



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

Practice Directive 61

**IN THE HIGH COURT OF NAMIBIA**

<b>Case Title:</b> PAMO TRADING ENTERPRISES CC v TENDER BOARD OF NAMIBIA	<b>Case No:</b> HC-MD-CIV-ACT-DEL-2020/02891
	<b>Division of Court:</b> HIGH COURT(MAIN DIVISION)
<b>Heard before:</b> HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	<b>Date of hearing:</b> 19 NOVEMBER 2021
	<b>Date of order:</b> 03 DECEMBER 2021
<b>Neutral citation:</b> <i>Pamo Trading Enterprises CC v Tender Board of Namibia</i> (HC-MD-CIV-ACT-DEL-2020/02891) [2021] NAHCMD 566 (03 December 2021)	
<b>Results on merits:</b> Merits not considered.	
<b>The order:</b> Having heard <b>JACOBUS VISSER</b> , on behalf of the Applicant(s)/Plaintiff(s) and having read the papers for <b>HC-MD-CIV-ACT-DEL-2020/02891</b> and other documents filed of record:  <b>Ruling:</b> <ol style="list-style-type: none"><li>1. The application for leave to appeal is granted.</li><li>2. Cost to be cost in the appeal.</li></ol> <b>Cost in respect of proceedings on 28 May 2021 :</b>	

3. Cost is limited to Rule 32(11).

### Reasons for orders:

#### Introduction

[1] This is an application for leave to appeal against my judgment delivered on 9 December 2020. The application has been brought in terms of rule 115 of the rules of this court.

[2] In addition to the application for leave to appeal this court was called upon to determine the issue of the scale of the wasted cost payable by the respondents in respect of the proceedings of 28 May 2021.

#### **AD COST SCALE:**

##### Brief background

[3] The application for leave to appeal was scheduled for hearing on 28 May 2021. In terms of this court's order dated 22 February 2021 the Government respondents had to file their answering papers on or before 8 March 2021 and their heads of argument on or before 14 May 2021. The respondents failed to comply with both these dates and as a result the applicants raised a *point in limine* that the respondents' failure to comply with the court order stand to be sanctioned in terms of rules 53 and 54 of the Rules of Court as the respondents failed to seek condonation for the non-compliances.

[4] In addition thereto the respondents failed to address or deny the majority of contentions advanced on behalf of the applicants in support of their application for leave to appeal.

[5] In spite of the respondents having had knowledge of the *points in limine* raised on 7 May 2021, wherein the applicants were at pains to point out the defects in the papers of the respondents, the respondents only jumped action and filed an application for condonation on 27 May 2021 (approximately 24 hours prior to the hearing of the matter).

[6] The application for condonation was considered on 28 May 2021 but was struck from the roll for a number of reasons. The application was doomed from the onset, not only due to the non-compliance with rule 32(9) and (10) but also due to a poorly drafted founding affidavit that failed to provide a detailed and accurate explanation regarding the non-compliance with the court order and further failed to deal with the prospect of success. To add insult to injury, it also

became clear in the application that the respondents failed to bring the application for condonation as soon as they became aware of the non-compliance.

[7] As a result of the striking of the application the respondents were held liable for the applicants' wasted costs however the applicability of rule 32(11) on the wasted costs awarded to the applicants, stood over for determination together with the application for leave to appeal.

#### The applicability of Rule 32(11)

[8] Counsel for the applicants took a strong view that the costs should not be capped as there was a flagrant disregard with the court order and that the respondents should be liable for cost on a scale not limited to rule 32(11). Counsel for the respondents requested the court to limit the costs but left it in the decision in the hands of the court.

[9] It is trite that the court has a discretion in the apportioning of costs liability, which discretion is to be exercised judicially and not arbitrarily.

[10] In *Spangenberg v Kloppers*<sup>1</sup> 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 bears the onus of convincing the court that rule 32(11) should not apply.

[11] In *South African Poultry Association v The Ministry of Trade and Industry*,<sup>2</sup> Damaseb JP found the following factors to be determinative in the exercise of the court's discretion with 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

<sup>1</sup> *Spangenberg v Kloppers* 2018 (2) NR 494 (HC).

<sup>2</sup> (A 94/2014) [2014] NAHCMD 331 (07 November 2014), para 67.

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.'

[12] In the aforementioned 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.'<sup>3</sup>

[13] It is thus clear 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.

[14] The parties had the opportunity to file additional heads of argument subsequent to their appearance in court on 28 May 2021 and neither parties deemed it prudent or necessary to address the issue of higher cost scale in their papers. I am of the view that due to the nature of the application that served before court on 28 May 2021 and the lack of complexity thereof it does not justify cost at the upper limit of the cost scale.

## AD MERITS

[15] Having considered the papers filed of record as well as counsel's oral submissions the court is of the view that there is reasonable prospect that another court may come to a different conclusion. Accordingly, the court is persuaded that leave to appeal should be granted.

[16] My order is therefore as set out above.

	<b>Note to the parties:</b>
	Not applicable.

<sup>3</sup> *South African Poultry Association and Others v Ministry of Trade and Industry and Others* (supra) at paragraph [67].

<b>Counsel:</b>	
<b>Plaintiffs</b>	<b>Defendants</b>
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