

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case Title: <i>Marmowerke Karibib (Pty) Ltd v Transnamib Holdings Ltd</i>	Case No.: HC-MD-CIV-ACT-CON-2017/01542
	Division of Court: High Court (Main Division)
Heard/tried before: Honourable Mr Justice B Usiku J	Date of hearing: 06 October 2020
	Delivered on: 06 October 2020
Neutral citation: <i>Marmowerke Karibib (Pty) Ltd v Transnamib Holdings Ltd</i> (HC-MD-CIV-ACT-CON-2017/01542) [2020] NAHCMD 458 (6 October 2020)	
The Order: Having heard Adv Colemann (SC) with Adv Obbes on behalf of the plaintiff and Adv Makando with Mr Conradie on behalf of the defendant and having read pleadings and other the documents filed of record: IT IS ORDERED THAT: 1. The court order granted by this court on 7 May 2020 is appealable. The plaintiff is granted leave to appeal to the Supreme Court.	

2. The costs of the application for leave to appeal are costs in the appeal.
3. The matter is postponed to 31 March 2021 at 15:15, for status hearing on the outcome of the appeal.
4. The parties must file a joint status report on or before 24 March 2021.

Reasons: Practice Direction 61(9)

Introduction

[1] This is an application by the plaintiff, for leave to appeal to the Supreme Court against the entire order and judgment made by this court on 7 May 2020. For the sake of convenience, I shall refer to the parties as they are cited in the action.

[2] On 7 May 2020 this court made an order in the following terms:

'IT IS ORDERED THAT:

1. The notice of intention to amend replication filed by the plaintiff on 25 November 2019 and the amended replication filed by the plaintiff on 16 December 2019 are improperly before court and are hereby struck out.
2. The plaintiff is directed to pay the defendant's costs occasioned by defendant's opposition to the delivery of the abovementioned documents. Such costs are to include costs of one instructing and one instructed counsel. It is further directed that the costs ordered herein shall not be limited by the provisions of rule 32(11).
3. The matter is postponed to 20 May 2020 at 15:15 for status hearing alternatively for allocation of trial dates in respect of special pleas.
4. The parties are directed to file a joint status report on or before 14 May 2020.'

[3] The events that preceded the making of the abovementioned order and the reasons for making the order, are outlined in the reasons for judgment of 7 May 2020, and I am not going to repeat them here.

[4] Aggrieved by the foregoing order, the plaintiff now seeks leave to appeal against

the order to the Supreme Court.

Application for leave to appeal

[5] In essence, the grounds upon which the plaintiff seeks leave to appeal are to the effect that the managing judge had erred in law and/or on the facts and/or misdirected himself in the following respects, namely in:

- (a) finding that an amendment to a pleading under *rule* 52(1) is an interlocutory proceeding and that the provisions of *rule* 32 are applicable to such a proceeding;
- (b) finding that a party who desires to amend a pleading after close of pleadings must seek and obtain prior leave of the court;
- (c) finding that a party wishing to amend a pleading before close of pleadings is required to seek directions in terms of *rule* 32(1) and (4);
- (d) setting aside the plaintiff's amended replication in absence of any application for such relief, and,
- (e) in awarding costs against the plaintiff and directing that such costs not be circumscribed as contemplated under *rule* 32(11).

Defendant's opposition

[6] The defendant opposes the application on the ground that the judgment or order in respect of which the application is brought, is not appealable, because it lacks the essential features of an appealable order.

[7] The defendant further broadly argues that there are no prospects of success that another court could come to a different conclusion on the merits of the matter.

Analysis

[8] Insofar as the issues of appealability of the order in question is concerned, I am of the view that the substance of the order dated 7 May 2020 is that: a party wishing to amend a pleading is required to comply with the provisions of rule 32.

[9] In contrast, the plaintiff is of the view that it has a “right” to amend a pleading, in terms of rule 52(1) without prior compliance with the provisions of rule 32. From the broad contention advanced by the plaintiff, I get the impression that the plaintiff wishes to retain the alleged “right” to amend its pleadings without prior directions from the court having been sought and obtained, at any stage of the proceedings but before delivery of judgment. It also appears that the plaintiff wishes to take issue on whether a court may *mero motu* direct compliance with rule 32 in the event where a pleading has been filed without prior compliance therewith.

[10] Having considered the argument of both parties on the question of appealability of the order, I am of the view that the order is appealable. The court has made a decision on the issue. The core of the order is dispositive of the issue in dispute and the court is therefore *functus officio* insofar as the issue at hand is concerned. The court has considered the merits of the applicability or otherwise, of rule 32. The ‘right’ of the plaintiff to bring an amendment, has been finally determined by the judgment or order. The plaintiff may not re-approach this court on the same issue. I therefore find that the order dated 7 May 2020 is a ‘judgment or order’ within the contemplation of section 18 of the High Court Act, and is appealable.

[11] Insofar as the question of leave to appeal is concerned, the trite test in applications of this nature, is whether there are reasonable prospects of success on appeal. Put differently, the test is whether there are reasonable prospects that a court on appeal may have a different view.

[12] In the present matter, the substance of the order in respect of which leave to appeal is sought, raises a matter of some importance, in the sense that it raises an important procedural issue on the control and management of cases before court. In my view the decision on appeal will have relevance not only to the case at hand, but also to the conduct of other related cases under case management. I have not been able to find decided cases precisely on the same issue and no decided cases on the issue were referred to by counsel on either side. The order in question entailed interpretation of the rules and the rules interpreted are matters on which a different court could have a different view. In the circumstances, I hold a view that reasonable prospects do exist that a court on appeal could come to a different conclusion. For the foregoing reasons, the application for leave to appeal stands to be granted.

[13] In the result I make the following order:

1. The court order granted by this court on 7 May 2020 is appealable.
The plaintiff is granted leave to appeal to the Supreme Court.
2. The costs of the application for leave to appeal are costs in the appeal.
3. The matter is postponed to 31 March 2021 at 15:15, for status hearing on the outcome of the appeal.
4. The parties must file a joint status report on or before 24 March 2021.

Judge's signature	Note to the parties:
	Not applicable
Counsel:	
Plaintiff	Defendants
Adv Colemann (SC) with him Adv. D Obbes Instructed by Engling, Stritter and Partners Windhoek	Adv. S.S Makando with him Mr D Conradie Instructed by Conradie and Damaseb Legal Practitioners Windhoek