

IN THE HIGH COURT OF NAMIBIA

Case Title: C J S v C S	Case No: HC-MD-CIV-ACT-MAT-2017/00179
	Division of Court: HIGH COURT(MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	Date of hearing: 11 MARCH 2020
	Date of order: 13 MARCH 2020
	Reasons delivered on: 13 MARCH 2020
Neutral citation: C J S v C S (HC-MD-CIV-ACT-MAT-2017/00179) [2020] NAHCMD 92 (11 March 2020)	
Results on merits: Merits of the main action not considered. Merits of the application for leave to appeal considered.	
The order: Having heard ADV JONES , on behalf of the Applicant/Defendant and MR STRAUSS , on behalf of the Respondent/Plaintiff and having read the documents filed of record: IT IS HEREBY ORDERED THAT: <ol style="list-style-type: none"> 1. The application for leave to appeal the cost order is hereby refused. 2. Applicant is ordered to pay the cost of this application. Such costs to include the cost of one instructed and one instructing counsel. 	
Reasons for orders:	
<p>[1] This is an application for leave to appeal an order that was handed down by this Court on 2 December 2019, after the applicant lodged an application seeking and allowing the substitution of Adv Jones with Ms Delpport as cross-examiner of plaintiff's witness, Mr Terence Dowdall. The order granted was as follows:</p> <ol style="list-style-type: none"> '1. Ms Delpport to be allowed to replace Adv Jones as cross-examiner of Mr Terence Dowdall; 2. Ms Delpport's cross-examination to be limited to the authorities listed by Mrs Van Rooyen in her report and any issues pertaining to the minor child since the last Court date; 3. The applicant to pay the costs of the application inclusive of one instructed/one instructing counsel.' 	

[2] The application for substitution was sought despite rule 99 (7) (b) of the Rules of Court prohibiting such a substitution. But be that as it may, that is an issue that this Court dealt with and gave a ruling in favour of the applicant.

[3] The applicant however seek leave to appeal to the Supreme Court the order granting costs against him.

Submissions and discussion

Point in limine

[4] The respondent, in her heads of argument, raised a point in limine in that the applicant failed to comply with the provisions of rule 115 (2) of the Rules of Court in that the applicant merely delivered a notice and/or statement of application for leave to appeal although it was required of him to file an application as contemplated by rule 115 (2). Rule 115 (1) and (2) reads as follows:

‘(1) When leave to appeal from a judgment or order of the court is required the person seeking leave to appeal may, on a statement of the grounds for the leave to appeal, request for leave to appeal at the time of the judgment or order.

(2) When leave to appeal from a judgment or order of the court is required and it has not been requested at the time of the judgment or order, application for such leave must be made together with the grounds for the leave to appeal within 15 days after the date of the order appealed against.’

[5] Adv Mouton, counsel for the respondent, argued that the definition of the word ‘application is provided for in the rules and is defined as ‘an application on notice of motion as contemplated in Part 8’. He argued that Part 8 commences with rule 65 which provides as follows:

‘Requirements in respect of an application

65. (1) Every application must be brought on notice of motion supported by affidavit as to the facts on which the applicant relies for relief and every application initiating new proceedings, not forming part of an existing cause or matter, commences with the issue of the notice of motion signed by the registrar, date stamped with the official stamp and uniquely numbered for identification purposes.’

[6] Adv Mouton therefore submitted that taking into account the above rule, the applicant failed to seek

leave to appeal at the time of the order and as a result had to comply with the provisions of rule 115 (2) which required the applicant to have brought this application for leave to appeal on notice of motion supported by an affidavit and not merely on a notice and/or statement as was done in this instance.

[7] It was therefore submitted on behalf of the respondent that the applicant's notice should be dismissed with costs.

[8] In contrast, Ms Delpont, counsel for the applicant however argued that the notice of application for leave to appeal substantially complies with the requirements of rule 115 (2) and that in any event this is a unique matter and does not in the strict sense have to comply with rule 115 (2) by filing a notice of motion supported by an affidavit as the facts are already before court. She submitted that there are no factual issues to be resolved and the ground of appeal are clear.

[9] In *Namibia Water Corporation Ltd v Tjipangandjara*¹ the court was faced with an application for leave to appeal a decision of the High Court to the Supreme Court in a labour matter. Masuku J, in the said case, stated and held the following:

[11] Mr. Khama further attacked the procedure adopted by the applicant as wrong and unprecedented. The applicant, in this matter followed a rather unusual procedure. It filed a notice entitled, 'Application for leave to Appeal'. It is directed to this court. The second page of the said notice, records the judgment in respect of which leave is sought; the extent of the leave, namely, against the whole order, save costs. In relation to the grounds on which the application is predicated, the applicant attached what is called a notice of appeal, marked "A". Further attached is a copy of the judgment of this court.

[12] Mr. Khama, in his spirited address, argued that the procedure followed by the applicant is improper. In this regard, he argued that when the rules speak of an application, they envisage a notice of motion, which is accompanied by an affidavit. Mr. Maasdorp, for the appellant, argued that this is not a hard and fast rule and that there is nothing innately wrong with the procedure his client followed as all that needs to be known regarding the application is presently before court.

[13] It follows, as I have held above, that the application for leave to appeal is in terms of the High Court Rules. The said rules are clear as to what an application is. Rule 1(1) defines an application and states, "application" means an application on notice of motion as contemplated in Part 8.'

[14] Rule 65, on the other hand, which falls under the rubric of Part 8, provides the following in subsection (1),

¹ (LCA 16 & 17/2017) [2019] NALCMD 33 (21 November 2019).

'Every application must be brought on notice of motion supported by an affidavit as to the facts on which the applicant relies for relief and every application initiating new proceedings, not forming part of an existing cause or matter, commences with the issue of a notice of motion signed by the registrar, date stamped with the official stamp and uniquely numbered for identification purposes.'

[15] It is clear that these provisions are peremptory and this is so from the language employed by the rule-maker, especially when regard is had to the use of the word 'must' in the very first sentence and line. In this regard, the application must consist of a notice of motion and also be accompanied by an affidavit setting out the facts on which the relief sought by the applicant is predicated. There is no notice of motion in this matter and furthermore, there is no affidavit filed stating the facts on which the application is based.

[16] In the premises, the applicant has not complied with these mandatory provisions. The fact that the application admittedly is on notice, provides cold comfort both to the respondent and the court. I know of no procedure in which an applicant for leave is allowed, when they seek leave, to merely file a notice of appeal. The notice would ordinarily be filed once the application for leave is granted by this court, or if refused, leave has been granted by the Supreme Court. I accordingly agree with the respondent in this regard.

[17] I am of the considered view, in any event, that the applicant has also not complied with the provisions of the said rule 115, which require the applicant to make a statement of the grounds for the leave to appeal. This the applicant did not do. If it had been the intention of the rule-maker to require the applicant for leave to appeal, to merely file the proposed notice of appeal without more, it would have stated so in clear language, in my considered view.'

[10] I am in respectful agreement with the conclusion that the court in *Namibia Water Corporation Ltd* reached regarding the position that the application for leave to appeal must be brought on notice of motion supported by affidavit. There appears to be merits in the point in limine raised on behalf of the respondent and the said point in limine is upheld.

Merits of the application

[11] Although the point in limine was upheld which disposed of the matter, I am of the considered view that I must deal with the merits of the matter as the parties not only argued the point in limine but also advanced arguments on the merits of the application for leave to appeal.

[12] Not to overburden the record, I will not reiterate the submissions made by both counsel.

[13] Therefore having considered the written submissions filed as well as the oral submissions made by

counsel, the application for leave to appeal the cost order granted against the applicant is hereby refused on the merits, and my reasons are as follows:

a) From the record of this matter, more specifically the order of 21 June 2019, an impression was made and created by applicant's instructing and instructed counsel that Adv Jones, who was also present in a chamber meeting, was available to conduct the continuation of the trial from 11 to 15 November 2019 as well as the further hearing of 2 to 6 December 2019. Mr Jones affirmed that he was able and available to conduct the continuation of the trial and specifically the cross-examination of Mr Dowdall with whom he commenced with during June 2019 not only from 11 to 15 December 2019 but also from 2 to 6 December 2019 if necessary.

b) The Court acknowledges that the matter could not proceed during the first week of the 11th of November 2019 for continuation of trial due to unforeseen circumstances and the unavailability of the trial judge, but sight should not be lost of the fact that the dates for the continuation of the trial were already set as far back as June 2019, to dates which Adv Jones agreed to. No information at that point was availed to the trial judge or the opposing party that Adv Jones will not be able to proceed with the trial the first week of December. I am utterly perplexed by the position of the applicant in this matter that the application for relaxation of rule 99 (7) (b) and the substitution of Adv Jones by Ms Delpot was necessitated by the Court's unavailability during the first week of November, although Adv Jones himself agreed that he will avail himself to continue with the trial and cross-examination of Mr Dowdall during and as from 2 to 6 December 2019 if necessary. The applicant's counsel agreed to the aforesaid dates yet they now want to shift the blame on the Court.

c) What is even more inexplicable is that the applicant now suggests that had it not been for the Court's unavailability during the first week of November 2019, an application for the relaxation of rule 99 (7) (b) would not have been necessary. It was in no way definite that the cross-examination of Mr Dowdall would have been completed during the week of 11 to 15 November 2019 considering the numerous pages of Mr Dowdall's witness statement consisting of ± 70 pages excluding the annexures. It therefor does not assist the applicant to argue that the substitution of Adv Jones with Ms Delpot came about and was as a result of the Court's unavailability during the first week of November. In any event, it is evident from para 4 in applicant's affidavit in support of the application for substitution, that he sought an indulgence in relaxing rule 99 (7) (b).

d) The applicant, Ms Delpot and Adv Jones, according to para 9 in applicant's affidavit for the

application for substitution, knew as from the June 2019 session of the trial that the applicant was unable to afford Adv Jones for the remainder of the trial. However the applicant, with the knowledge of Ms Delpont and Adv Jones went ahead and reserved the services of Adv Jones for the period of 11 to 15 November 2019 and 2 to 6 December 2019. The applicant waited until 28 November 2019 to launch the application for substitution which should have been done months before when the financial situation of the applicant was made known to his legal team.

e) From a glance of the applicant's affidavit of the application for substitution, one notices that the applicant is blowing hot and cold air at the same time as he alleges in para 12 that he did not reserve Adv Jones for the first week of December whereas it is clear from para 13 that Adv Jones' reservation was cancelled. It is however not clear from reading the said affidavit when Adv Jones reservation was cancelled. This is information that was supposed to be brought before court.

f) As a result of the above discussion, the application for substitution was the applicants own doing and the blame should not be shifted towards the Court for the said application. It is due to the Applicant's own doing that such an application for substitution was brought and also brought at a late stage. I am therefore satisfied that I have in no way erred in making a cost order against the applicant.

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

Judge's signature	Note to the parties:
	Not applicable.
Counsel:	
Applicant	Respondents
Mrs Delpont Of Delpont legal Practitioners	Adv Mouton Instructed by De klerk Horn & Coetzee Incorporated