meaning and effect of the statement in the Supreme Court judgment. In order to explain this it is necessary to commence with the judgment by Heathcote AJ in the Court *a quo* reported as *Nationwide Detectives & Professional Practitioners CC v Standard Bank of Namibia Ltd* 2007 (2) NR 592 (HC). It is relevant to note that the applicant, who is not a legal practitioner, appeared in that matter on behalf of the close corporation ("Nationwide"), presumably with leave of the Court. In that matter Nationwide sought an order for "costs" against Standard Bank, which is also the first respondent in the present matter. In that matter the Court dealt with the meaning of the word "costs" in the context of costs orders and stated in footnote 1:

> "In the wide sense of the word 'costs' (*expensae litis*) are the expenses incurred by a litigant in actions or other legal proceedings, and they consist of money due to the solicitor for his fees and disbursements, the latter embracing counsel's fees, stamps upon documents, sheriff's fees and witness expenses. See PC Anders *The Law of Costs in South Africa*."

[18] While this description uses terminology such as "solicitor" and "counsel's fees" (in the sense of "advocate's") fees which is no longer used since the advent of a fused legal profession in Namibia, it is clear that the word "costs" means expenses consisting of moneys due to a legal practitioner for his fees and disbursements, the latter embracing instructed counsel's fees, stamps, sheriff's fees and witness expenses.

[19] Heathcote AJ then dealt with three questions which he considered necessary to determine for purposes of that case, the first of which is relevant to the current matter. This question is "Can the court award costs (in the wide sense of the word) to a lay litigant"? The conclusion of the Court is conveniently summarised as follows (at 599B-J):

> "[18] In summary, I accordingly find:
>
> > When granting an order of costs in favour of a lay litigant, the court should not simply use the word 'costs', but should rather make an order in terms of which the lay litigant is awarded 'costs limited to actual disbursements reasonably incurred'. This is so because, per recognised definition, the

concept of costs includes expenses for the labour of a qualified legal practitioner, which can never be applicable to a lay litigant.

A lay litigant can indeed prepare a bill of costs and present it to the Registrar for taxation. Although there is no specific authorisation in Rule 70 for the Registrar to tax a lay-litigant's bill of costs, he may do so by virtue of the provisions of s 30(1) of the High Court Act, 1990.

A lay litigant is not entitled to claim any fees for his labour, or loss of earning opportunity, in a bill of costs. He cannot take instructions, charge for drafting, perusal or any item in Schedule 6. (Those items can only be charged by virtue of the fact that someone is an admitted legal practitioner.)

A lay litigant is only entitled to his actual disbursement reasonably incurred. Such a disbursement may or may not be the same as those prescribed where legal practitioners are involved. That is for the registrar to determine. The concept 'actual disbursement reasonably incurred' merely confirms that in some instances actual expenses may also be unreasonably incurred.

The tariffs as determined in Schedule 6 of the Rules of Court in respect of reasonable disbursements were not promulgated for purposes of taxing a lay litigant's bill of costs. That is clear from the wording of rule 70 read with Schedule 6. What must guide the registrar is compensation for actual expenses or disbursements, reasonably incurred, and he may request proof that such expenses or disbursements were indeed incurred. In doing so he does not have a discretion as envisaged in rule 70(5). There is only one test, and that is, 'what is the actual disbursement'. If the answer is given and found to be reasonable, there is no basis upon which the registrar can allow an amount higher than the actual disbursement. However, if the actual disbursement is not reasonable, the registrar can and should decrease the amount.

Lay litigants have every right to litigate in person. But under no circumstances should it be allowed for lay litigants to make a 'profit' on

> disbursements. The principle is simple; taxation of a bill of costs should allow the lay litigant to recoup his actual disbursements, reasonably incurred, and not to make a living, or profit, out of lay litigation."

[20] The Court eventually ordered that (at 600D): "Respondent shall pay applicant's costs, limited to actual disbursement reasonably incurred, in case No (P)I 1361/2006."

[21] Nationwide appealed against this decision. One of the points *in limine* considered by the Supreme Court was whether Nationwide needed leave to appeal, it being common cause that no such leave had been sought (303I; 303C). In this context Shivute CJ stated the following (at 303C-G):

> "[40] The basic rule is that an award of costs is in the discretion of the court. In *Kruger Bros & Wasserman v Ruskin* [1918 AD 63 at 69], a decision that has been consistently followed by South African courts, Innes CJ said the following in respect of this basic rule [at 69]:
>
> > . . . the rule of our law is that all costs - unless expressly otherwise enacted - are in the discretion of the Judge. His discretion must be judicially exercised; but it cannot be challenged, taken alone and apart from the main order, without his permission.
>
> [41] The learned author Cilliers also points out that even the general rule, namely that costs follow the event, is subject to the above overriding principle. <u>It seems to me that when a court considers issues relating to whether or not to grant an order as to costs and the extent to which such costs are awarded, it exercises discretion. It appears also implicit in the appellant's application in the court below for an order of costs in the wide sense that it essentially prayed for the court to exercise its discretion. It is true that the court a quo held that when dealing with an award of costs in favour of a lay litigant, a court must specify that such costs are limited to disbursements, but it seems to me that disbursements are but a genus of costs, the other being fees, and that in specifying the extent of the costs to be paid to the lay litigant, the court is making 'an order as to costs left to the discretion of the court'.</u>" (emphasis supplied)

[22] Shivute CJ concluded that Nationwide should have sought leave to appeal against the Court *a quo's* order of costs and, as this had not been done, he upheld the point *in limine* and struck the appeal from the roll. Clearly the Supreme Court did not consider the merits of the appeal and therefore the applicant is incorrect in submitting that the Supreme Court "disagreed" with the judgment of the Court *a quo*.

[23] Furthermore, when the learned Chief Justice stated, "it seems to me that disbursements are but a genus of costs, the other being fees", he was distinguishing between two genera, i.e. classes, or kinds, of costs, the one being disbursements and the other being fees. In my respectful view the reference to "fees" must be taken to mean fees charged by a legal practitioner who is not acting as instructed counsel, i.e. formerly known as "solicitor's" or "attorney's" fees. Clearly the learned Chief Justice did not state that disbursements include such fees. The submission by the applicant to the contrary must therefore be rejected.

[24] I think it is also relevant that the applicant, in his approach to the matter, ignores the essential meaning of the word "disburse", which is "to pay out", the noun being "disbursement" (Collins Concise English Dictionary, 3rd ed. 1992), which is defined as "a paying out; that which is paid" (*Chambers Twentieth Century Dictionary*, New Edition 1972); and "money expended" (*Webster's Comprehensive Reference Dictionary and Encyclopedia*). The applicant clearly did not make any "disbursements" justifying the inclusion of the items in his bill of costs as set out in para. [5] above.

[25] In this regard I also place reliance on *Hameva v Minister of Home Affairs, Namibia* 1996 NR 380 (SC) (also reported at 1997 (2) SA 756 (Nms)) in which the Supreme Court stated (at 385A-B) that the principle in Roman-Dutch jurisdictions such as ours is as follows when it applied the following *dictum* by Innes CJ in *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 488:

> "Now costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation as the case may be. . . . Speaking generally, only amounts which the suitor has paid, or becomes liable to pay, in connection with the due presentment of his case are recoverable as costs." (emphasis supplied)

[26] The applicant cited examples from various cases to indicate that lay litigants acting in person have in the past been awarded "costs" and that this Court should also do so. However, it seems to me that, even in those cases such lay litigants would, as a practical matter, in any event not have been allowed to recoup their "fees" or "charges" for litigious work done, but would have been limited to permissible disbursements, precisely because they are not admitted legal practitioners. In stating this I take note of what Heathcote AJ said in his judgment, namely that "per recognised definition, the concept of costs includes expenses for the labour of a qualified legal practitioner, which can never be applicable to a lay litigant" (at 599C-D).

[27] It seems to me that, apart from the motivation cited by the learned acting judge for holding (at 599B-C) that, "[w]hen granting an order of costs in favour of a lay litigant, the court should not simply use the word 'costs', but should rather make an order in terms of which the lay litigant is awarded 'costs limited to actual disbursements reasonably incurred' ", there is another. The increase in civil litigation in which lay persons appear in person (sometimes also referred to as "self-actors"), or on behalf of one-person corporate entities, has brought in its wake a need for greater clarity when formulating costs orders to avoid, as far as possible, embroiling the taxing master and the courts in time consuming and, frequently, unnecessary disputes.

[28] There is also Supreme Court authority for the approach suggested by Heathcote AJ. In *Christian v Metropolitan Life Namibia Retirement Annuity Fund (supra), the* applicant was a lay litigant appearing in person. In this regard Maritz JA made a costs order in favour of the applicant (at 775D) for payment of "the costs of the review, such costs to be limited to disbursements reasonably incurred" after stating the following (at 774I-775A):

> "[45] The applicant is seeking payment of 'all costs in this matter'. He has appeared in person. Accordingly, the issue of costs does not arise except in the form of such disbursements as he may have reasonably incurred in pursuing this review."

[29] I think it is clear from the above discussion that there is no ambiguity in the costs order previously made. I return at this stage, as indicated in para. [13] above to the

requirements of Rule 44(1)(b). It has been held that the "ambiguity" required by rule 44(1)(b) is an ambiguity as a result of which the judgment does not reflect the intention if the judicial officer pronouncing it: in other words, the ambiguous language must be attributable to the Court itself. (See *Superior Court Practice (supra)* at B1-310) and the cases cited in footnote 11). As stated before, the alleged ambiguity arose in the mind of the applicant when he appeared before the taxing master. The ambiguity is not in the words used in the Court's order. The Court intended limiting the applicant's costs to disbursements reasonably incurred, and that is what it ordered.

[30] I now turn briefly to the remaining bases upon which the applicant sought to persuade me to amend the costs order. These are summarized in para. [6] *supra* of this judgment.

[31] In regard to (i), the first part of the complaint is simply incomprehensible. As to the charge that he is discriminated against because he is not an admitted legal practitioner, Heathcote AJ stated the following in *Nationwide Detectives & Professional Practitioners CC v Standard Bank of Namibia Ltd (supra)* (at 598J-599A), with which I am in respectful agreement:

> "…..[E]ven if it be found in future that a legal practitioner (acting in person) should be treated in the same manner as a lay litigant, it would not follow that the lay litigant should be put in a more advantageous position as is the case now."

[32] In regard to (ii), the relation between the right relied on and the issue of entitlement to costs was simply not demonstrated in the argument advanced by the applicant.

[33] In regard to (iv) the applicant submitted, in effect that he is the victim of prohibited restrictive practices placing him at a competitive disadvantage as contemplated in section 23(1) read with section 23(3)(a) and (f) of the Competition Act, 2003 (Act 2 of 2003). There is no merit in the submission for at least the following reason. Section 23(1) prohibits certain practices by "undertakings". An "undertaking" is defined as "any business carried on for gain or reward …..". The reason why the applicant is not entitled to costs in the wide sense of the word has nothing to do with any practice by any business.

[34] As far as (v) is concerned, the rule that a lay litigant is limited to disbursements reasonably incurred is not a "practice" as alleged, but has it foundation in law. Furthermore, the charge that the rule "has scourges of apartheid and racists (*sic*) practices" is simply unfathomable.

[35] As to (vi), the fundamental principle as set out correctly appears in the Supreme Court judgment in *Hameva v Minister of Home Affairs, Namibia (supra),* as dealt with in para. [25] above.

[36] The conclusion is therefore that there is no merit in the application, whether it is considered as a rule 44(1)(b) application or as an ordinary application by an aggrieved party to be heard on costs. The result is that the application is dismissed with costs.

_(Signed on the original)_________

K van Niekerk

Judge

APPEARANCE

For the applicant: In person

For the first respondent: Adv T C Phatela

Instr. by Andreas Vaatz & Partners