REPUBLIC OF NAMIBIA

REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION,
WINDHOEK

Case NO: HC-MD-CIV-ACT-DEL-2016/03201

In the matter between:

FRANKLIN MARCELINO BERTOLINI **PLAINTIFF**

and

ANTHONY STEVEN EHLERS **DEFENDANT**
GERALD REGINALD SCOTT **THIRD PARTY**

Neutral citation: *Bertolini v Ehlers and Another* (HC-MD-CIV-ACT-DEL-2016/03201) [2017] NAHCMD 284 (06 October 2017)

CORAM: MASUKU J

Heard: 12 September 2017
Delivered: 6 October 2017

Flynote: **RULES OF COURT** – Rule 97 (3) – withdrawal of proceedings and tender for costs therefor – failure to do so and consequences thereof **–** Rule 50 – the third party procedure – propriety of a plaintiff to invite a third party to proceedings via the rule 50 procedure – Rule 32 (11) – circumstances in which the cap of costs recoverable in terms of rule 32 (11) may be departed from. **CIVIL PROCEDURE** –

the necessity to issue letter of demand before issuing a summons – connection between letter of demand and overriding objectives of judicial case management.

Summary: The plaintiff's motor vehicle was damaged by a motor vehicle registered in the name of the defendant. This culminated in the plaintiff suing out a summons against the defendant. It thereafter transpired that the defendant had sold the vehicle to the third party a few years before the collision. The plaintiff became aware that the defendant had in the circumstances been misjoined to the proceedings. The plaintiff then issued a rule 50 notice joining the third party to the proceedings and later withdrew the proceedings against the defendant but refused to make tender for costs occasioned by the withdrawal. The defendant made application in terms of rule 94 (3) for costs, alleging that the initial costs should be payable on the ordinary scale and the latter stages of the proceedings before the withdrawal of the proceedings at the punitive scale.

Held – that on a consideration of the matter as a whole, the plaintiff had not made out any case for refusing to tender costs in the proceedings.

Held – that the plaintiff should have taken precautionary steps of issuing a letter of demand before the issuance of the summons as that would have obviated the need to issue a summons, a procedure that is time-consuming and costly. This approach, it was held further, complies with the overriding objectives of judicial case management.

Held – that the rule 50 procedure is not one that should be willy-nilly resorted to, particularly by a plaintiff in order to bring a third party to the proceedings. It is only a defendant, who seeks indemnification on the basis of some legal premise from the third party who should do so.

Held further – that after becoming aware of the sale of the vehicle, the plaintiff ought to have withdrawn the proceedings against the defendant and should have issued same against the third party. In this regard, keeping the defendant in the yoke of the proceedings although aware of the misjoinder was improper and inexcusable in the circumstances of this case.

Held – that the defendant had not motivated reasons why the cap in rule 32 (11) should be held not to apply. Furthermore, the court expressed the view that on a consideration of the papers, it was not satisfied that there were grounds for departing from the provisions of rule 32 (11) in this particular case.

Held – that although there may have been a basis for citing the defendant in the proceedings initially, once the issue of the third party came to light, it was not reasonable to keep the defendant in harness for a period in the excess of four months before withdrawing the proceedings against him. The court reasoned that the latter portion of the proceedings accordingly merited costs on the punitive scale, whereas the earlier stages of the proceedings merited costs on the ordinary scale.

ORDER

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1. The plaintiff is ordered to pay the costs occasioned to the defendant by the plaintiff's withdrawal of his claim against the defendant as follows:

    1.1 costs on the party and party scale from the institution of the action proceedings until 16 February 2017, the date of the plaintiff's invocation of rule 50; and

    1.2 costs on an attorney own client scale from 16 February 2017, the date of the plaintiff's invocation of rule 50 until the date of the status hearing wherein the action proceedings were withdrawn.

2. The balance of the matter is postponed to 01 November 2017, 15h15 for the plaintiff to apprise the Court as to the further conduct of the case.

3. The plaintiff is to file a status report three (3) days before the date stated in paragraph 2 above.

JUDGMENT

MASUKU J:

Introduction

[1] This is an interlocutory application in terms of rule 97(3) of this court's rules[1], in terms of which the defendant applies for an order for legal costs against the plaintiff on account of the latter's refusal to embody, in his notice of withdrawal of action proceedings instituted against the defendant, an offer to pay the defendant's costs.

[2] The defendant seeks costs on the party and party scale from the inception of the proceedings against him up to the stage of the delivery of his special plea of misjoinder and the plea in the proceedings. Thereafter, the defendant claims costs on an attorney and client scale, up to the stage of the plaintiff's withdrawal of the proceedings.

[3] Principally, the plaintiff opposes the defendant's application on the basis that he was perfectly justified in his refusal to accompany his withdrawal of the proceedings against the defendant with a tender to pay the costs occasioned thereby.

The parties

[4] For the sake of convenience, the parties are referred to in this application as in the action proceedings. The plaintiff, Mr. Franklin Marcelino Bertolini, is an adult male of Rehoboth. The defendant is Mr. Anthony Steven Ehlers an adult male residing at Erf.41 Brahm Street in Windhoek West. The 'Third Party' is Mr. Gerald Reginald, an adult male residing in Walvis Bay. I should mention at the infancy stage of this judgment however, that Mr. Reginald has no interest in the current proceedings and there is no order sought against him.

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? Rule 97(1) of the High Court: "If no consent to pay costs is included in the notice of withdrawal the other party may apply to court on notice for an order for costs".

The cause of action

[5] The plaintiff is the owner of a motor vehicle bearing registration number N 185375 W. This vehicle was involved in a collision on 13 December 2015 in Rehoboth with a vehicle bearing registration number N 86616 W of which the defendant is the registered owner. Consequent to the collision, the plaintiff issued a combined summons against the defendant, claiming payment of an amount of N$ 126 662.24, being an amount of damages allegedly sustained by him in order to restore the vehicle to its pristine condition.

[6] It is not necessary, for present purposes, to recount the bases upon which it is claimed by the plaintiff that the defendant was negligent nor to traverse the contents of the special plea and the averrals raised by the defendant in his plea.

Issues

[7] Essentially falling for determination is the question whether the defendant is entitled to costs occassioned in the proceedings withdrawn by the plaintiff. The corollary issue thereto, is whether or not the defendant is entitled to costs on a party and party scale up to the first stage of the proceedings and whether or not, the defendant is entitled to costs on an attorney and client scale regarding the second stage of the proceedings. I deal with these questions in turn below.

The applicable law and scope of the proceedings

[8] Mr. Du Pisani, counsel for the defendant and Ms. Angula, counsel for the plaintiff, agreed that the overarching and corollary issues arising for determination, are to be considered in view of the exposition of the law as set out in *Erf Sixty-Six, Vogelstrand (Pty) Ltd v Council of the Municipality of Swakopmund and Others*[2] *("Erf Sixty-Six, Vogelstrand (Pty) Ltd")*, wherein this court, confronted with the issue similar to the present, observed that:

> '[10] The first issue I must determine is whether, in adjudicating the opposed Rule 42(1)(c) application, I must do so by considering the merits of the matter as a whole based on the papers as they stood after the first respondent answered; or whether I should determine the costs liability solely on the basis of the conduct of the parties in the litigation. [To be read with the necessary changes] The Court has a discretion in the matter. As this

[2] 2012 (1) NR 393 (HC).

Court said in *Channel Life Namibia Ltd v Finance in Education (Pty) Ltd* **2004 NR 125** at 126F-G:

'There may very well be cases where the Court will have no other choice but to consider the merits of a matter in order to make an appropriate costs allocation, while there will, doubtless, be others where the Court may make an appropriate costs allocation based on the 'material' at its disposal, without regard to the merits of the case. Each case will be treated on its own facts."

[11] I am guided by the quoted *dicta* in the following cases: In *Germishuys v Douglas Besproeiingsraad* the court said:

> "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."

In Reuben Rosenblum Family Investments (Pty) Ltd and another v Marsubar (Pty) Ltd (Forward Enterprises (Pty) Ltd and Others Intervening, the court said:

> "Where a party withdraws a claim the other is entitled to costs unless there are good grounds for depriving him."

[12] The Court retains discretion as to the award of costs, even where an action or application has been withdrawn. It is ultimately a question of fairness as between the parties. The Court may therefore in the exercise of its discretion in appropriate circumstances take into account that the party that has withdrawn the litigation was justified in bringing the litigation:

> "It is clear from the above, in my view, that, even in cases where litigation has been withdrawn, the general rule is of application, namely that a successful litigant is entitled to his costs unless the Court is persuaded, in the exercise of its judicial discretion upon consideration of all facts, that it would be unfair to mulct the unsuccessful party in costs."'

[9] In view of the defendant's prayer for costs against the plaintiff on distinct scales at separate stages of the proceedings, and given the nature and extent of the litigation history of the proceedings set out below, it is apposite that the court exercises its discretion in these proceedings with reference to the pleadings and the conduct of the parties.

[10] The exercise of the court's discretion, will invariably be informed by the overriding objectives of judicial case management as articulated in rule 1(3) of this

court's rules. The aforesaid objectives, in so far as they apply to these proceedings, provide that:

"(3) The overriding objective of these rules is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable by -
…
(b) saving costs by, among others, limiting interlocutory proceedings to what is strictly necessary in order to achieve a fair and timely disposal of a cause or matter;…

(d) ensuring that cases are dealt with expeditiously and fairly;

(e) recognising that judicial time and resources are limited and therefore allotting to each cause an appropriate share of the court's time and resources, while at the same time taking into account the need to allot resources to other causes; and

(f) considering the public interest in limiting issues in dispute and in the early settlement of disputes by agreement between the parties in dispute.

(4) The factors that a court may consider in dealing with the issues arising from the application of the overriding objective include –
…
(b) the extent to which the parties have used reasonable endeavours to resolve the dispute by agreement or to limit the issues in dispute;

(c) the degree of promptness with which the parties have conducted the proceeding, including the degree to which each party has been prompt in undertaking interlocutory steps in relation to the proceeding;

(d) the degree to which any lack of promptness by a party in undertaking the step or proceeding has arisen from circumstances beyond the control of that party;
…
(f) the public importance of the issues in dispute and the desirability of a judicial determination of those issues;

(g) the extent to which the parties have had the benefit of legal advice and representation; and…"

[11] The overriding objectives of judicial case management strive, as far as possible, to achieve the resolution of disputes at the earliest practical juncture and to minimise if not to altogether avoid unnecessary litigation between parties. Disputants' pre-litigation endeavours, even in the absence of statutory obligations to so engage, are instrumental to the achievement of those objectives.

The approach

[12] I deal will with the issues arising in this judgment in the following manner: Firstly, the parties' respective contentions are narrated. Secondly, the litigation history of the proceedings is delineated. Thirdly, the propriety and wisdom of the application of rule 50 of this court is addressed. Fourthly, the applicable law set out above is applied to findings, flowing from the litigation history. Last, but by no means least, the disposal of the issues is made, accompanied by way of an appropriate order.

The litigation history

[13] The following common cause facts appear from the pleadings and the judicial case management processes:

(a) On 30 September 2016, the plaintiff instituted proceedings against the defendant as the registered owner of, alternatively *bona fide* risk bearing possessor of the motor vehicle that through the alleged negligence of its driver, collided with the plaintiff's motor vehicle, thereby causing damage to the latter. Prior to the institution of legal proceedings, the plaintiff did not issue the defendant with a demand for its claim;

(b) On 21 November 2016, the defendant was served with the combined summons;

(c) On 05 December 2016, the defendant delivered a notice of intention to defend;

(d) On 14 December 2016, the defendant addressed a letter to the plaintiff, informing the plaintiff that whilst he may be the registered owner of the motor vehicle, he alienated same to one Mr. Scott on 05 December 2012 and further stated that on the date of the motor vehicle collision, the defendant was in Henties Bay. The plaintiff acknowledges receipt of this letter;

(e) On 18 January 2017, the registrar docket-allocated the matter to a managing judge and notified the parties to deliver a proposed joint case plan for consideration at the case planning conference scheduled for 22

February 2017;

(f) On 20 February 2017, the parties delivered a proposed joint case plan, which case plan was made an order of court on 22 February 2017. It is apposite to reproduce the salient terms of the case planning order. They read as follows:

'4.1 The Plaintiff filed a third party notice on the 16th February 2017.

Defendant's rights remain strictly reserved in this regard.

4.2 The Defendant shall file his plea to the Plaintiff's particulars of claim

on or before the 10th March 2017.

4.3 The Plaintiff shall replicate to the Defendant's plea on/or before 24th March 2017.

…

6.5 The parties further request this Honourable Court to postpone this matter to 29 March 2017 to 10h00 for the mediation referral proceedings…"

(g); The plaintiff records that on account of paragraph (d) above, in terms of rule 50, he delivered a third party notice in respect of Mr. Scott, on 14 February 2017. The third party notice reads as follows;

'… Plaintiff has commenced proceedings against the… Defendant for the relief set out in the summons, a copy of which is attached hereto.

… defendant claims a contribution of indemnification on the grounds set out below:

1. Defendant sold his vehicle to the Third Party. At the time of the collision, the vehicle involved in the accident was in possession of the Third party since 05th December 2012…'

(h) On 26 April 2017, the plaintiff's legal practitioner made the following submission during a status hearing of this matter:

'… the legal practitioner dealing with this matter to court are *(sic)* in the process of joining the third party to the proceedings. Based on the instructions that were received from the Defendants. At this juncture the Defendant is now basically held hostage because we cannot withdraw the claim against the Defendants, failing the joinder of another party. The reality is then the action

> will fall away… I propose we postpone the matter to a status hearing which will enable us to join the third party and then at that hearing the issue of the withdrawal against the Defendant and the result into costs be addressed.'

(i) On 06 June 2017, the third party notice was served on Mr. Scott; and

(j) On 13 June 2017, the plaintiff withdrew the action proceedings against the defendant, without consenting to pay the latter's costs, thereby prompting these interlocutory proceedings.

The defendant's case

[14] The defendant contends that he is entitled to costs on a party and party scale from the stage of the institution of the proceedings against him by the plaintiff up to the first stage of the proceedings, and thereafter, to costs on an attorney and client scale, for the second stage of the proceedings as articulated earlier.

[15] The defendant contends further that with respect to the first stage proceedings, the costs must as of right follow as day follows night. Mr. Du Pisani, on the strength of *Erf Sixty-Six, Vogelstrand (Pty) Ltd*, argued that the plaintiff, because of his withdrawal of the proceedings against the defendant, in essence made a concession regarding the soundness of the merits of the defendant's defence. Accordingly, the defendant is entitled to costs given the futility of the proceedings instituted by the plaintiff evidenced by the withdrawal of the said proceedings.

[16] With respect to the second stage of the proceedings, the plaintiff argued that he is entitled to costs as between attorney and client due to the plaintiff's unreasonable persistence with the proceedings, despite the plaintiff's full knowledge of the defendant's misjoinder thereto. Counsel argued further that the plaintiff's belated withdrawal of the proceedings against plaintiff was a vexatious and self-serving stratagem meant to give the plaintiff a tactical advantage.

[17] Counsel therefor asserted that in view of the common cause litigation history detailed above, this was particularly so given that the defendant's third party notice dated 14 February 2017 was only served on Mr. Scott on 06 June 2017 thus unreasonably keeping the defendant in harness in the proceedings during that prolonged period. This, according to counsel, rendered the defendant's conduct reprehensible, thereby meriting the mulcting of the defendants with a punitive order

as to costs in favour of the defendant.

[18] In this respect, Mr. Du Pisani referred the court to *Hailulu v Anti-Corruption Commission*[3] *("Hailulu"),* wherein this court stated that:

> 'The court has an inherent discretion to grant attorney-and client costs when special circumstances are present arising from reprehensible conduct of a litigant which warrants such an order, and the court considers it just that an innocent litigant adversely affected by such conduct in not put out of pocket in respect of the expense caused by such conduct. The court must be satisfied that a party-and-party costs order will not sufficiently meet the expense incurred by the innocent litigant.'

The plaintiff's case

[19] In rebuttal to the defendant's contentions, the plaintiff asserted that the litigation history detailed above did not warrant his consent to pay the defendant's costs on account of his withdrawal of the proceedings against the defendant.

[20] Ms. Angula, with reference to the authorities cited in *Erf Sixty-Six, Vogelstrand (Pty) Ltd*, submitted that with respect to the first stage of the proceedings, the plaintiff acted reasonably in citing the defendant in the proceedings, particularly given that the defendant is the registered owner of the motor vehicle, who ordinarily would have legal standing in respect of causes related to the motor vehicle in question. Moreover, after the plaintiff learned from the defendant that the defendant was misjoined to the proceedings, the plaintiff delivered a third party notice on Mr. Scott, the defendants' successor-in-title, in relation to the ownership of the motor vehicle. Ms. Angula argued strenuously that despite this, the defendant nonetheless proceeded to incur costs by amongst others, delivering a special plea and plea in the proceedings.

[21] Ms. Angula further submitted that the circumstances of the proceedings dictated that the defendant invoke the third party procedure against Mr. Scott. The defendant, she further contended, however, inexplicably failed to do so. She therefore submitted in sum that the court should not exercise its discretion in the defendant's favour with respect to the prayers presently sought by the defendant.

Rule 50 of this court

[22] Before considering the live controversy between the parties, there are

[3] 2011(1) NR (HC), 377 G – 378 A.

submissions by counsel on both sides with respect to the import of rule 50, governing third party procedure that require the court's attention and comment.

[23] Counsel appeared to labour under the misapprehension that the third party procedure can competently be invoked by a party to the proceedings in order to join other parties thereto no matter the prevailing circumstance. As earlier stated, Mr. Du Pisani contended that the plaintiff was duty bound to join Mr. Scott by way of a third party procedure at the earliest opportunity to the proceedings so as to immediately effectuate or conduce to the early withdrawal of the defendant from the proceedings. On the other hand, Ms. Angula argued that the defendant was remiss in not joining Mr. Scott to the proceedings by way of the third party procedure but instead waited for the plaintiff to do so.

[24] The relevant provisions of rule 50, read as follows:

> 'Third party procedure
>
> 50 (1) Where in an action a party claims –
>
> (a) as against any other person not a party to the action (in this rule called a "third party") that party is entitled in respect of any relief claimed against him or her to a contribution or indemnification from the third party; or
>
> (b) that any question or issue in the action is substantially the same as a question or an issue which has arisen between that party and the third party and the question or issue should properly be determined not only as between any parties to the action but also as between those parties and the third party or between any of them,
>
> that party may issue a notice (hereinafter referred to as "third party notice") on Form 16 and the notice be served by the deputy-sheriff.'

[25] It is apparent from the portion of the rule cited above that the application of rule 50 is clearly of limited compass and may not be invoked willy-nilly. Submissions by both counsel with respect to the import of rule 50 are not only erroneous and have no support from the rule and the commentary thereon.

[26] There is no basis upon which it can be properly contended that the plaintiff was competent to join Mr. Scott by way of the third party procedure apparently on behalf of the defendant to the proceedings as he purported to do. A plaintiff, though being the *dominis litis,* cannot invite third parties to the litigation on behalf of a

defendant by way of the third party procedure or any other procedure for that matter. Litigation, it must be recorded, is not a party where the plaintiff, being the 'host', can invite whomsoever she or he wills on behalf of others.[4]

[27] Furthermore, there is similarly no proper basis upon which it can be contended that the defendant should have joined Mr. Scott by way of the third party procedure to the proceedings. It is clear from the history of the matter that the defendant sought no contribution or indemnification, either in contract or statute, from Mr. Scott in respect of the relief sought by the plaintiff. A party to proceedings cannot competently compel another to invoke the provisions of rule 50.[5]

[28] Without prejudice to the plaintiff and Mr. Scott's rights to further deal with this aspect in due course, I find the plaintiff's invocation of rule 50 in the proceedings was irregular and uncalled for and should not afflict and occasion any further confusion in this matter.

Application of law to the facts

[29] Having regard to the parties' respective submissions in view of the litigation history delineated above, I come to the following conclusions:

(a) It was unreasonable, in the peculiar circumstances of this case for the plaintiff to sue the defendant solely on account of the fact that the defendant was the registered owner of the motor vehicle without having engaged in pre-litigation steps which may have yielded information that may have rendered the institution of legal proceedings against the defendant unnecessary. With the benefit of hindsight, a letter of demand, even though it was not a legal requirement, was appropriate and necessary, as it may have obviated the need to initiate the legal proceedings against the defendant. I can think of no conceivable inconvenience that the plaintiff may have suffered thereby. Those legal luminaries who invented the use of the letter of demand before initiating legal proceedings were not lazy to institute action but knew that a lot of unnecessary time, effort, emotion and money may be saved by the mere issuance of a letter of demand. This should ordinarily be the first port of call for the

[4] Cilliers *et al*.2009. *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of South Africa* (5th ed).Cape Town: Juta, pg. 232 - 234.

[5] *Ibid.*

benefits it yields.

(b) Prior to the parties' receipt of the notice for a case planning conference from the registrar, the parties appeared to be *ad idem* regarding the defendant's misjoinder to the proceedings. Despite that realisation, the parties, particularly the plaintiff, as the *dominits litis*, did not, as he prudently should have, withdraw the proceedings against the defendant in the view of the common cause fact of the misjoinder. As a result of the proceedings against the defendant continuing, it would have been precipitous for the defendant not to cater for its rights and interests by folding his arms when a case against him stood and required an answer. Unless the proceedings were withdrawn against him, the defendant was bound to meet the case against him.

(c) In their proposed case plan and during the case planning conference, the parties,[6] did not, as they prudently should have, seek directions[7] from the court in view of their consensus regarding the defendant's misjoinder to the proceedings. Instead, the parties, and more particularly the plaintiff, embarked on the irregular process of drawing the third party into the fray and at the same time kept the defendant in the yoke of the proceedings. This was inimical to the efficient utilisation of the court's limited resources and the cost effective and expeditious resolution of the real dispute in the proceedings.

(d) The plaintiff unreasonably engaged the defendant in the proceedings for longer than was necessary and the defendant unduly incurred costs thereby.

[30] Viewing the pleadings and the conduct of the parties during the proceedings through the prism of the principles enunciated in *Erf Sixty-Six, Vogelstrand (Pty) Ltd*, I find that there are no reasons why the defendant should not be entitled to the costs occasioned on account of the plaintiff's withdrawal of the proceedings. The plaintiff's

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[6] Rule 19 of the High Court: 'Obligations of parties and legal practitioners in relation to judicial case management… Every party to proceedings before the court and, if represented, his or her legal practitioner is obliged - … (b) to assist the court in curtailing proceedings; …(g) to use reasonable endeavours to resolve a dispute by agreement between the persons in the dispute; (h) to ensure that costs are reasonable and proportionate; …'

[7] Rule 23(3)(f) of the High Court: "any issue that may be appropriately dealt with at that early stage or on which the managing judge's direction is sought by the parties."

proceedings against the defendant were indeed futile if not still-born right from the word go.

[31] It now remains for the court to consider the scale of costs that should apply to the first and second stage of the proceedings.

[32] With respect to the first stage of the proceedings, I am satisfied that costs on a party and party scale are condign. The plaintiff's remissness in employing appropriate pre-litigation steps to ascertain the propriety of the defendant's joinder to the proceedings and the plaintiff's untimely withdrawal of the proceedings against the defendant upon his knowledge of the defendant's misjoinder thereto was unreasonable.

[33] Applying the principles enunciated in *Hailulu*, I find that there are indeed special circumstances warranting the granting of a punitive order as to costs in relation to the period from 16 February 2017. I am not satisfied that an award of costs on a party and party scale will meet the expenses incurred by the defendant from 16 February 2017, the date upon which the plaintiff irregularly invoked rule 50. The plaintiff, in disregard of the defendant's rights, deliberately belatedly withdrew the proceedings against the defendant so as to obviate the fate of extinction that would befall the proceedings. The plaintiff's conduct, though not intended to be so by the plaintiff, was indeed objectionable, unreasonable, unjustifiable and oppressive of the defendant's rights and placed the defendant at an unnecessary expense.[8]

[34] In my considered view, there was no need for the plaintiff to keep the defendant in harness as it were, yoked in the proceedings when it was evident that he should not continue participating in the proceedings as it had become clear that he had been misjoined. Once it became clear that the third party would be the proper party to sue, the proper thing for the plaintiff to have done was to withdraw the proceedings against the defendant and to then issue a fresh summons against the third party as the new defendant. I say so because there is no legal basis upon which the plaintiff, as discussed earlier, could have drawn Mr. Scott to the proceedings as a third party.

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[8] *Namibia Breweries Limited v Serrao* (TI3131/2005) [2006] NAHC 37 (23 June 2006), paragraph 15.

[35] As a result, it was possible and necessary, in the circumstances for the plaintiff to deal with each of the co-litigants at different times and stages and not seek to hold the defendant 'hostage', so to speak, while waiting to join Mr. Scott to the same proceedings. The neat and proper manner of dealing with this matter was to release the defendant by withdrawing the proceedings against him and then engaging Mr. Scott in tow, as the new defendant.

Conclusion

[36] Accordingly, the defendant is entitled to the costs occassioned in the proceedings withdrawn against him by the plaintiff on a party and party scale during the first stage of the proceedings and costs on an attorney own client scale from 16 February 2017 until the date of the status hearing wherein the proceedings were withdrawn against him. It is disconcerting that the plaintiff was ardent in its refusal to consent to paying the defendant's costs at all.[9]

Costs

[37] These proceedings have been decided in favour of the defendant. No reasons were advanced as to why the general rule that costs should follow the event should not apply.

[38] Mr. Du Pisani, was not done. He further moved that the costs of these proceedings be not limited by the provisions of rule 32(11).[10] Is his contention supportable?

[39] In *South African Poultry Association v The Ministry of Trade and Industry*[11], this court observed the following factors to be determinative in the exercise of the court's discretion with respect rule 32(11):

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[9] Rule 32(9) of the High Court: "In relation to any proceeding referred to in this rule, a party wishing to bring such proceeding must, before launching it, seek an amicable resolution thereof with the other party or parties and only after the parties have failed to resolve their dispute may such proceeding be delivered for adjudication by the court."

[10] Rule 32(11) of the High Court: "(11) Despite anything to the contrary in these rules, whether or not instructing and instructed legal practitioners are engaged in a cause or matter, the costs that may be awarded to a successful party in any interlocutory proceeding may not exceed N$20 000."

[11] (A 94/2014) [2014] NAHCMD 331 (07 November 2014), paragraph 67.

'[67] … this court has discretion to grant costs on a higher scale and that given the importance and complexity of the matter and the fact that the parties are litigating at full stretch, the court should in exercise of its discretion grant costs on a higher scale. … The rationale of the rule is clear: to discourage a multiplicity of interlocutory motions which often increase costs and hamper the court from speedily getting to the real disputes in the case. A clear case must be made out if the court is to allow a scale of costs above the upper limit allowed in the rules… The onus rests on the party who seeks a higher scale. To add to the factors…: the parties must be litigating with equality of arms and it will be a weighty consideration whether both crave a scale above the upper limit allowed by the rules. Another critical consideration will be the reasonableness or otherwise of a party during the discussions contemplated in rule 32(9). Another important consideration is the dispositive nature of the interlocutory motion and the number of interlocutory applications moved in the life of the case; the more they become the less likely it is that the court will countenance exceeding the limit of the rules.'

[40] In view of the criteria set out in the case immediately above, I do not find that Mr. Du Pisani's request for the awarding of costs in excess of the cap in rule 32 (11) is properly motivated in the instant case. In any event, and considering the issues at play in these proceedings, I do not find that there is any reason for departing from what otherwise appear to be peremptory provisions (subject of course to the court's discretion on issues of costs) by the rule-maker to limit costs in interlocutory proceedings.

Order

[41] In the result, the following order is appropriate:

1. The plaintiff is ordered to pay the costs occasioned to the defendant by the plaintiff's withdrawal of his claim against the defendant as follows:

    1.1 costs on the party and party scale from the institution of the action proceedings until 16 February 2017, the date of the plaintiff's invocation of rule 50; and

    1.2 costs on an attorney own client scale from 16 February 2017, the date of the plaintiff's invocation of rule 50 until the date of the status hearing wherein the action proceedings were withdrawn.

2. The balance of the matter is postponed to 01 November 2017, 15h15 for the plaintiff to apprise the Court as to the further conduct of the case.

3. The plaintiff is to file a status report three (3) days before the date stated in

paragraph 2 above.

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T. S. Masuku

Judge

APPEARANCES:

PLAINTIFF:	M. Angula
	Dr. Weder, Kauta & Hoveka & Inc.
DEFENDANT:	L. Du Pisani
	Du Pisani Legal Practitioner