

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING ON COSTS**

Case No: HC-MD-CIV-ACT-OTH-2017/01338

In the matter between:

MARINDA SPANGENBERG

PLAINTIFF

and

ELVIDGE ZIRKIE BERNARDUS KLOPPERS

DEFENDANT

Neutral Citation: *Spangenberg v Kloppers* (HC-MD-CIV-ACT-OTH-2017/01338) [2018]
NAHCMD 81 (5 April 2018)

CORAM: PRINSLOO J

Heard: 27 February 2018

Delivered: 22 March 2018

Reasons: 5 April 2018

ORDER

1. Defendant's application that the cost order dated 01 November 2017 not be limited in terms of Rule 32(11) is dismissed with costs, cost to include one instructed and one instructing counsel limited to Rule 32(11).
2. The case remains postponed to 02/08/2018 at 15:00 for Status hearing (Reason: Pre-trial status hearing).

RULING ON COSTS

[1] This court made a ruling on 01 November 2017 which read as follows:

- '1. Application is refused with cost, which cost will be cost of one instructed and on instructing counsel.
2. Matter is postponed to 23/11/2017 for Case Management Conference.
3. Joint Case Management Conference report must be filed in terms of Rule 24(2).'

[2] The aforementioned ruling was based on an interlocutory proceeding and the defendant described the issue between the parties now as to whether the costs so ordered is limited to the amount of N\$ 20 000 in terms of the provisions of Rule 32(11) or not.

[3] I will start by summarizing the submissions of the defendant as the matter is before court at the instance of the defendant.

Submissions by defendant

[4] The defendant submits that the limitation of costs was not argued at the hearing of the application and further submits that the court is thus not *functus officio* and has the jurisdiction to consider the costs issue in terms of rule 103 (1) (b).¹ The defendant further submits that where a Rule of Court makes provision for limitation on fees and such has not been argued at the hearing of the matter, a party is fully entitled to thereafter raise the issue and a court has jurisdiction to entertain the application and supplement its order. However, in the event that the limitation of cost was indeed ventilated at the hearing of the matter, the court must entertain the application in terms of the provisions of Rule 103(1)(c)², whether the limitation is applicable or not and whether it has been omitted from the order.

[5] The defendant submits that an order limiting the costs in this matter is not justified based on the following grounds:

5.1. Both parties employed instructed counsels.

5.2. The underlying application was of great importance to both parties, therefore requiring voluminous papers to be filed.

5.3. The hearing of the application amounted to heated debates on a number of complex legal principles and as a result, the application was by no means a normal and simple interlocutory application.

5.4. The interlocutory application was the first application in the matter and there was no other.

¹ 103(1) 'In addition to the powers it may have, the court may of its own initiative or on the application of any party affected brought within a reasonable time, rescind or vary any order or judgment-

(a)

(b) in respect of interest or cost granted without being argued;

(c) in which there is an ambiguity or a patent error or omission, but only to the extent of the ambiguity or omission.'

² Supra.

With the above, the defendant submits that this court is fully justified in allowing costs to exceed the limit imposed by rule 32 (11).

[6] The defendant further submits that the limitation of costs was never an issue between the parties, and that the parties tacitly agreed that rule 32 (11) would not be applicable. Further, as a result of the voluminous papers that had to be filed and with regard to the fact that the issues were complicated as they were, the defendant submits that it could not possibly have been the intention that the costs would be limited to N\$20 000.

[7] The defendant further submits that when a court makes an order as to costs, it is to indemnify the successful party for the expense to which it has been put through as a result of the litigation, however, the defendant submits that a cost order should not be made to compel a party to pay excessive costs. In this light, the defendant submits that the award of costs by the honorable court was not intended to be limited to N\$20 000. The defendant further submits that where a court makes an order for costs to include the costs of one instructing and one instructed counsel, such costs would of necessity be costs exceeding N\$20 000. The defendant further submits that if nothing is said about the limitation, then it is not applicable.

[8] The defendant referred the court to the matter of *South African Poultry Association and Others v Ministry of Trade and Industry and Others* 2015 (1) NR 260 (HC) and *Wise v Shikuambi NO*, unreported judgment under case no. A 293/2014 delivered on 24 May 2017. In the *SAPA* matter the court also omitted to address the issue of Rule 32(11) in the actual cost order, as in the current matter. It was argued that between the two matters the court's approach in the *SAPA* matter is the preferable one. The distinction drawn by the defendant with the two decision is that with the *SAPA* case, the court made it clear in its judgment that the limit imposed by rule 32 (11) will not be applicable and in the order the court granted costs to include the costs of one instructing and two instructed counsel. The defendant submits that the order by nature exceeds

N\$20 000 and it is not necessary to explain why. Any other interpretation would therefore render the order of costs by the court a folly. With respect to *Wise v Shikuambi*, the defendant submits that the gist in that matter seem to be that where a court makes an order as to costs, such costs to include the costs of one instructing and one instructed counsel, without further stating anything about the limitation, the taxing master is entitled to tax the order to maximum of N\$20 000 only. The defendant submits that rule 32 (11) should not be understood to have the effect that any costs order should be limited to N\$ 20 000 unless expressly stated otherwise by the court.

[9] The defendant in conclusion requests that the cost order of 1 November 2017 not be limited to N\$ 20 000 and that the plaintiff pay the costs of this proceeding.

Submissions by plaintiff

[10] The plaintiff in turn submits that when a court makes a ruling or gives judgment, it becomes *functus officio* and the only manner in which it can alter its ruling or judgment is by way of a rule 103 (1) application, which the plaintiff submits, no application was made by the defendant. Therefore, the plaintiff submits that there is no application before this court to consider, in this case being the order as to costs.

[11] In addressing the issue with respect to costs, the plaintiff submits that one must look at whether the court acceded to the defendant's instructed legal practitioner's prayer that costs in respect of the interlocutory proceedings should not be limited in terms of rule 32 (11) and whether this was omitted by this court.

[12] The plaintiff submits that if one is to have regard to the ruling given by this court in whole, the answer to the point in issues lies in the judgment itself and if one is to apply the usual well-known rules of construction applicable to documents and the judgment is clear and unambiguous, there is nothing needed to be clarified or rectified.

[13] The plaintiff further submits that when reading the judgment in its entirety, there is nothing to indicate that the judgment does not indicate the intention of the court and further nothing to indicate that the court intended that the limitation based in rule 32 (11) should not apply. As a result, the plaintiff reiterates that the judgment is clear and unambiguous and therefore nothing was omitted that should now be added. The plaintiff therefore submits that insofar as the court is allowed to vary its own judgment, the content thereto should not be affected, i.e. the judgment cannot be varied afterwards to the effect that the limitation should not apply and cannot be added after judgment is handed down.

[14] The plaintiff further submits that neither of the parties asked for an order that the limitation in terms of rule 32 (11) should not apply and highlights the point that the defendant also made the submission that rule 32 (9) and (10) was applicable in the interlocutory application. The plaintiff submits that it is only during oral argument that the defendant raised the issue pertaining to the limitation imposed by rule 32 (11) for interlocutory proceedings. The plaintiff submits that if the defendant intended to have the rule 32 (11) limitations not be applicable, it ought to have raised it at the hearing of the interlocutory application and further in its papers and also make out a case for it, which the plaintiff submits was not done.

[15] The plaintiff further submits that rule 32 (11) is the default position when it comes to interlocutory applications and the court does have the discretion to award costs on a higher scale if a case is made out for the court to exercise such discretion. The plaintiff further submits that the defendant may have or ought to know the limitation imposed by rule 32 (11) and ought to have made out its case during the interlocutory application for the limitation not to be applicable. The plaintiff further submits that the rule clearly states that even if instructed counsel are at play, the limitation remains, hence the discretion of the court to allow a higher scale if a case is made out for it.

[16] The plaintiff further refers to the defendant's submission in its heads that there was a tacit agreement between the parties that the limitation would not be applicable in

this matter. The plaintiff submits that the defendant attempts to make an application and tender evidence in support thereof through its heads of argument, hence why it was necessary for the defendant to make an application on notice of motion to which the plaintiff would be able to answer to. However there is no such application before this court, submits the plaintiff. The plaintiff submits that there is no merit in the submission that there was a tacit agreement between the parties.

[17] In conclusion, the plaintiff submits that the defendant should bear the costs of these proceedings as the plaintiff was brought to court on the defendant's request, such costs to include the costs of one instructing and one instructed counsel.

Discussion

Variation of the court order:

[18] In effect, what I have before me is a request to vary the court order dated 01 November 2017 in the following terms:

'That the cost order of 1 November 2017 is not limited to N\$ 20 000.00;...'

[19] It is trite that once a court has duly pronounced a final judgment or order, it has in itself no authority to correct, alter or supplement such judgment or order and by reason of that the court thereupon becomes *functus officio*: its jurisdiction in the case having been fully and finally exercised.³ There are however a few exceptions to this general rule where the court may vary or rescind its orders or judgments, which have been codified in Rule 103 of the Rules of Court. Rule 103 deals with variation and rescission of court orders and judgments in general and reads as follows:

³ *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at page 306.

(1) In addition to the powers it may have, the court may of its own initiative or on the application of any party affected brought within a reasonable time, rescind or vary any order or judgment-

- (a) erroneously sought or erroneously granted in the absence of any party affected thereby;
- (b) in respect of interest or cost granted without being argued;
- (c) in which there is an ambiguity or a patent error or omission, but only to the extent of the ambiguity or omission.
- (d) an order granted as result of a mistake common to the parties.

(2) A party who intends to apply for relief under this rule may make application therefor on notice to all parties whose interests may be affected by the rescission or variation sought and rule 65 does, with necessary modifications required by the context, apply to an application brought under this rule.

(3) The court may not make an order rescinding or varying an order or judgment unless it is satisfied that all parties whose interests may be affected have notice of the proposed order.'

[20] It is common cause that insofar as Rule 103 is concerned, this court can only rescind or vary its order or judgment when there is an ambiguity, error or mistake. Included in the mix though are matters where an order or judgment in respect of which the court granted interest or costs granted without being argued.

[21] What is evident from the wording of the rule is that in order for the court to consider variation or rescission an application must be brought on notice. Defendant failed to bring an application on notice to all parties wherein the relief sought was clearly set out. There is therefore effectively no application before this court to consider. However, the court has acceded to the request of the defendant to hear his argument regarding the issue of cost.

[22] The defendant seems to have an 'either/or' approached in this matter as he relies on Rule 103(1)(b) stating that to the best of his recollection and as per his instructions the issue of Rule 32(11) was not argued and therefore the court is not *functus officio*. From the heads of argument on behalf of the plaintiff and with specific reference to the court record it is clear that even though the plaintiff did not address the issue of Rule 32(11) either on the paper or in argument, the defendant did address the issue that the limitation should not be applied. Having had the benefit of a transcribed record of the proceedings dated 27 September 2017 same could be verified⁴. As this issue was addressed in argument on behalf of the defendant it is clear that Rule 103(1)(b) does not find application in the current matter. The court was referred to the matter of *Poggrund v Yutar*⁵ but the said matter is distinguishable from the matter *in casu* as the issue of cost was not argued at the hearing of the application in the *Podgrund* matter.

[23] As an alternative the defendant then argues that if the limitation was ventilated, then the court has jurisdiction to entertain the 'application' in terms of Rule 103(1)(c) in that the issue whether the limitation is applicable or not having been omitted from the order.

Rule 32(11)

[24] In order to decide on the validity of the said argument it would be necessary to consider the provisions and application of Rule 32(11). Rule 32 (11) 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.'

⁴ Transcribed record page 23 line 26-32; page 24 line 1-13; page 28 line 26-31 and page 45 line 13-16.

⁵ 1968 (1) SA 395 (A)

[25] The object of the rules, it would seem, is to limit the number of interlocutory causes or matters to the bare minimum. This is with a view to have the parties concentrate and expend their time and energy on the real issues in dispute. In this regard, the rules, particularly in rule 32 (1), call for ‘speedy finalization thereof’, namely, of interlocutory proceedings.⁶

[26] In *South African Poultry Association v The Ministry of Trade and Industry*,⁷ this court observed the following factors to be determinative in the exercise of the court’s discretion with respect rule 32(11):

‘[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.’

[27] In the *SAPA* matter this court clearly states that:

‘A clear case must be made out if the court is to allow a scale of cost above the upper limits allowed by the rules. The onus rests on the party who seeks a higher scale.’⁸

⁶ *Uvanga v Steenkamp & Others* (I 1968/2014) [2016] NAHCMD 378 (2 December 2016) at [9].

⁷ (A 94/2014) [2014] NAHCMD 331 (07 November 2014), paragraph 67.

⁸ *South African Poultry Association and Others v Ministry of Trade and Industry and Others* (supra) at paragraph [67]

[28] It is quite clear in order for a party to be allowed cost a higher scale is not just for the asking, which is the case in the current matter. The fact that counsel were engaged in the matter does not automatically mean that the limitation should not apply. There is an onus that rest on the party to convince the court that the limitation should not apply. This was patently clear in the *Wise* matter⁹ where the court found as follows:

'If the defendant wanted costs on a scale above the limit set in Rule 32(11) the onus was on the defendant to make out case for that want or need.'

[29] What can be distilled from the *SAPA* and *Wise* matters is that the default position of Rule 32(11) is that the cost that may be awarded may not exceed N\$ 20 000, **unless** a clear case is made out for a higher cost scale.

[30] If the court therefor does not pronounce itself specifically on the limitation set by Rule 32(11), the default position would apply.

Does the court order contain an ambiguity, a patent error or an omission?

[31] A 'patent error or omission' has been described in the matter of *Seattle v Protea Assurance Co Ltd*¹⁰ as '*an error or omission as a result of which the judgment granted does not reflect the intention of the judicial officer pronouncing it.*'

[32] The fact that the cost order does not include the said limitation does not cause the order to be vague or ambiguous nor does it constitute an omission. The meaning of the order is not obscure or otherwise.

[33] I am therefor of the opinion that the provisions of rule 103 does not find application in this matter before me to have the costs order be revisited and that this court is *functus officio*. As a result, the order therefore stands.

[34] My order is thus as follows:

⁹ *Wise v Shikuambi NO* (supra) at paragraph [32]

¹⁰ 1984(2) SA 537(C)

1. Defendant's application that the cost order dated 01 November 2017 not be limited in terms of Rule 32(11) is dismissed with costs, cost to include one instructed and one instructing counsel limited to Rule 32(11).
2. The case remains postponed to 02/08/2018 at 15:00 for Status hearing (Reason: Pre-trial status hearing).

J S Prinsloo
Judge

APPEARANCES:

PLAINTIFF:

B de Jager

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DEFENDANTS:

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