

“ANNEXURE 11”

Practice Direction 61

**IN THE HIGH COURT OF NAMIBIA**

<b>Case Title:</b> <i>Communications Regulatory Authority of Namibia v Mobile Telecommunications Company Namibia</i>	<b>Case No.:</b> HC-MD-CIV-ACT-OTH-2019/01367
	<b>Division of Court:</b> High Court (Main Division)
<b>Heard/tried before:</b> Honourable Mr Justice B Usiku J	<b>Date of hearing:</b> 20 August 2020
	<b>Delivered on:</b> 20 August 2020
<b>Neutral citation:</b> <i>Communications Regulatory Authority of Namibia v Mobile Telecommunications Company Namibia</i> (HC-MD-CIV-ACT-OTH-2019/01367) [2020] NAHCMD 365 (20 August 2020)	
<b>The Order:</b> Having read the pleadings and documents filed of record and having considered the heads of argument filed by the parties:  <b>IT IS ORDERED THAT:</b>  1. An application for leave to appeal is not an interlocutory application within the meaning of rule 32. Accordingly, the defendant’s point in limine on this score, is dismissed with costs.  2. The plaintiff’s application for condonation of the late filing of the application for leave to appeal, is dismissed.  3. The application for leave to appeal, having been filed out of time, is improperly before	

court and is, therefore, struck from the roll.

4. The plaintiff is ordered to pay the defendant's costs occasioned by defendant's opposition to the plaintiff's application for condonation and the application for leave to appeal.

5. The matter is postponed to the 07 October 2020 at 15:15 for status hearing.

6. The parties are directed to file a joint status report on or before 30 September 2020.

**Reasons: Practice Direction 61(9)**

Introduction

[1] Presently before court for determination are three applications launched by the plaintiff, namely applications for:

- (a) condonation of the plaintiff's failure to make application for leave to appeal within 15 days after the date of the order appealed against;
- (b) condonation of plaintiff's failure to comply with rule 32 (9) and (10) in respect of plaintiff's application for leave to appeal, and,
- (c) application for leave to appeal.

[2] On the 15 November 2019, this court made an order in the following terms:

'1. The court declines to entertain this matter on the basis that it does not meet the requirements of a 'special case' contemplated under rule 63.

2 The purported 'special case' is therefore struck from the roll.

3 The plaintiff is ordered to pay the costs of the defendant, such costs to include costs of one instructing and two instructed legal practitioners. It is further directed that the capping which applies to interlocutory applications in terms of rule 32 (11) should not apply.

4 The case is postponed to 29/01/2020 at 15:15 for Status hearing.

5 The parties are directed to file a joint status report on or before 23/01/2020.'

[3] Aggrieved by the aforesaid order, the plaintiff, on the 13 December 2019, filed a notice of application for leave to appeal against the *'whole'* of that order.

[4] In terms of rule 115, an application for leave to appeal must be made 'within 15 days after the date of the order appealed against'.

[5] It is common cause that the plaintiff ought to have made the application for leave to appeal on or before the 9 December 2019. The plaintiff did not do so. The plaintiff filed its application for leave to appeal on 13 December 2019, some 3 or 4 days out of time.

[6] The plaintiff has brought, among other things, an application for condonation of the late filing of the application for leave to appeal, on 5 March 2020.

[7] The defendant opposes both the application for leave to appeal and for condonation of the late filing of the application for leave to appeal. In addition, the defendant maintains that the plaintiff, having not complied with rule 32(9) and (10) before bringing the application for leave to appeal, the application for leave to appeal must be struck from the roll.

#### The plaintiff's application(s)

[8] As regards the application for leave to appeal, the gist of the application is that the court erred in making the impugned order.

[9] The defendant raises a point in limine to the effect that, an application for leave to appeal is an interlocutory matter. In terms of *rule 32(9)*, a party wishing to bring an interlocutory proceeding, must, before launching it, seek an amicable resolution thereof with the other party and only after the parties have failed to resolve the dispute may such proceeding be delivered to the court. The defendant further argues that, the plaintiff was obliged in terms of *rule 32(10)* to file a statement detailing the steps taken to have the matter amicably resolved, before filing the application for leave to appeal. The defendant contends that the plaintiff did not comply with rule 32(9) and (10) before filing the application for leave

to appeal and for that reason the application for leave to appeal be struck from the roll.

[10] The defendant further attacks the application for leave to appeal on the basis that it is not on notice of motion supported by an affidavit. The defendant submits that the plaintiff's purported application for leave to appeal does not meet the requirements of an application contemplated under the rules, and accordingly there is no application for leave to appeal before court. The defendant cites, as authority for its proposition, the case of *Namibia Water Corporation Ltd v Tjipangandjara*.<sup>1</sup>

[11] In response, the plaintiff contends that the provisions of *rule* 32(9) are not applicable to an application for leave to appeal.

[12] As regards whether the application in terms of *rule* 115 should have been brought on notice of motion accompanied by an affidavit, the plaintiff argues that the provisions of *rule* 115 do not lend themselves to such an interpretation. The plaintiff therefore contends that the decision in the *Namibia Water Corporation Ltd v Tjipangandjara* is not consistent with the provisions of *rule* 115.

### Analysis

[13] I shall first deal with the point *in limine* raised by the defendant to the effect that the plaintiff ought to have complied with *rule* 32 (9) and (10) before bring his application for leave to appeal. If those provisions are applicable and it is shown that the plaintiff did not comply with them prior to bring the application for leave to appeal, then there may be no need for the court to proceed further.

[14] *Rule* 32(9) and (10) read as follows:

'(9) 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

---

<sup>1</sup> *Namibia Water Corporation Ltd v Tjipangandjara* (LCA 16&17/2017) 2019 NAHCMD 33 (21 November 2019).

proceeding be delivered for adjudication by the court.

(10) The party bringing any proceeding contemplated in this rule must before, instituting the proceeding, file with the registrar details of the steps taken to have the matter amicably resolved as contemplated in subrule (9) without disclosing privileged information.'

[15] The relevant provisions of *rule* 115 provide as follows:

'115(1) When leave to appeal from a judgment or order of the court is required the leave to appeal may, on a statement of the grounds for the leave to appeal, request for leave to appeal at the time of the judgment or order.

(2) When leave to appeal from a judgment or order of the court is required and it has not been requested at the time of the judgment or order, application for such leave must be made together with the grounds for the leave to appeal within 15 days after the date of order appealed against.

(3) If the reasons or the full reasons for the court's judgment or order are given on a later date than date of the judgment or order, the application may be made within 15 days after the later date and the court may, on good cause shown, extend the period of 15 days.

(4).....

(5) The application referred to in subrule (2) or (3) must be set down on a date arranged with the registrar who must give written notice of the date to the parties and the date for set down must not be less than 15 days and not more than 30 days after the expiry of the periods referred to in subrule (2) or (3).

(6).....

(7).....

(8).....

(9).....

(10).....'

[16] Practice direction 36 provides:

'36 (1) Unless otherwise directed by the presiding judge, the parties in an application for leave to appeal from a judgment or order, other than a criminal judgment or order, are not required to file heads of argument.

(2) Where leave to appeal from a judgment or order, other than a criminal judgment or order, is required in terms of rule 115(5) of the rules, the applicant must within five days after the expiry of the periods referred to in rule 115(2) give written notice to all the parties to meet at the registrar's office on a Wednesday at 9h00 in order to obtain a date for the hearing of the application, and the notice period to meet with the registrar must be not less than three days.

(3) The registrar must, during the meeting to determine the date referred to in subparagraph (2), provide the parties with a written notice of the date and time of set down, and file a copy of such notice on the court file.

(4) If the parties fail to appear during the meeting referred to in subparagraph (2) the registrar may in the absence of the parties set the application down for hearing on any date, and the parties are bound to the set down date.'

[17] It is common cause that there is no *rule* 32(10) statement filed by the plaintiff prior to the filing of the application for leave to appeal, setting out details of the steps taken to have the matter amicably resolved. I therefore came to the conclusion that *rule* 32(9) and (10) was not complied with.

[18] The next question is whether the provisions of *rule* 32(9) and (10) are applicable to an application contemplated under *rule* 115.

[19] It would appear to me that from the provisions of rule 115 read with *practice direction* 36, the following conclusions can be drawn:

- (a) leave to appeal may be requested at the time of judgment or order. In such a case, all that is required of an applicant is a statement of the grounds for the leave to appeal;
- (b) when leave to appeal has not been requested at the time of the judgment or order, the applicant '*must*' make application together with the grounds for the leave to appeal '*within 15 days after the date of the order appealed against*'.
- (c) the application is set down on a date arranged with the registrar; and,
- (d) the parties to an application for leave to appeal are not required to file heads of argument, unless otherwise directed by the presiding judge.

[20] The import of the foregoing provisions appears to me to be inconsistent with the requirements of *rule* 32(1) to (7) which deal with interlocutory matters and application for directions. To the extent that a request for leave to appeal may be made at the time of judgment or order, without a prior application for directions, appears to me to exclude the applicability of *rule* 32 entirely. Furthermore, where leave to appeal has not been requested at the time of the judgment or order, the peremptory tone of *rule* 115(2) appears to me to exclude a prior application for directions, in respect of an envisaged application for leave to appeal. Taking into consideration the combined effect of *rule* 115 and practice direction 36, I am constrained to think of the type of directions that a presiding judge may make in terms of *rule* 32, if he/she were called upon to do so. I am inclined to believe that in making *rule* 115, the rule-maker must have been aware of the provisions 32 and saw it fit to word *rule* 115 the way it is, to exclude the applicability of the provisions of *rule* 32 to a *rule* 115 application.

[21] For the foregoing reasons, I am of the opinion that it is not the intention of the rule-maker to make the provisions of *rule* 32 applicable to an application for leave to appeal. Therefore, an application for leave to appeal is not an interlocutory application within the meaning of *rule* 32 and thus *rule* 32 (9) and (10) are not applicable to an application for leave to appeal.

[22] I now turn to the application for condonation of the late filing of application for leave to appeal.

[23] It is trite law that an applicant for condonation is required to:

- (a) furnish a reasonable and acceptable explanation for the default or non-compliance, and
- (b) show that he/she has reasonable prospects of success on the merits (of the application for leave to appeal in the present case).

[24] Frank, AJA has the following apposite remarks to make on the subject of condonation:

'There is some interplay between these two considerations, e.g. good prospects of success

may lead to the granting of a reinstatement application even if the explanation is not entirely satisfactory. Thus, in *Road Fund Administration v Scorpion Mining Company (Pty) Ltd* overwhelming prospects of success and public importance of the issue in question led to condonation application being granted despite non-compliance which bordered on being glaring, flagrant and not satisfactorily explained. Whereas the broad considerations are generally considered conjunctively this is not always so. Thus, when there is no acceptable explanation for the glaring or flagrant non-compliance with the rules, the application may be dismissed without consideration of the prospects of success on appeal. Conversely, an entirely satisfactory explanation will not save an application when there is no prospects of success on appeal.'

[25] The gist of the plaintiff's explanation for the non-compliance with rule 115 (i.e failure to file application within 15 days) is contained in the affidavit deposed to by Mr Festus Katuna Mbandeka ('Mr Mbandeka'), the then Chief Executive Officer of the plaintiff, as well as in the affidavit of Mr Sisa Namandje ('Mr Namandje') the plaintiff's legal representative of record.

[26] In his affidavit, Mr Mbandeka states that the plaintiff was wrongly advised by its legal representative, Mr Namandje, that the last day for the filing of the notice for leave to appeal was 17 December 2019.<sup>2</sup> Mr Mbandeka further states that he has been advised by Mr Namandje that Mr Namandje was at the material time aware of the 15 days period under *rule 115*, however, he (Mr Namandje) *mistakenly* and *inadvertently* looked at the *Rules of the Supreme Court* in respect of which an appeal period of 21 days is required, calculated from the date of judgment of the High Court.<sup>3</sup> The plaintiff believed at the time that such information was correct. This however, turned out to have been an error on the part of the Mr Namandje. Mr Mbandeka then referred the court to the confirmatory affidavit deposed to by Mr Namandje in that respect.

[27] In his confirmatory affidavit Mr Namandje relates that he somehow gave the plaintiff wrong information that the application for leave to appeal must be filed on or before 17

<sup>2</sup> Para 15(1) of Mr Mbandeka's affidavit.

<sup>3</sup> *Ibid.*



December 2019. Such information was wrong. The giving of wrong information came about an account that he *inadvertently* and *mistakenly* looked at Rules of the Supreme Court in respect of which a notice to appeal from a judgment or order of the High Court must be filed within 21 days after the order of the High Court. This was a mistake and Mr Namandje only realised the mistake after 19 February 2020 when he was considering judgment in the case of *Namibia Water Corporation Ltd v Tjipangandjara*.

[28] It therefore appears from the two affidavits that the core of the explanation given for non-compliance with *rule 115*, is the inadvertence and mistake on the part of the Mr Namandje, in having looked at the *Rules of the Supreme Court*, instead of the *Rules of the High Court* culminating in him giving inaccurate information to his client.

[29] The court is called upon to determine whether the explanation given by the plaintiff for the non-compliance is a reasonable and acceptable explanation in the circumstances.

[30] Mr Namandje has confirmed the correctness of the contents of Mr Mbandeka's affidavit insofar as it relates to him. However, neither Mr Mbandeka nor Mr Namandje does explain the context in which Mr Namandje was, at the material time, aware of the 15 days period under *rule 115*, yet he proceeded to advise a 21 days period within which to file application for leave to appeal. Nor does Mr Namandje explain how the '*inadvertence*' and '*mistake*' came about. In other words, it is not explained how Mr Namandje, being *aware* of the 15 days period under *rule 115* of the High Court Rules, happened to look at the *Rules of the Supreme Court* and singled out a period of time which is inconsistent with the 15 days period he was aware of.

[31] Confronted with a similar situation, Frank AJA, expressed the following sentiments:

'In view of the frequent warnings of this court concerning the laxity of legal practitioners when it comes to the rules concerning appeals, the explanation for the late filing of the record in this case is not reasonable and acceptable. It amounts to no explanation. If the explanation proffered in this case is accepted, the court will have to accept every other explanation for failing to comply with the rule in question or indeed any other rule of this court.'<sup>4</sup>

---

<sup>4</sup> Sun Square Hotel (Pty) Ltd v Southern Sun Africa and Another (supra) para 22.

[32] Similarly, in the present matter, I find that the explanation given by the plaintiff for the late filing of the application for leave to appeal, is neither reasonable nor acceptable. If accepted it would create a bad precedent in respect of failure to comply with any of the *Rules of Court*. The fact that the non-compliance was occasioned due to the conduct of the plaintiff's legal representative would not save the plaintiff in this matter.

[33] In addition to the foregoing, I am also of the opinion that the plaintiff has not shown that it has reasonable prospects of success on appeal. The plaintiff has not advanced legal or factual basis for contending that the purported '*special case*' which was struck from the roll on 15 November 2019, did indeed meet the requirements of *rule 63*.

[34] For the reasons foregoing, it follows that the application for condonation of the late filing of application for leave to appeal stands to be dismissed. Seeing that the application for leave to appeal is improperly before court, having been filed out of time, the application for leave to appeal falls to be struck from the roll. In view of the conclusion I have reached, I do not deem it necessary to consider other issues raised by the parties, including the issue of whether the application for leave to appeal ought to have been on notice of motion supported by affidavit.

[35] Insofar as costs are concerned, I am of the view that the general rule that costs follow the event must find application in this matter.

[36] In the result, I make the following order:

1. An application for leave to appeal is not an interlocutory application within the meaning of *rule 32*. Accordingly, the defendant's point in limine on this score, is dismissed with costs.
2. The plaintiff's application for condonation of the late filing of the application for leave to appeal, is dismissed.

3. The application for leave to appeal, having been filed out of time, is improperly before court and is, therefore, struck from the roll.

4. The plaintiff is ordered to pay the defendant's costs occasioned by defendant's opposition to the plaintiff's application for condonation and the application for leave to appeal.

5. The matter is postponed to the 07 October 2020 at 15:15 for status hearing.

6. The parties are directed to file a joint status report on or before 30 September 2020.

<b>Judge's signature</b>	<b>Note to the parties:</b>
	Not applicable
<b>Counsel:</b>	
<b>Plaintiff</b>	<b>Defendant</b>
S Namandje Of Sisa Namandje & Co Inc Windhoek	N. Tjombe Of Tjombe – Elago Inc Windhoek