

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING IN TERMS OF PRACTICE DIRECTION 61

<b>Case Title:</b>  Spar Group Limited  and  Insignia Retail (Pty) Limited Mekondjo Kweenda Ambrosius Mulongeni Tarah Natangwe Shaanika Ndinelao Kweenda Alwaysn Petrus Van Straten N.O.	Plaintiff   1 <sup>st</sup> Defendant 2 <sup>nd</sup> Defendant 3 <sup>rd</sup> Defendant 4 <sup>th</sup> Defendant 5 <sup>th</sup> Defendant 6 <sup>th</sup> Defendant	<b>Case No:</b> HC-MD-CIV-ACT-CON-2022/02052  <b>Division of Court:</b> Main Division  <b>Heard on:</b> 18 July 2023
<b>Heard before:</b> Honourable Mr Justice Usiku	<b>Delivered on:</b> 8 August 2023	
<b>Neutral citation:</b> <i>Spar Group Limited v Insignia Retail (Pty) Limited</i> (HC-MD-CIV-ACT-CON-2022/02052) [2023] NAHCMD 487 (8 August 2023)		
<b>Order:</b> <ol style="list-style-type: none"><li>1. The plaintiff's prayer for costs not limited in terms of rule 32(11) is refused.</li><li>2. The first, second, third, fourth and fifth defendants are ordered to pay, jointly and severally, the one paying the other to be absolved, the costs of the plaintiff occasioned by the exception. Such costs include costs of one instructing and one instructed counsel. Furthermore, the costs granted herein are subject to the limit imposed by rule 32(11).</li><li>3. The defendants shall file their intended notice of intention to amend their plea and counterclaim on or before 31 August 2023.</li><li>4. The plaintiff shall file notice of objection, if any, on or before 14 September 2023.</li><li>5. If no notice of objection is filed, the defendants shall file their amended plea and</li></ol>		

counterclaim on or before 21 September 2023.

6. The matter is postponed to 4 October 2023 at 15h15 for status hearing.
7. The parties shall file a joint status report on or before 27 September 2023.

### **Reasons for order:**

USIKU J:

#### Introduction

[1] The only issue to be determined in this matter is whether the plaintiff is entitled to a costs order on the scale higher than the limit imposed by rule 32(11).

#### Background

[2] On 5 May 2023, the plaintiff brought an exception against plea and counterclaim filed by the first, second, third, fourth and fifth defendants. The ground for the exception was that the plea and counterclaim lack averments necessary to sustain a cause of action, alternatively that the same is vague and embarrassing. The plaintiff prayed that the exception be upheld with costs not limited by the provisions of rule 32(11).

[3] The exception was set down for hearing for the 18 July 2023. At the hearing the parties informed the court that the defendants intend to remove the cause of the complaint, by amending their plea and counterclaim, and tender costs to the plaintiff limited to N\$20 000, in terms of the provisions of rule 32(11).

[4] Ordinarily, the matter would have ended there. However, the plaintiff insists that it is entitled to a costs order not limited in terms of rule 32(11). The defendants resist that prayer.

#### Plaintiff's position

[5] The plaintiff submits that it is entitled to a costs order not limited by the provisions of rule 32(11), on account that:

- (a) the plaintiff went to great effort to set out its grounds of exception in as much detail as possible and with reference to authority to afford the defendants ample opportunity to

properly and timeously consider it and then attend to remedying the grounds of the exception without the need for an unnecessary and costly interlocutory hearing;

(b) the fact that:

- (i) the plaintiff has done all that it can to resolve the interlocutory dispute, by providing the defendants with detailed grounds of the exception and the authority in support thereof at the earliest possible stage; and that,
- (ii) the plaintiff is required by law to raise an exception as early as possible, to avoid wastage of resources on unnecessary litigation on excipiable defence or counterclaim;

would render a costs order limited by rule 32(11) prejudicial to the plaintiff in the circumstances.

#### Defendants' position

[6] The defendants submit that they indicated to the plaintiff on 10 July 2023, that they intend to amend their pleadings with a view to remove the cause of complaint.

[7] The defendants further submit that even if the hearing of the exception was conducted and the plaintiff wins, the plaintiff would still have been entitled only to a costs order limited to N\$20 000.

[8] It is a further submission of the defendants that there is a good reason for setting a cap on costs in interlocutory applications and that the plaintiff bears the *onus* of showing why the capping is not necessary in the present case.

#### Analysis

[9] The general rule governing the granting of costs in civil litigation is that the successful party is awarded costs as between party and party. It is common cause that the successful party in the present matter is the plaintiff.

[10] Insofar as interlocutory proceedings are concerned, the general rule is that the costs that may be awarded to a successful party may not exceed N\$20 000<sup>1</sup>. The rationale of the rule limiting costs in interlocutory matters to N\$20 000 is to discourage a multiplicity of interlocutory motions which often increase costs and hamper the court from speedily getting to the real

<sup>1</sup> Rule 32(11) of the rule of the High Court of Namibia.

disputes in the case<sup>2</sup>.

[11] Where a party seeks a costs order on a higher scale, such party bears the *onus* to set out a factual basis on which he seeks departure from the rule that costs are limited to N\$20 000<sup>3</sup>.

[12] In the matter of *SA Poultry Association v Ministry of Trade and Industry*,<sup>4</sup> the court set out the following factors to be taken into account when considering whether or not to grant costs on a higher scale, namely:

- (a) the importance and complexity of the matter;
- (b) the fact that the parties are litigating at full stretch;
- (c) whether the parties are litigating with equality of arms. It will be a weighty consideration if both parties crave a scale above the upper limit allowed by the rules;
- (d) the reasonableness or otherwise of a party during the discussions contemplated in rule 32(9);
- (e) the dispositive nature of the interlocutory motion; and,
- (f) 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 set by the rules.

[13] In the present matter, the exception in question is the first interlocutory application between the parties. There is no evidence that the defendants have conducted themselves unreasonably under rule 32(9). The exception that was raised is not dispositive of the main case. It appears to me that the parties are not litigating with equality of arms and do not have comparable strength in terms of resources. It is common cause that the defendants are opposed to a costs order above the limit set by the rules.

[14] The gist of the plaintiff's claim to a costs order not limited by rule 32(11) is that, it has done all that it reasonably could to avoid the interlocutory dispute.

[15] I am of the view that it is the responsibility and obligation of all parties to do all they reasonably can to avoid interlocutory disputes, in all cases. Absent evidence that the opposing party conducted itself in an unreasonable manner during the discussions contemplated under

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<sup>2</sup> *SA Poultry Association v Minister of Trade and Industry* 2015 (1) NR 260 at p 282 B-E.

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

<sup>4</sup> *Supra*, footnote 2.

rule 32(9) or absent some other special considerations arising from the circumstances which gave rise to the launching of the interlocutory proceeding or from the conduct of the party, the fact that a party has done all that reasonably could be done, in order to avoid the interlocutory dispute, on its own, does not warrant the deviation from the limit set by rule 32(11).

[16] For its argument that it is entitled to a costs order not limited by rule 32(11), the plaintiff relied on the case of *CRAN v MTC*<sup>5</sup>. I am of the view that the CRAN matter is distinguishable from the present case in that the Supreme Court in that matter considered that:

- (a) both parties held the view that costs should not be limited in terms of rule 32(11);
- (b) the exception was dispositive of the dispute between the parties;
- (c) the matter was of public interest and considerable importance to the parties; and that,
- (d) the sums involved were considerable.

[17] The foregoing considerations do not apply to the present matter.

[18] I am of the view that the plaintiff has not discharged its onus of setting out a factual basis warranting a departure from the provisions of rule 32(11). For that reason, the plaintiff's prayer to be granted a costs order not limited by the provisions of rule 32(11) stands to be refused.

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

1. The plaintiff's prayer for costs not limited in terms of rule 32(11) is refused.
2. The first, second, third, fourth and fifth defendants are ordered to pay, jointly and severally, the one paying the other to be absolved, the costs of the plaintiff occasioned by the exception. Such costs include costs of one instructing and one instructed counsel. Furthermore, the costs granted herein are subject to the limit imposed by rule 32(11).
3. The defendants shall file their intended notice of intention to amend their plea and counterclaim on or before 31 August 2023.
4. The plaintiff shall file notice of objection, if any, on or before 14 September 2023.
5. If no notice of objection is filed, the defendants shall file their amended plea and counterclaim on or before 21 September 2023.

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<sup>5</sup> *CRAN v MTC* Case No SA 37/2011 delivered on 4 November 2021.

6. The matter is postponed to 4 October 2023 at 15h15 for status hearing.	
7. The parties shall file a joint status report on or before 27 September 2023.	
<b>Judge's signature</b>	<b>Note to the parties:</b>
B Usiku Judge	Not applicable
<b>Counsel:</b>	
<b>Plaintiff:</b>	<b>First &amp; Sixth Defendants:</b>
SJ Jacobs Instructed by Koep & Partners, Windhoek	AP Van Straten NO. Windhoek
	<b>Second, Third &amp; Fifth Defendants</b>
	S Namandje Of Sisa Namandje & Co. Inc., Windhoek
	<b>Fourth Defendant</b>
	L Kavendjii, Of Kangueehi & Kavendjii Inc., Windhoek