NOT REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: I 2909/2006

In the matter between:

LEOPARD TOURS CAR AND CAMPING HIRE CC **1st APPLICANT**

BARBARA HAUSNER **2nd APPLICANT**

MANFRED HAUSNER **3rd APPLICANT**

And

DIETMAR DANNECKER **RESPONDENT**

Neutral citation: *Leopard Tours Car and Camping Hire CC v Dannecker (I 2909-2006) [2016] NAHCMD 260 (9 September 2016)*

CORAM: VAN WYK, ACTING

Heard: 25 July 2016

Delivered: 9 September 2016

Flynote: Order refusing absolution of the instance – interlocutory in nature – three attributes indicative of an interlocutory nature when considering appealability - *s18 (3)* of the High Court Act, 16 of 1990 (the Act) – *Rule 32 (11)* of the Rules of the High Court – cost limitation for interlocutory proceedings.

Summary: Defendants in the main dispute, brought an application for absolution of the instance at the end of the plaintiff's case. It was dismissed with costs; the main dispute is still pending. Plaintiff submitted their bill of costs to the taxing master; same was approved in the amount of N$127,274.62, and was followed by the issuance of a warrant of execution against defendants.

This application sought to set aside the warrant of execution, based thereon that the cost restriction of N$20 000 contained in *rule 32(11)*, is applicable in respect of the cost of the proceedings refusing absolution of the instance and hence the taxed bill of cost was not a competent order of the taxing master.

Held, the proceedings in the application for absolution of the instance was not definitive of the rights of the parties. It did not dispose of a substantial portion of the relief claimed. It is interlocutory in nature.

Held, because of its interlocutory nature, the cost of proceedings resorts under the restriction in terms of *rule 32 (11).*

Held, the cost order in the amount of N$127,274.62, made by the taxing master was not a competent order. It is set aside and so is the warrant of execution and all court process issued pursuant thereto.

ORDER

1. The application is granted.
2. The warrant of execution dated, 7 July 2015 is set aside.
3. All process of court issued in pursuance of the said warrant of execution is set aside.
4. There is no order in respect of costs.

JUDGMENT

VAN WYK, AJ

BACKGROUND

[1] In the matter currently before me, the main dispute is *sub-judice*. The defendants in the main dispute are the applicants in this matter and the respondent in this matter is the plaintiff in the main dispute. Defendants in the main dispute brought an application for absolution of the instance at the end of the plaintiff's case. It was dismissed with

costs in the decision of Damaseb JP, in *Dannecker v Leopard Tours Car & Camping Hire CC* on 20 February 2015.[1]

[2] Plaintiff has subsequently drawn up a bill of costs in respect of the application for the absolution from the instance, in the amount of N$127,274.62, bearing the signature of the taxing master and the High Court stamp dated 19 May 2015. On 7 July 2015, plaintiff caused a warrant of execution to be issued against the movable goods of the defendants as well as against the members' interest of the second and third defendants, held by them in Hausner Properties CC.

[3] Defendants, in this matter, the applicants (and I will be using the term applicants forthwith), are contending that the application for absolution of the instance was an interlocutory application and hence resorts under the cost restriction in terms of *rule 32 (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 cost that may be awarded to a successful party in any interlocutory proceeding may not exceed N$ 20 000.'

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1 *(I 2909/2006) NAHCMD 30 920 (FEBRUARY 2015)*

[4] Respondents in this matter, (and I will forthwith use this term), contended by way of opposing affidavit of the legal practitioner of record, Mr. Vaatz, that an application for absolution of the instance is not an interlocutory proceeding and hence is not subject to the legal cost restriction in *rule 32(11)*. Mr. Vaatz raised a further argument that the taxation of the applicant's bill of cost is *res judicata*, and applicant can no longer challenge the cost granted in the taxation. On the date of hearing this application, Mr. Vaatz abandoned his latter point regarding the taxation being *res judicata*, and restricted his opposition to the application to the argument that absolution of the instance is not an interlocutory application within the contemplation of the Legislator in *rule 32(11)*.

[5] He advanced an interesting argument that the legal figure of absolution of the instance does not fit into the category of interlocutory proceedings addressed by *rule 32* in general. These proceedings in *rule 32* is mainly providing for the seamless flow of the joint case management process by a managing judge. It has been introduced as part of the new High Court Rules in 2014 for this very purpose, and it was not the intention of the Legislator to include absolution of the instance also in this category – so his argument goes. He contended that 'In that context the question of interlocutory matters and applications for directions becomes relevant, because of the new function the judge is fulfilling under the new amended system'[2].

[2] Respondent's Heads of Argument

[6] He further submitted that reliance on textbooks and judgments prior to 2014, is not appropriate in the interpretation of *rule 32(11)*. 'Absolution of the instance is something totally different. An application for absolution can result in the court granting judgment in favour of the defendant, so it is a substantially more comprehensive application'[3] and essentially more legal work is to be done to avert the matter ending badly for the plaintiff. He continued by stating that this cost restriction in *rule 32(11),* was mainly aimed at these minor procedural matters on which the judge's ruling is intended, and essentially is not including an application like absolution of the instance that can result in the end of the matter.

[7] The question before this court in this regard is two-fold. Firstly, whether absolution of the instance is an interlocutory proceeding or not and then secondly – whether it is contemplated to be resorting under the type of interlocutory proceedings contemplated in *rule 32(11).*

[8] In this respect counsel for the applicant, Mr. Mouton, submitted that an interlocutory order is an order granted by a court at an intermediate stage in the course of litigation, settling or giving directions with regard to some preliminary or procedural question that has arisen in the dispute between the parties.[4] It may be purely interlocutory or an interlocutory order having final or definite effect. The distinction between a purely interlocutory order and an interlocutory order having final effect is of

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3 Respondent's Heads of Argument

4 Herbstein & Von Winsen, The Practise of the High Courts of South Africa, Fifth Edition, Volume 2 page 1204 and 1210

great importance in relation to appeals. It has been held that a refusal to grant absolution from the instance at the close of the plaintiff's case is interlocutory in form, not appealable and therefore interlocutory also in nature.[5] The following dicta of Lord De Villiers in the case of *Steytler NO v Fitzgerald* was cited as authority:

'To take the case of a judgment of absolution from the instance. It is classed by Voet (42.1.5) among interlocutory sentences, but has the force of a definitive sentence inasmuch as by our practice the particular suit in which it has been pronounced is ended, and a fresh suit is necessary to enable the plaintiff again to proceed against the same defendant. It has accordingly been frequently held in our Courts that a judgment of absolution from the instance may be appealed against, and such appeals have been brought from the Cape Supreme Court to the Privy Council. It would be different, however, where a Court refuses to grant absolution from the instance on the application of the defendant. Such refusal is purely interlocutory and has not the effect of definitive sentence, inasmuch as the final word in that suit still has to be spoken. The Court, having decided that the suit should take its ordinary course and not be put an end to by absolution the questions at issue remain open until final judgment.'[6]

[9] In my view the characteristics of the legal figure of absolution of the instance in relation to appeal – as articulated in the *Fitzgerald* matter above demonstrates the nature of this legal figure. The High Court Act, 16 of 1990*,* in *s 18 (3)* stipulates:

'No judgment or order where the judgment or order sought to be appealed from is an interlocutory order or an order as to costs only left by law to the discretion of the court shall be subject to appeal save with the leave of the court which has given the judgment or has made

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5 *Caro v Tulley 1910 TDP 1026; Steytler N.O. v Fitzgerald 1911 AD 295 at 304*

6 *Steytler N.O. v Fitzgerald supra*

the order, or in the event of such leave to appeal being refused, leave to appeal being granted by the Supreme Court.

[10] In circumstances where the application for absolution is dismissed the matter is purely interlocutory, "as the final word in the suit must still be spoken". In the matter of *Namibia Financial Institutions Union (NAFINU) v Nedbank Namibia Ltd,*[7] Smuts JA, with Damaseb DCJ and Mainga JA concurring, held that an interim interdict 'is an inherently interlocutory order upon the application of the principles laid down in *Zweni v Minister of Law and Order.*[8]

[11] I respectfully considered the discussion in *NAFINU,*[9] of these principles laid down in *Zweni*, to understand what is indeed an "inherently interlocutory order' and whether this can be a helpful approach in determining the legal questions under my current scrutiny. The crux of this discussion follows below:

'<u>Was the order appealable without leave?</u>

[15] This court has on several occasions considered the appealability of judgments and orders of the High Court[10]. The starting point is s 18(1) which grants a right of appeal against all

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7 Case No SA 26/2015 Para 32

8 (2) 1991 (4) SA 183 (W)

9 *Supra*

10 See, for example, *Vaatz and Another v Klotzsch and Others*, unreported judgment of this court, SA 26/2001, dated 11 October 2002; *Aussenkehr Farms (Pty) Ltd and Another v Minister of Mines and Energy and Another* 2005 NR 21 (SC); *Wirtz v Orford and Another* 2005 NR 175 (SC); *Handl v Handl* 2008 (2) NR 489 (SC); M*inister of Mines and Energy and Another v Black Range Mining (Pty) Ltd* 2011 (1) NR 31 (SC); *Knouwds NO (in his capacity as provisional liquidator of Avid Investment Corporation (Pty) Ltd) v Josea and Another* 2010 (2) NR 754 (SC); *Namib Plains*

'judgments and orders' of the High Court. Its corollary is s 14(1) of the Supreme Court Act which vests this court with jurisdiction to hear and determine appeals from 'any judgment or order of the High Court'. The Labour Court is a division of the High Court. (See s 115 of Act 11 of 2007).

[16] In *Knouwds NO (in his capacity as Provisional Liquidator of Avid Investment Corporation (Pty) Ltd) v Josea and Another* 2010 (2) NR 754 (SC) para 10, this court stated in this context:

''This court has, with approval, accepted the meaning ascribed to the words "judgment or order" set out in the case of *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 523I (see *Aussenkehr Farms (Pty) Ltd and Another v Minister of Mines and Energy and Another* 2005 NR 21 (SC)). Generally speaking, the attributes to constitute an appealable judgment or order are threefold, namely, the decision must be final, be definitive of the rights of parties or must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceeding. In terms of s 18(3) of the High Court Act interlocutory orders are not appealable as of right and need the leave of that court or, if that was refused, the leave of the Chief Justice, given by him on petition, to be able to come on appeal''.

[12] The NAFINU case above, relates to the legal questions in this matter in the following manner. It distilled the attributes of an interlocutory order as contemplated in *section 18(3) of the High Court Act*. In my view, the extent to which the proceedings currently under my scrutiny, also comply with these attributes should be a guideline or

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Farming and Tourism CC v Valencia Uranium (Pty) Ltd and Others 2011 (2) NR 469 (SC). *Shetu Trading CC v Chair, Tender Board of Namibia and Others* 2012 (1) NR 162 (SC); *Kahuure and Another in re Nguvauva v Minister of Regional and Local Government and Housing and Rural Development and Others* 2013 (4) NR 932 (SC).

at least illustrative[11] of whether an application for absolution of the instance is interlocutory - or not.

[13] It was held in NAFINU:[12]

'[17] The threefold attributes, drawn from *Zweni* and referred to by the court in *Knouwds,* have been frequently followed by this court.[13] In *Zweni*, the court made the distinction between 'judgments and orders' – the phrase also employed in the Supreme and High Court Acts – on the one hand which are appealable and 'rulings' on the other hand which are not.

[18] As was stressed by this court in *Shetu Trading,* the principles set out in *Zweni* on the question of appealability are 'not cast in stone' but are 'illustrative and not immutable'.[14] They are thus 'useful guidelines but not rigid principles to be applied invariably'.[15]

[19] Judgments and orders with these attributes can thus be appealed against as of right to this court. *Section 18(3)* creates an exception to this general principle. Interlocutory orders or costs orders only left to the discretion of the High Court cannot be appealed against except with leave of the High Court, or where refused, on petition where granted by this court. Leave was not sought in this instance.'

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11 *Shetu Trading CC v Chair, and Others 2012 (1) NR 162 (SC*);
12 *NAFINU,* para 17 -19
13 See for example in *Knouwds, NO, supra,* para 10, *Aussenkehr Farms (Pty) Ltd v Minister of Mines and Energy and Another* 2005 NR 21 (SC) at p 29; *Shetu Trading, supra,* para 18 – 19. *Kahuure, supra,* para 18.
14 *Supra at para 22.*
15 *Supra at para 22.*

[14] Absolution of the instance, it appears when refused is one of those orders that cannot be appealed against, without leave as contemplated in s 18 (3) of the Act. The refusal was a determination by the court in a very intermediate stage of the case and in dismissing it, the court issued marching orders to continue with the adjudication of the main dispute in which 'the final word has not been spoken'[16].

[15] The order of the court in refusal of absolution is not giving finality to the dispute between the parties in any sense; it is not definitive of the rights of the parties. Nor does it have the effect of disposing of a substantial portion of the relief claimed. Absolution of the instance when refused according to these attributes confirmed in the case of *NAFINU*, are indeed illustrative of an order falling into the category of interlocutory orders contemplated in *s 18 (3)* Act, for which leave to appeal would be required.

[16] Accordingly, I respectfully associate myself with the continued reasoning in *NAFINU*, confirming the reasoning in the case of *Cronshaw and Another v fidelity Guard Holdings (Pty) Ltd,*[17] where a further explanation is offered why a purely interlocutory order, is without prompt appeal. This reasoning of Schutz JA, to my mind, is the very foundation why the refusal of an application for absolution is interlocutory and not appealable as of right. It goes to the root of the intermediate and interlocutory nature of the decision, it is a decision in midstream of litigation and some finality must be afforded to the decision of the court a quo to give an orderly flow to the resolution of disputes in the court room:

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16 *Steytler N.O. v Fitzgerald supra*

17 *1996 (3)SA 686 (A) at 690D*

'[28] [18]Schutz JA in *Cronshaw* provides a further explanation why the grant of a temporary interdict is without prompt appeal. Prospective harm is a factor to be judged by the court of first instance in weighing the balance of convenience. This weighing exercise is aptly described by Schutz JA:

> ''This is a responsible and often difficult balancing, premised as it is on the distinct possibility that the order be wrongly granted, because of the incomplete information available to the judge, and sometimes the haste with which such matters have to be dealt with. If the grant of an interim interdict were appealable and leave were to be granted (the test being reasonable prospects of success) the interim order would be stayed. Such a stay would be destructive of the main object of an interim interdict - to maintain the status *quo* pending the final determination of the main case.
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> The stay may in its turn lead to what is called an application for leave to execute (to put the order into operation again) where considerations similar to those already weighed under the balance of convenience would have to be re-assessed. The court of first instance would then be required to reach a decision, on imperfect information, a second time, all with regard to the interim situation. If it be postulated that leave to appeal can and has been granted, the appeal court would have to reconsider that situation without being in a position to reach a final decision. From a practical point of view it seems preferable that the merits of the interdict be left for final determination at the trial, and that the interim relief, to which the balance of convenience is relevant, be considered once only.
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> The net effect of a contrary rule, allowing an appeal against the grant of interim orders, could be the undermining of a necessarily imperfect procedure, which is nonetheless usually best designed to achieve justice''. [19]

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18 *NAFINU* considering *Cronshaw supra* at 691B-C.

19 *Supra* at 691 B-F.

[17] In my determination of the question of whether the proceedings were interlocutory or not, I respectfully follow the exact same logic as in Cronshaw above - from a practical point of view it seems preferable that the merits of an application of absolution of the instance that was refused, be considered only once. And that the final determination of the rights of the parties, thereafter be considered in the trial. Hence, it makes perfect sense that an order refusing absolution of the instance, should fall into the category of interlocutory orders contemplated in s18 (3) of the Act and should not be appealable as of right.

[18] The question arises in respect of the interlocutory nature of the proceedings where absolution of the instance was granted. Can it be said that such an order is because of its appealibility[20] not an interlocutory order? In the matter currently under my scrutiny absolution of the instance was refused and I am inclined to restrict my findings to that. The outcome of the proceedings[21] is clearly not definitive of the rights of the parties, it is clearly not giving any finality to the dispute between the parties and it clearly did not dispose of any part of the case. In fact, the case is still pending.

[19] In the premises, it is my respectful finding that the order made by Damaseb JP in *Dannecker v Leopard Tours Car & Camping Hire CC,*[22] on 20 February 2015 was interlocutory in nature as it complies with all three guiding principles distilled in *Zweni* and confirmed in *NAFINU*.

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20 *Steytler N.O. v Fitzgerald supra*
21 *Dannecker v Leopard Tours Car & Camping Hire CC supra*
22 *Supra – footnote 1*

[20] The order is interlocutory, but can the same be said about the proceedings? To get an answer to this I resolved to apply the same three guiding principles to the nature of the proceedings.

[21] It seems it can be applied with equal force. The proceedings did not result in a finality of the case; it was of definitive of the rights of the parties, nor did it dispose of a substantial portion of the relief claimed. The proceedings had the potential to result in a final and definitive effect between the parties. Such is the argument of Mr. Vaatz, and that potential result is what caused the cost to escalate in defending the proceedings. Mr. Mouton countered this argument with the argument that absolution of the instance, if granted only defines the parties' rights in so far as the evidence currently before the court.

[22] Damaseb JP, stated that the test for absolution of the instance, is not whether the evidence led by the plaintiff established what would finally be required to established, but whether, there is evidence upon which a court, applying 'its mind reasonably' to such evidence, could find or might find in favour of the plaintiff.[23] It implies that the plaintiff can approach the court again, this time with the necessary evidence that can unravel the case of the defendant against the backdrop of the pleadings. If considered from this angle it seems that even proceedings when resulting

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[23] *Dannecker v Leopard Tours Car & Camping Hire CC supra, para 51*

in the granting of absolution of the instance, despite its appealability, is not final and may be interlocutory in nature.

[23] Be that as it may, it is not necessary for this court to determine the nature of the proceedings where an application for absolution of the instance was upheld. This question is left open.

[24] In the premises, I hold that the proceedings and the order so made, fall squarely within the ordinary meaning of the wording in *rule 32(11).* The language of the provision is clearly peremptory. Moreover the provision starts with the wording, 'despite anything to the contrary in these rules' – this phrase is indicative of a wider interpretation of the provision, overriding any remaining interpretation of the rules that might direct otherwise in respect of cost for interlocutory proceedings.

[25] I am mindful of the arguments that was advanced by Mr Vaatz. I do not dismiss it lightly. Absolution is indeed a serious attack on the success of any case in progress and is not a merely procedural direction in the case management process, as might be for most of the orders and directions contemplated in rule *32*. However, the wide and inclusive formulation of *rule 32 (11)* as it currently reads, compels me to give the provision its ordinary meaning. It is definitely imposing a cost limitation for interlocutory proceedings and I am satisfied that the proceedings in question was indeed interlocutory.

[26] It follows that the bill of cost taxed by the taxing master, was done contrary to *rule 32 (11).* It follows further that the warrant of execution dated, 7 July 2015, and all court process pursuant thereto is set aside.

[27] The following order is made:

1. The application is granted.
2. The warrant of execution dated, 7 July 2015 is set aside.
3. All process of court issued in pursuance of the said warrant of execution is set aside.
4. There is no order in respect of costs.

L VAN WYK
ACTING JUDGE

APPEARANCES

1st – 3rd APPLICANT: **MUELLER LEGAL PRACTITIONERS**

RESPONDENT: **ANDREAS VAATZ & PARTNERS**