REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

IN THE HIGH COURT OF NAMIBIA

Case Title: HELIOS ORYX LIMITED vs ELISENHEIM PROPERTY DEVELOPMENT COMPANY (PTY) LTD	**Case No:** HC-MD-CIV-ACT-CON-2020/02288 **Division of Court:** MAIN DIVISION
Heard before HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	**Date of hearing:** 7 October 2021 **Delivered:** 21 October 2021
Neutral citation: *Helios Oryx Limited vs Elisenheim Property Development Company (Pty) Ltd* (HC-MD-CIV-ACT-CON-2020/02288) [2021] NAHCMD 490 (22 October 2021)	

Having heard **HANNO BOSSAU,** on behalf of the Plaintiff(s) and **ANE MAASS,** on behalf of the Defendant(s) and having read the pleadings for **HC-MD-CIV-ACT-CON-2020/02288** and other documents filed of record:

ORDER IS GRANTED IN THE FOLLOWING TERMS:

1. The Plaintiff's request to be granted cost that exceeds the upper limits permitted by Rule 32(11) is dismissed. Cost to follow the outcome.
2. The Defendant is ordered to pay the Plaintiff's wasted costs occasioned by the withdrawal of the notice of exception dated 19 March 2021, as limited by Rule 32(11) of the Rules of the High Court of Namibia.

Reasons for orders:

The parties

[1] The plaintiff is Helios Oryx Limited, a company with limited liability, registered in Mauritius and the defendant is Elisenheim Property Development Company(Pty) Ltd, a company with limited lability, registered in Namibia.

[2] The plaintiff instituted proceedings against the defendant during June 2020 wherein the plaintiff is suing for payment under a guarantee issued by the defendant in favour of the plaintiff on 29 December 2016.

[3] The plaintiff's claim is founded upon a written Demand Guarantee, dated 29 December 2016 and a Covering Mortgage Bond dated 31 January 2017 executed by the defendant in favour of the plaintiff as the sixth mortgagee. Bank Windhoek apparently holds the first to fifth mortgages.

Brief background

[4] On 19 March 2021 the defendant filed a notice of exception, raising two grounds of exception to the plaintiff's particulars of claim as it then stood. Pursuant to the notice of exception the plaintiff filed a notice of intention to amend its particulars of claim on 14 April 2021.

[5] The defendant opposed the plaintiff's intended amendment and after the exchange of correspondence between the parties the plaintiff withdrew the notice of intention to amend and tendered the defendant's wasted costs.

[6] On 20 May 2021 the plaintiff filed a new notice of intention to amend its particulars of claim. The proposed amendment was not opposed and was duly effected in terms of rule 52 of the Rules of Court on 9 June 2021.

[7] However, on 7 June 2021 the defendant indicated in a joint status report that notwithstanding the amendments by the plaintiff it still intended to proceed with the exceptions recorded in its notice of exception on 19 March 2021.

[8] This court then proceeded to allocate a hearing date to the matter and gave the parties directions on the filing of their heads of argument. The matter was set to be heard on 6

September 2021. The matter could however not be heard on 6 September 2021 as my Brother Miller AJ was conflicted causing the matter to be rescheduled for hearing for 6 October 2021.

[9] On 5 October 2021 the defendant filed a notice of withdrawal of its notice of exception dated 19 March 2021 and tendered to pay the plaintiff's wasted costs, limited to rule 32(11)[1] of the Rules of Court.

[10] The plaintiff was amenable to accept the tender for cost of the defendant for three reasons, ie:

1) That the cap as contemplated in rule 32(11) does not contemplate a situation where proceedings are withdrawn and therefore rule 97(1)[2] regulates such a withdrawal.
2) That the guarantee under which the plaintiff sues the defendant provides for all legal costs to be paid by the defendant on an attorney own client scale.
3) That the conduct of the defendant was palpably directed towards delaying the matter.

[11] My understanding of the stance of the plaintiff is thus not that the cost should not be limited but that rule 32(11) is not applicable. If the court therefore finds that the rule is applicable then the second objection raised by the plaintiff falls away.

<u>Arguments advanced on behalf of the parties:</u>

On behalf of the plaintiff

[12] Mr Babamia argued that rule 32(11) speaks to a situation whereby the interlocutory application has been litigated to finality, whereas rule 97(1) regulates a situation where proceedings are withdrawn after they have been set down. In the current matter the exception proceedings were withdrawn after having been set-down and therefore falls squarely within the ambit of rule 97(1).

[13] On the agreement of costs Mr Babamia argued that in terms of clause 23 of the guarantee[3] the defendant agreed to pay all legal costs incurred by the plaintiff on a scale as

[1] (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.

[2] 97. (1) A person instituting proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he or she must deliver a notice of withdrawal and may include in that notice a consent to pay costs and the taxing officer must tax such costs on the request of the other party.

between attorney and own client. Mr Babamia argued that the provision has been widely drafted to include costs incurred in connection with the satisfaction or enforcement of any judgment and therefore in the event that the parties have seen it fit to bind themselves to pay such costs, the court is required to give effect to their contract. In this regard the court was referred to *Western Bank Limited v Meyer, De Waal, Swart and Another*[4] as well as *Sapirstein v Anglo African Shipping Co (SA) Ltd.*[5]

[14] Mr Babamia submitted that the agreement between the parties essentially put an end to any debate as to the scale of costs payable by the defendant.

[15] Lastly Mr Babamia argued that the defendant's conduct is deserving of a punitive cost order as, in the view of the plaintiff, the defendant employed the exception as a delaying tactic. Mr Babamia contended that the lack of merits of the exception was clearly addressed in the plaintiff's heads of argument on the exception and if the defendant believed in the merits of its exception it would not have withdrawn same.

On behalf of the defendant

[16] Mr van den Bergh confirmed that the defendant withdrew its notice of exception dated 19 March 2021.

[17] Mr van den Bergh submitted that in terms of rule 32(11) the default position is that cost in an interlocutory application is limited to N$ 20 000 unless a clear case is made out for a higher cost scale.

[18] Mr van den Bergh urged this court to disregard the argument advanced by Mr Babamia that rule 97(1) rather than rule 32 is applicable to the withdrawal of the notice of exception. Mr

[3] **23. COSTS**

All legal costs incurred by a Party in consequence of a default of the provisions of this Agreement by any other Party shall be payable on demand by the defaulting Party on the scale as between attorney and own client and shall include collection charges, the costs incurred by the non-defaulting Party in endeavouring to enforce such right prior to the institution of legal proceedings and the costs incurred in connection with the satisfaction or enforcement of any judgment awarded in favour of the non-defaulting Party in relation to its rights in terms of or arising out of this Agreement.

[4] 1973 (4) SA 697 TPD.

[5] 1978 (4) SA 1 (AD) at 14.

van den Bergh pointed out that the Rules of Court are divided in certain Parts and Part 10 of the Rules, within which rule 97 falls, deals with trials and not interlocutory applications.

[19] Mr van den Bergh referred me to *South African Poultry Association v The Minister of Trade and Industry*[6] wherein the court in unequivocal terms stated that a clear case must be made out for the court is to allow a scale of cost above the upper limit allowed in the rules and that the onus rests on the party who seeks a higher scale. Mr van den Bergh submitted that the plaintiff failed to make out a clear case for the higher scale of costs.

[20] Regarding the plaintiff's submission that the defendant raised the exception as an delaying tactic Mr van der Bergh submitted that if one considers the amendment of the plaintiff's particulars in order to address the exception raised it is clear that the exception has been well founded.

[21] In conclusion Mr van den Bergh argued that the agreement between the parties is subject to the court rules of Namibia and thus rule 32 applies to the cost scale in the current matter.

Legal principles in respect of cost

[22] *Cilliers*[7] defines the concept of "costs" as being the sum of money a court orders one party in proceedings to pay to another party as compensation for the expense of litigation incurred. In considering the purpose of costs Maritz JA stated the following in *Afshani and Another v Vaatz*[8]:

'Costs are not awarded on a party and party-basis as punishment to the litigant whose cause or defense has been defeated or as an added bonus to the spoils of the victor: The purpose thereof is to create a legal mechanism whereby a successful litigant may be fairly reimbursed for the reasonable legal expenses he or she was compelled to incur by either initiating or defending legal proceedings as a result of another litigant's unjust actions or omissions in the dispute. . .It is intended to restore the disturbed balance in the scale litigation expenses.'

[23] The court has a discretion in the apportioning of costs liability, which discretion is to be

[6] 2014 JDR 2379 (Nm).

[7] A C Cilliers *Law of Costs* para 1.03.

[8] *Afshani and Another v Vaatz* 2007 (2) NR 381 (SC) para [27].

exercised judicially and not arbitrarily.

Application of rule 32(11) in interlocutory proceedings

[24] Rule 32(11) imposes a limitation on the fees recoverable in interlocutory proceedings and reads as follows:

> '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.'

[25] In *Spangenberg v Kloppers*[9] this court confirmed that the capping of fees to N$20,000 was the default position and a deviation therefrom was not merely to be had for the asking. A party seeking costs on a higher scale bore the onus of convincing the court that rule 32(11) should not apply.

Rule 32 or rule 97

[26] In *Safland Property Services Namibia (Pty) Ltd v Haikali*[10] I noted as follows:

> ' [18] It is common cause that in terms of Practice Directive 21 exceptions are to be dealt with as if they are interlocutory proceedings despite it being trite that an exception is regarded a pleading. The taking of an exception is procedural in nature and is interposed before the filing of a plea. It is therefore understandable why it is treated as interlocutory.
>
> [19] To this end cost in respect of interlocutory proceedings are regulated by rule 32(11) of the Rules of Court which stipulates that:
>
> '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$ 20 000.00.'
>
> [20] However, notwithstanding the aforementioned, this court's discretion remains and can be exercised should circumstances dictate.
>
> [21] 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

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[9] *Spangenberg v Kloopers* 2018 (2) NR 494 (HC).

[10] (HC-MD-CIV-ACT-CON-2018/02683) [2019] NAHCMD 302 (19 August 2019*).*

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

respect to 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."

[22] It is quite clear from the above passage that in order for a party to be allowed cost on a higher scale it 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.'

[27] There is no question in my mind that proceedings that relates to exceptions are interlocutory in nature and that Mr Babamia's argument that rule 32(11) would only relates to exception proceedings that has been taken to a point of finality does not hold any water. In any event, a withdrawal of the exception to take the application to finality and the opposing party is regarded as the successful party.

The exception raised as delaying tactic

[28] The plaintiff raised the issue of delay because it is an issue that the court may take into consideration when it must decide on the cost scale, be it in terms of rule 32(11) or 97 (which is not applicable in the instant matter). When having regard to the papers before me and the arguments advanced by the parties it is clear that quite some time has lapsed since the institution of the action but to lay the delay solely at the door of the defendant would be incorrect.

The plaintiff was quite indecisive when it came to the issue of amending its particulars and when it reached a point of indeed amending same, the defendant merely indicated that it will persist with the exception. The defendant did not file a new notice exception, it stood by the original exception.

[29] To argue that the exception was without merit because it was withdrawn is unfounded. Clearly the plaintiff regarded the exception as having merit as it amended its particulars of claim to remedy the complaint. The plaintiff also complained that the defendant only withdrew its exception after the matter was already set down once for hearing and postponed. The defendant can to a certain extent be critised in that regard, however Mr van den Bergh sufficiently explained what information was obtained from Bank Windhoek which holds the first five mortgage bonds over the property concerned. I cannot find that there was any undue delay caused by the defendant by raising the exception, nor can I find that the defendant applied it as a delaying tactic.

Scale of cost to apply

[30] The defendant tendered the wasted costs occasioned by the withdrawal of the exception. Such costs to be limited to rule 32(11). From the plaintiff's own point of view this matter is not of a complex nature. In my view no clear case was made out to consider granting cost order outside the limitations of rule 32(11) and the cost as tendered by the defendant is appropriate under the circumstances.

[31] My order is as set out above.

Judge's signature	**Note to the parties:**
PRINSLOO Judge	Not applicable.
Counsel:	
Plaintiff	**Defendant/Applicant**
Mr Babamia Instructed by H.D Bossau & Co.	Mr van den Bergh Instructed by Van der Merwe-Greef and Andima Inc.