

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING IN TERMS RULE 75 (7)

PRACTICE DIRECTION 61

Case Title: Utz Oliver Adolph and Johannes Petrus Willem Nagel	Plaintiff Defendant	Case No: HC-MD-CIV-ACT-CON-2022/02127 Division of Court: High Court, Main Division
Coram: Honourable Justice Schimming-Chase	Heard: Determined on the papers Delivered: 30 October 2023	
Neutral citation: <i>Adolph v Nagel</i> (HC-MD-CIV-ACT-CON-2022/02127) [2023] NAHCMD 687 (30 October 2023)		
Order:		
1. The taxation review is dismissed.		
Reasons:		

SCHIMMING-CHASE J:

[1] This is a stated case brought in terms of rule 75(4) of the rules of this court. The plaintiff (the applicant in this review application) seeks to review the determination and ruling made by the taxing master during the taxation hearing of 17 July 2023.

[2] The plaintiff is Utz Oliver Adolph, an adult male businessman and German national. The defendant is Johannes Petrus Willem Nagel, an adult male and Namibian national. I refer to the parties as they are cited in the main action, for the sake of brevity.

[3] On 6 February 2023, the court made the following order:

'IT IS HEREBY ORDERED THAT:

- 1 The defendant must file a document titled 'amended plea and counterclaim' on or before **10 February 2023**.
- 2 The defendant must pay the plaintiff's costs occasioned by the amendment and rule 61 notice.
- 3 The plaintiff must file, if so advised, a replication on or before **27 February 2023**.
- 4 The parties must file a joint case management report in PDF and MS word format on or before **15 March 2023**.
- 5 The matter is postponed to **20 March 2023 at 15:30** for a Case Management Conference.'

[4] It is the above order, specifically paragraph 2 thereof, that forms the subject-matter of the current taxation review before court. During the taxation hearing, the taxing master ruled that the proceedings which were subject to be taxed are interlocutory in nature and that costs must be capped to N\$20 000 in terms of rule 32(11) of the rules of court.

[5] It appears that both counsel for the parties agreed that the proceedings are interlocutory in nature and that the proceedings are linked to one another during the taxation hearing. However, the plaintiff takes the view that given the filing of the amended pleadings by the

defendant without the managing judge having heard the interlocutory applications, rule 32(11) finds no application. I understand the plaintiff's contention to be that given that the matter was not set down for hearing and no arguments having been advanced, it cannot be said that rule 32 (11) is not applicable in this instance. An additional argument advanced by the plaintiff is that the wording of the costs order, which 'mentions costs occasioned by the amendment and rule 61 notice', was in fact 'wasted costs'.

[6] In advancing his arguments, the plaintiff's counsel delivered written contentions in terms of rule 75 (4). The plaintiff takes the stance that there are two proceedings subject to be taxed – the purported amendment, and the rule 61 proceeding. As regards the amendment, the plaintiff submitted that compliance with rule 52(1) and (2) of the rules of court did not take place. Therefore, there was effectively no amendment application before court to consider. To further substantiate this argument, the plaintiff submitted that there was never compliance with rule 32(9) and (10) of the rules of court. This, in the plaintiff's view, means that the costs order relates to wasted costs which are not subject to rule 32(11).

[7] In respect of the rule 61 proceeding, the plaintiff submitted that given a 'completely new plea and counterclaim' being filed by the defendant, the rule 61 proceeding could not proceed and this was never argued and ruled upon by the court.

[8] The taxing master is of the view that 'for all intents and purposes, she was guided by the cost order issued by the court'. In this regard, the taxing master's opinion is that the court order denotes that the cost order is subject to rule 32(11) as it is interlocutory in nature. To substantiate her view, the taxing master states that 'the court in its order noted that it read the papers filed of record in the matter and its directions were accordingly to have the defendant file its amended plea and counterclaim and the costs occasioned therefor were to be borne by the defendant.' It was her further view that the applications 'were linked as can be deduced from the parties' rule 32(10) report filed and consequently only N\$20 000 should be allowed.'

[9] As regards the plaintiff's contention that the costs order of 6 February 2023 should be interpreted as 'wasted costs' which is not subject to rule 32(11), reference was made to the case

of *Van Heerden and Another v Tarr*¹ to define the term 'wasted costs' which arise 'when the services which occasioned them are of no more use to the parties in the action.' I fully agree with the principles elucidated in this matter as regards the definition of the term 'wasted costs'.

[10] What is necessary in this instance however, is to consider the provisions of rule 32, and in particular rule 32(11) and the rationale behind it to determine whether the taxing master was correct in making her ruling.

[11] Rule 32 deals specifically with all interlocutory (or interim) matters. Rule 32(11) provides 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.

[12] Damaseb JP in *South Africa Poultry Association v The Ministry of Trade and Industry*² dealt with the rationale the rationale of rule 32(11):

'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.' (Emphasis supplied.)

[13] This dictum is to be considered together with the overriding objectives of judicial case management set out in rule 1(3), which are to *inter alia* facilitate the real issues in dispute speedily, efficiently and cost effectively by limiting interlocutory proceedings.

[14] The proceedings which were subject to be taxed by the taxing master were interlocutory in nature and therefore clearly governed by the provisions of rule 32(11). The defendant's amendment was granted in view of paragraph 1 of the Order of 6 February 2023. In the premises, I cannot agree with the plaintiff's argument that there is no successful party to the

¹ *Van Heerden and Another v Tarr* 1959 (2) SA 328 (E) at 330H.

² *South Africa Poultry Association v The Ministry of Trade and Industry* 2015 (1) NR 260 (HC) para 67. See also *Spangenberg v Kloppers* 2018 (2) NR 494 (HC) paras 26-30

proceedings, as it is evident that the defendant's amendment was granted despite no notice under rule 52 (1) being filed. It is also apparent that the plaintiff took no issue therewith, having subsequently filed his plea to the amended counterclaim on 23 February 2023.

[15] Irrespective of whether the costs were wasted or not, or 'occasioned' or not, the proceedings were interlocutory. It is now well established that the uncapping of costs in terms of rule 32(11) requires separate and additional facts or argument to be presented, warranting a departure from the amount capped by the subrule. That would result in an order specifically removing the cap placed by Rule 32(11), which is not the case in this instance. No arguments were presented before court on this. No attempt was made to request an opportunity to argue costs. Therefore all costs occasioned in this matter fall squarely within the ambit of rule 32(11) and the taxing master was entirely correct in her interpretation of the costs order of 6 February 2023. As a result, I make the following order:

1. The taxation review is dismissed.

Judge's signature	Note to the parties:
Counsel:	
Plaintiff	Defendants
R Steinbach Of Cronjé Inc., Windhoek	No appearance