

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT ON REVIEW

HC-MD-CIV-MOT-GEN-2018/00352

In the matter between:

VINCENZIO MAXIMILLIAN OLIVIER

APPLICANT/PLAINTIFF

and

THE DEPUTY SHERIFF FOR THE

DISTRICT OF WINDHOEK

1ST RESPONDENT/DEFENDANT

NEAVERA FRANSISCA OLIVIER

2ND RESPONDENT/DEFENDANT

Neutral Citation: *Olivier v The Deputy Sheriff for the District of Windhoek* (HC-MD-CIV-MOT-GEN-2018/00352) [2020] NAHCMD 48 (13 February 2020)

Delivered on: 13 February 2020

Flynote: Civil procedure – Review in terms of 75(4) - Rules of Court – rule 32(11) – whether the cap of N\$ 20 000 stipulated in rule 32(11) should include or exclude items such as Value Added Tax, attendances and amount for drawing bill of costs in interlocutory matters.

Summary: The question submitted to the court for review was whether a successful party in interlocutory proceedings is entitled, in drawing the bill of costs, to include items such as VAT, drawing the bill of costs and attendances, if the effect of adding those items is to exceed the maximum amount of costs of N\$20 000 stipulated in the rules of court.

Held: that the mischief sought to be arrested by introducing rule 32(11), was to allow parties without limitless resources to litigate in court on interlocutory matters, without a possibility that they may be mulcted with tall bill of costs in interlocutory matters, which result in them being unable to continue to litigate their matters further.

Held that: the rationale of the maximum amount of N\$20 000 is to discourage the multiplicity of interlocutory applications which tend to increase costs and hamper the court from speedily arriving at the real issues in dispute between or among the parties.

Held further that: the costs of the interlocutory application, together with the cost for drawing to the bill, VAT and attendance fees, etc., should not exceed the maximum amount stated above. In other words, the maximum amount should include all other incidental expenses, failing which the intention of the law giver may be violated by the items mentioned above, raising the amount payable far in excess of the maximum, thus doing violence to the very purpose of stipulating the maximum amount.

JUDGMENT ON REVIEW

MASUKU, J.

Introduction

[1] This is a stated case brought in terms of the provisions of rule 75 (4) of the rules of this court.

[2] The question submitted for determination arises from an allocator dated 13 June 2019 issued in the matter quoted above.

[3] Stripped to the bare bones, the question for determination acuminates to this – do the costs of an interlocutory application, in terms of rule 32(11), include all costs, including those for drawing the bill of costs, attending taxation and Value Added Tax?

[4] It would appear that in the instant matter, the Taxing Officer allowed the maximum amount of N\$20 000 and proceeded to allow 5% for drawing the bill of costs and 2.5% for the attendance to the bill of costs, thus resulting in the amount payable surpassing the ceiling of N\$20 000 mentioned in the said rule 32(11). Was the Taxing Officer correct in so doing?

[5] I am of the view that the answer to be returned to the question lies nowhere outside the very provisions of rule 32(11). The said provision has the following rendering:

‘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.’

[6] The question to ask is the following: what was the mischief meant to be arrested by the rule-maker in stipulating a ceiling amount in respect of costs payable in interlocutory applications in the above quoted subrule?

[7] It is clear that interlocutory applications had become a hotbed for out-litigating those who were not well endowed in terms of financial means. Individuals and corporations with means could, in the previous dispensation, deliberately draw out proceedings at the interlocutory level in order to run the opponent dry of the fuel of

finance, thus rendering them unable to meaningfully prosecute their case or the opposition thereof.

[8] As a result, a tall bill of costs, would be incurred and when the one at the receiving end thereof failed to pay the costs, the result would be the proceedings being stayed and finally dismissed in appropriate cases. This would yield grave injustice to those with lesser means without that being an accurate reflection of the strength of their case on the merits. They would be wearied and brought to their knees of submission by the sheer tall order of costs just for the interlocutory application.

[9] The *raison d'etre* for the promulgation of this subrule was described as follows by Damaseb JP in *SA Poultry Association v Ministry of Trade and Industry*¹:

'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.'

I agree with the wise of the law exposition above, which in any event coincides with sentiments expressed by other Judges of this Court on this very issue.

[10] With the reason for the promulgation now apparent, the question to ask is whether or not it is permissible to have the costs determined at the maximum amount set out and then other incidental charges like VAT and drawing of the bill etc., added on, thus resulting in the amount payable thereafter exceeding the ceiling that the law-giver has stipulated in clear and unambiguous terms? Would this not serve to subvert the intention of the rule-maker?

[11] I am of the considered view that when one has regard to the solitudes behind the cap of fees in the subrule, considered in tandem with the language used, namely, the imperative language, 'Despite anything to the contrary in these rules. . .' it would appear that the costs, together with any necessary incidentals, should not exceed the amount

¹ 2015 91) NR 260 (HC), p282B.

of N\$20 000, because to do so by allowing the incidentals, like the amount for drawing the bill and attendance fee etc., to spill over the capped amount, may actually result in a breach and subversion of the very ham the rule-maker intended by promulgating the sub-rule in question.

[12] A few instances may occur, where the successful party is awarded the maximum costs of an interlocutory application and the costs of drawing the bill of costs, coupled with several attendances, then exceed the maximum amount allowed. This may, in some cases, result in the capped amount being exceeded, if not doubled by the extra items mentioned above, if allowed. This would undoubtedly defeat the very essence and purpose of the capping of the amount.

[13] In the premises, I accordingly answer the question posed as follows –

1. The amount of the costs, including the incidental costs, like those for drawing the bill, VAT and attendance fee, should not, when included, exceed the amount of N\$20 000, stipulated by 32 (11) of the Rules of the High Court.

T. S. Masuku
Judge