

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION

RULING ON COSTS

CASE NO. I 160/2015

In the matter between:

SOLTEC CC

PLAINTIFF

and

SWAKOPMUND SUPER SPAR

DEFENDANT

Neutral Citation: *Soltec CC v Swakopmund Super Spar* (I 160/2015) [2018] NAHCMD 265 (31 August 2018)

CORAM: MASUKU J

Heard: 2 December 2016; 16 February 2018

Delivered: 31 August 2018

Flynote: Civil Procedure – Rules of Court – Rule 32(11) – Rule 100 – application for absolution from the instance – whether application for absolution from the instance is an interlocutory application within the meaning of Rule 32 and particularly whether the provisions of Rule 32 (11) in relation costs apply thereto.

Summary : The plaintiff instituted proceedings against the defendant for payment of money arising from a contract for services rendered in terms of an oral agreement. At the close of the plaintiff's case, the defendant moved an application for absolution from the instance, which the court dismissed with costs. In argument, the question for determination was whether the cap of N\$ 20 000 stipulated in Rule 32(11) applies to an application for absolution from the instance. In other words, the question was whether an application for absolution from the instance, is an interlocutory application, which admits of the application of the provisions of Rule 32(11), in particular.

Held – that the policy reason for promulgating rule 32(11), was to try and limit the costs associated with interlocutory matters and to cap them in order to encourage the parties to litigate on the real issues for determination.

Held further – that although the sub rule is couched in peremptory terms, the court may, in appropriate cases, e.g. where the parties are litigating at full stretch; where the matters are complex and the parties are litigating with equality of arms, the cap stipulated may, in the exercise of the court's discretion, be departed from.

Held further – that an interlocutory application is one that is incidental to or contiguous or peripheral to the main issues up for decision.

Held – that absolution from the instance is an application moved after the close of the plaintiff's case and half-way through the trial on the real merits of the matter. For the reason that the action on the merits would have commenced and oral evidence led, an application for absolution is not an interlocutory application to which rule 32 in general applies and rule 32(11), in particular applies.

Held further – that by the time the application for absolution from the instance is reached, depending on the case, witnesses would have been called, and in some cases, many witnesses. It would therefore be improper and an unjust reward for a legal practitioner who has been successful in the application to be confined to the cap stipulated in rule 32(11).

ORDER

1. An application for absolution from the instance is not an interlocutory application as contemplated in Rule 32 of this Court's Rules.
 2. The order for costs issued by this Court on 2 December 2016, in favour of the plaintiff in respect of an application for absolution from the instance, is not subject to the provisions of Rule 32(11).
 3. The matter is removed from the roll and is regarded as finalised.
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RULING

MASUKU J:

Introduction

[1] Submitted for determination, is a crisp issue of law, namely, whether a plaintiff, who has been successful in warding off an application for absolution from the instance, and who has been granted a favourable order as to costs in respect of the said application, is bound to the cap stipulated in rule 32 (11), which is applicable to interlocutory proceedings. Put differently, the question is whether an application for absolution from the instance is an interlocutory application and to which the provisions of rule 32 (11) should apply.

Background

[2] It is important to place the question for determination in its proper historical context. I proceed to do so. By combined summons, the plaintiff sued the defendant for payment of the sum of N\$ 104, 086.32. This amount was in respect of an alleged agreement between the parties and in terms of which the plaintiff supplied and installed an additional inverter combiner enclosure, together with an additional safety equipment, known as the switch gear or circuit breaker in the defendant's shop premises situate in Swakopmund, within the jurisdictional precincts of this Republic.

[3] The defendant denied liability and additionally raised defences that shall not be traversed in this judgment. I do not do so because final judgment was entered in favour of the plaintiff on 20 August 2018, together with interest and costs, an issue that need not be revisited or reopened in these proceedings.

[4] It is necessary though to state in this regard, that at the close of the case for the plaintiff, the defendant moved an application for absolution from the instance, which was vigorously opposed by the plaintiff. The court, despite valiant attempts by the defendant, dismissed the said application with costs, via a ruling delivered on 3 June 2016.¹ In that ruling, the court ordered the defendant to pay plaintiff's costs occasioned by the unsuccessful application and these costs were ordered to be consequent upon the employment of one instructing and one instructed counsel.

[5] As foreshadowed above, the question for determination is whether or not this favourable costs order should be limited to the amount of N\$ 20 000, stipulated in rule 32(11). The positions of the parties in this regard are obvious. The plaintiff contends that the application, being one of absolution from the instance, is not interlocutory in nature and effect and for that reason, the provisions of rule 32 (11), well founded as they are, do not find application in the present matter. The defendant, assumes a different posture and it argued that the application is interlocutory and for that reason, the said provisions should apply without any qualification.

¹ *Soltec CC v Swakopmund Super Spar* (I 160/2015) NAHCMD 159 (3 June 2016).

Apology

[6] I should, at this juncture, tender my apologies to both parties for the reason that it had been agreed during the trial that the issue of whether or not, rule 32 (11) applies to the application for absolution, would be dealt with in the main judgment. I had, before delivery of the judgment, requested my Research Assistant to make enquiries as to the exact identity of the issue that would form part of the main judgment. I did so because the exact nature of the issue for determination had escaped my mind, having been involved in many trials and later, complex applications. I received a report from my Assistant that she could not get assistance in that regard. When I finally got down to writing the judgment, this issue just sunk into oblivion and I forgot to deal with it and for which I again apologise. Delayed is not necessarily denied, though that may be cold comfort to the parties, but I hope not.

Rule 32(11)

[7] The said sub rule provides the following:

'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.'

It is a matter of comment that the provision is couched in peremptory terms and suggests that this provision is not to be easily or readily jettisoned where a proceeding is interlocutory in nature.

[8] I shall refer to a few judgments of this court that deal with the policy reason why this subrule was enacted in the first place. In *Brink N.O and Another v Erongo All Sure Insurance And Others*,² an issue that was not upset on appeal, this court held that rule 32 (11), though couched in mandatory terms, was not crafted as the law of the Medes and the Persians, as it were. In this regard, it was held that the court may depart from

² Case No. (I 3249/2015) [2016] NAHCMD 200 (8 July 2016).

the strict application of the rule in deserving cases, which the court should be satisfied are, due to persuasive and compelling reasons advanced, deserving of departure from the rule.

[9] In dealing with the policy behind the promulgation of the rule, the court reasoned as follows at para [43]:

'I have no doubt that there were laudable reasons for including this provision and on the peremptory terms that were applied. One possible reason was to make litigation more affordable and not to "out-litigate" parties who may not be able to have the financial power and muscle by endlessly launching interlocutory applications to "kill" the matter by drying the pools of that party's financial resources.'

[10] In *South African Poultry Association and Others v Minister of Trade and Industry and Others*,³ the learned Judge President Damaseb also came to the view that though peremptory in its terms, the application of the subrule could be departed from where a clear case therefor has been made. He reasoned that the rule was targeted at avoiding or discouraging a multiplicity of interlocutory applications, which often increase in number and intensity and hamper the court from resolving the real disputes in the case. In this regard, the Judge President stated that the parties must be litigating with equality of arms for the court to depart from the otherwise mandatory application of the said provisions.

[11] Of particular interest, the learned Judge President, it seems, was enamoured to the argument presented by Mr. Gauntlett, to the effect that the cap provided in rule 32 (11) could be jettisoned where the parties were litigating 'at full stretch' and that the court could also consider the dispositive nature of the interlocutory motion in the life of the case in deciding whether or not to depart from the strict provisions of the said subrule.

Is an application for absolution from the instance an interlocutory application?

³ (A 94/2014) [2014] NAHCMD 331 (07 November 2014).

[12] As foreshadowed earlier in this judgment, this is the main question that has to be determined. The need to take the route of briefly examining the subrule and its policy considerations may not be apparent at the present moment. I am of the view, however, that there are nuggets of wisdom discussed, particularly in the *South African Poultry* case that may be helpful in deciding the question presented for determination.

[13] An exhaustive analysis of what an interlocutory matter and order constitute, was undertaken by the learned Chief Justice Shivute in *Antonio Di Savino v Nedbank Namibia Limited*.⁴ I will not engage myself in a work of supererogation, as the Supreme Court left no stone unturned in dealing with the issue of interlocutory proceedings and orders. In the course of grappling with the issue, the learned Chief Justice stated the following at para [52] of the judgment:

‘The order given by Miller AJ refusing leave to amend is interlocutory. According to the *South Cape* case, the term “interlocutory” refers to all orders pronounced by the court, upon matters incidental to the main dispute, preparatory to or during the progress of litigation.’

[14] It appears to me that the Supreme Court accepted the meaning given in the case quoted for the meaning to be attached to the words in situations such as the present. The above quotation, it would seem, gives a proper definition that should be applied to the provisions of rule 32, generally, and to rule 32(11) in particular.

[15] In this regard, I would venture to say, the question that needs to be asked before deciding whether or not the peremptory provisions of rule 32(11) should apply in any matter, and this is quite separate from the question whether the said provisions should, although applying, be departed from on given reasons, is whether absolution from the instance is a proceeding that is ‘incidental to the main dispute’ or is ‘preparatory to or during the progress of litigation’. If absolution from the instance has any of these characteristics, then, in my view, it is interlocutory and the provisions of rule 32(11) should apply, unless the court otherwise orders and on the basis of cogent reasons advanced by the parties therefor.

⁴ Case NO. SA 82/2014.

[16] In *Uvanga v Steenkamp (infra)*, the court referred, for the definition of interlocutory, to the Black's Law Dictionary. There, interlocutory was defined as, 'interim or temporary, not constituting a final resolution of the whole controversy'.

I adopt the definition and find that it does not constitute a radical or any departure from that adopted by the Supreme Court in *Di Savinio*.

[17] At this juncture, I find it necessary, for purposes of some clarity and possibly uniformity, to list some of the matters that in my view fall neatly within the category of interlocutory proceedings. The list is not, by any means to be considered as exhaustive, and immutable as the law of the Medes and the Persians, as it were. It will hopefully form a useful basis for reference and may be augmented from time to time. It might to some extent, assist with regard to identifying the proceedings to which rule 32 in general, and rule 32(11), in particular, applies.

[18] From my reading of the rules, the following, it would seem, fall within the category of interlocutory proceedings:

- (a) discovery - Rule 28;
- (b) seeking directions in terms of Rule 31 (1), (2) and (4);
- (c) joinder of parties – Rule 41;
- (d) applications for intervention of parties – Rule 41;
- (e) consolidation of proceedings – Rule 41;
- (f) applications for transfer of proceedings from one division to another – P.D. 47;
- (g) third party proceedings – Rule 50;
- (h) applications for amendment of proceedings – Rule 52;
- (i) applications for condonation; upliftment of bar, extension and relaxation of time – Rule 55;
- (j) applications for relief from sanctions – Rule 56;
- (k) applications for security for costs – Rule 57;
- (l) exceptions – Rule 57;
- (m) application to strike out – Rule 58;

- (n) applications for summary judgment – Rule 61 (although subject to some controversy, but now accepted that rule 32 applies);
- (o) irregular proceedings – Rule 61;
- (p) application for amplification of witness' statements – Rule 93(3); and
- (q) variation and rescission of orders or judgments – Rule 103.

[19] Having recorded the foregoing, we now have to locate an application for absolution from the instance in the course of trial proceedings. At what stage is it moved and to what end? From the provisions of rule 100, it is clear that an application for absolution from the instance is moved, where appropriate, at the close of the case for the plaintiff. It is moved in instances where the defendant forms the view that the plaintiff has failed to make out a case that would require the said defendant to be placed on its defence.

[20] What immediately becomes clear from the foregoing, is that the application for absolution is dealt with as part of the merits of the dispute, meaning that it is at the center and heart of the dispute in need for resolution. It is not a mere tangential skirmish that needs to be attended to and resolved before the real merits of the matter are grappled with and determined.

[21] In this regard, it appears plain to me that absolution from the instance is considered once the plaintiff's evidence is led and closed, as I have stated. Depending on the nature of the case, there may be one or fifteen witnesses called by the plaintiff before he or she closes his or her case. The question to be asked, if the defendant's position is to be adopted in this case is, would it be proper, just or fair to limit the successful party in this application only to the cap stated in rule 32(11), notwithstanding that so much effort and time has been expended on the merits of the case, including the calling of witnesses to adduce evidence? I think not.

[22] It would appear to me, on a mature consideration, that an application for absolution from the instance, is not preparatory nor is it incidental or merely tangential to the main case. It is actually part of the main case and can be regarded as the half-

way point of the actual trial, where one party has led evidence, leaving the other party, depending on how the application is determined, to lead the balance of the evidence. For the above reason, I am of the view that an application for absolution from the instance is not interlocutory and that for that reason, the provisions of rule 32, particularly those of subrule (11), do not apply at all.

[23] If one were to borrow from the language employed in the *South African Poultry* case, it is clear that the parties in this case were litigating at full stretch in the true sense of the word and particularly so in the context of a proper trial, where witnesses were called and examined in full, with the engine of cross-examination unleashed and operating at full rev. It would, in the circumstances, be a work of great injustice and unfairness to order that a party who has been involved in a full trial should be rewarded, in terms of the costs, at the scale of preparatory, tangential or incidental litigation, when they had actually waded past the initial preparatory waters and were eventually caught, as the case progressed, in the deep tempestuous waters and angry waves of the trial proper.

[24] A not dissimilar issue faced this court in the case of *Uvanga v Steenkamp*.⁵ That case involved a special plea of *locus standi in judicio* of the plaintiff to institute the proceedings. In order to resolve that plea, the plaintiff called witnesses who were examined and cross-examined accordingly and submissions were made at the end of the evidence. The court dismissed the special plea and held that the plaintiff was possessed of the necessary standing to launch the proceedings.

[25] In due course, the costs order was presented to the taxing officer for taxation. The parties took disparate positions regarding whether the provisions of rule 32(11) applied or not. In dealing with the case, the court started by considering the provisions applicable to interlocutory matters proper. In this regard, the court went on to consider that interlocutory proceedings were to be brought for hearing within a specified period to the managing judge to deal with, namely 30 days.⁶ The court further considered that the ruling on same should, in terms of the rules, be delivered within a period of 15 days

⁵ (I 1968/2014) [2016] NAHCMD 378 (2 December 2016).

⁶ Rule 32(2).

from the date of hearing. In contradistinction, the court reasoned that rulings relating to special pleas had to be delivered within a month from the date of hearing in terms of the rules.

[26] I should interpose at this point and observe that this reasoning applies with equal force to the present case as well. According to the guidelines for delivery of judgments, it is clear that rulings on interlocutory applications must be delivered within 15 days of the hearing. When one has regard to applications for absolution from the instance, however, the lawgiver, chose to order such rulings to be delivered within a period of 4 months from the date of hearing. This, in my considered view, shows indubitably that applications for absolution from the instance are not interlocutory in nature or effect. In particular, the court is required, before making a decision, to have regard, albeit to a limited extent, to the evidence adduced on behalf of the plaintiff and this may be quite voluminous.

[27] As held earlier, this points inexorably in the direction that these applications are not interlocutory at all but deal with the very merits of the disputes, with a possibility, I may add, of bringing those particular proceedings to an end. This is not the effect that interlocutory proceedings have on the main proceeding, both in terms of the result and the process followed to reach the stage where the application is actually moved.

[28] At paragraph [14] and [15] of the cyclostyled judgment, the court proceeded to say the following:⁷

'[14] Furthermore, it is clear that in interlocutory proceedings, and in the majority of cases, all the issues are ordinarily issues of law, which should eschew the leading of oral evidence, hence the short period prescribed for dealing with them in rule 32. In the instant case, as I have pointed out above, the plaintiff testified and he was cross-examined extensively and also called

⁷ *Ibid* at para [14].

his brother/*adoptandus*, as a witness. At the end of the evidence, extensive heads and submissions were filed and the court was addressed in a full fashion.

[15] In view of the foregoing, I am of the firm view that it would be a travesty of justice for a successful party, in such a matter, to be confined to recovering costs even at the upper end of the scale set out in rule 32 (11). Had that been the intention, besides the different level of preparation and consultation needed at times for special pleas, like the instant one, where evidence is led, requiring, in the process, the preparation of witnesses' statements even for the special plea, the Rulemaker would have stated that position without any equivocation.'

[29] I am of the considered view that the sentiments and reasoning expressed above, apply to the instant case and I am tempted to say, fit hand in glove. I therefor adopt the reasoning and the conclusion reached by the court in that case as accurately reflective of the position that should apply in the instant case. A further matter placed in the equation in that decision, was the option open to a dissatisfied party with regard to a special plea. The court held that a dissatisfied party could approach the Supreme Court directly and as of right and would not have to seek leave to appeal from this court. That consideration also holds true in the instant case. A party dissatisfied with a ruling on an application for absolution from the instance may approach the Supreme Court directly, without having first to seek this court's leave, or if refused, to petition the Chief Justice for leave.

Conclusion

[30] In view of the foregoing, I am of the considered view that the plaintiff's submissions in this regard should prevail and carry the day. It was not the intention of the rule-maker, to subject involved processes like absolution from the instances, which deal with the merits of the dispute, to the transient and inconclusive effect of interlocutory applications. By extension, I am of the considered view that the provisions of rule 32 (11) therefor, do not apply to an application for absolution from the instance.

Order

[31] In the premises, I issue the following order:

1. An application for absolution from the instance is not an interlocutory proceeding as contemplated in Rule 32 of this Court's Rules.
2. The order for costs issued by the court on 2 December 2016, in favour of the plaintiff, in relation to the application for absolution from the instance, is not subject to the provisions of Rule 32 (11) of this Court's Rules.
3. The matter is removed from the roll and is regarded as finalised.

T S Masuku
Judge

APPEARANCES:

PLAINTIFF:

Y Campbell

instructed by Behrens & Pfeiffer , Windhoek

DEFENDANT:

JP Ravenscroft-Jones

instructed by Ellis Shilengudwa Inc., Windhoek