

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: Henner Diekmann and Free Press of Namibia (Pty) Ltd Tangeni Amupadhi Shinovene Immanuel Tileni Mongudhi Ndanki Kahuirika	Plaintiff 1 st Defendant 2 nd Defendant 3 rd Defendant 4 th Defendant 5 th Defendant	Case No: HC-MD-CIV-ACT-DEL-2020/04201 Division of Court: Main Division Heard on: 24 September 2021
Heard before: Mr. Justice Sibeya, J		Delivered: 01 October 2021
Neutral citation: <i>Diekmann v Free Press of Namibia (Pty) Ltd</i> (HC-MD-CIV-ACT-DEL-2020/04201) [2021] NAHCMD 454 (01 October 2021)		
Order:		
<ol style="list-style-type: none">1. The defendants' application for leave to appeal to the Supreme Court against the order and judgment of this court for the dismissal of the exception is refused.2. The defendants are ordered to pay the plaintiff's costs for opposing the application for leave to appeal, jointly and severally, the one paying the other to be absolved, subject to rule 32 (11).3. The matter is postponed to 02 November 2021 at 14:00 for a Case Planning Conference.4. The parties must file a joint case plan on or before 28 October 2021.		

Reasons for order:

SIBEYA, J:

Introduction

[1] Serving before this court is an application for leave to appeal where the defendants seek leave to appeal to the Supreme Court against the order (delivered on 24 June 2021) and the whole judgment (delivered on 02 July 2021). The order and judgment sought to be appealed against is for the dismissal of the exception raised by the defendants with costs subject to rule 32(11). The application for leave to appeal is opposed. The parties herein are referred to as cited in the main action.

[2] In the main action, the defendants raised an exception to the plaintiff's particulars of claim where the plaintiff seeks a declaration that the defendants are in contempt of court on account of failure to comply with a court order. The exception was that the particulars of claim do not disclose or sustain a cause of action for not been instituted on notice of motion as provided for in rule 74(1). In the judgment of this court, the exception was found to be meritless, consequently the exception was dismissed with costs. It is against that judgment that the defendants seek to appeal.

[3] The defendants set out several grounds on which the application for leave to appeal is based which can be summarized as follows:

(a) That this is the first matter within this Court's jurisdiction where contempt of Court proceedings were instituted by issuing out summons in terms of rule 7 of the High Court Rules, instead of being instituted on notice of motion in terms of rule 74(1), therefore the Supreme Court should air its voice and settle the issue.

(b) That the court erred in interpreting the word "must" in rule 74(1) to be directory, not peremptory.

(c) That the court erred in finding that there is a foreseeable dispute of fact (which in any event could not be resolved by referring the particular dispute for oral evidence in terms of rule 67).

Appealability

[4] The plaintiff raised a point of law that the order of this court dismissing the exception is not appealable. Mr. Heathcote, who appeared for the plaintiff, submitted that the order of this court did not dispose of a substantial portion of the relief claimed in the main action, neither was it final on the merits of the matter, thus making it not appealable. He referred to *Knouwds NO (in his capacity as liquidator of Avid Investment Corporation (Pty) Ltd v Josea and Another*¹ for his submission. Mr. Boesak submitted the contrary and argued that it is beyond question that the order of his court is appealable. I must point out that by the time that the plaintiff challenged the appealability of the judgment, the defendants had long filed their heads and they did not supplement same in order to address this subject. This subject was therefore not comprehensibly addressed by Mr. Boesak in oral arguments.

[5] The point of departure to determine the appealability or not of the judgment of this court on the exception raised is s 18(3) of the High Court Act,² which provides that:

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

[6] While addressing s 18(3) of the High Court Act, Shivute CJ in *Di Savino v Nedbank Namibia Ltd*³ stated that:

‘...The spirit of s 18(3) is that before a party can pursue an appeal against judgment or order of the High Court, two requirements must be met. Firstly, the judgment or order must be appealable. Secondly, if the judgment or order is interlocutory, leave to appeal against such judgment or order must first be obtained even if the nature of the order or judgment satisfies the first requirement.’

[7] The Supreme Court in *Shetu Trading CC v Tender Board of Namibia*⁴ set out the following requirements to be satisfied for a judgment or order to be appealable:

a) It must be final in effect and not susceptible to alteration by the court of first instance;

¹ *Knouwds NO (in his capacity as liquidator of Avid Investment Corporation (Pty) Ltd v Josea and Another* 2010 (2) NR 754 (SC) para 10.

² 16 of 1990.

³ *Di Savino v Nedbank Namibia Ltd* 2017 (3) NR 880 (SC) para 51.

⁴ *Shetu Trading CC v Tender Board of Namibia* 2012 (1) NR 162 (SC). See also *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A).

- b) It must be definitive of the rights of the parties; and
- c) It must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

[8] Mr Heathcote cited the Supreme Court judgment of *Elifas and Others v Asino and Others*⁵ where Damaseb DCJ found that the decision of the High Court to direct a deponent to an affidavit in pending motion proceedings to give oral evidence in terms of rule 67(1)(a) was not an appealable judgment or order.

[9] I hold the view that a ruling on an exception is as *in casu* is distinguishable from that delivered on application to have the deponent to an affidavit subjected to giving oral evidence. An exception goes to the root of the claim, so to speak, while the referral to oral evidence is a merely procedural step. It may be argued that the present exception raised also amounts to a procedural step camouflaged in an exception. Considering that this subject was not fully addressed by the defendants, I have decided not to pursue and leave it for debate on another day, save to state that for the purposes of these proceedings, I am prepared to accept that the judgment is final in effect but I opt not to address the remainder of the questions on appealability.

The application for leave to appeal

[10] In *Shilongo v Vector Logistics*⁶ the court stated as follows regarding the test for an application for leave to appeal:

[4] It was observed in *S v Nowaseb* that –

“[2] (Thus) an application for leave to appeal should not be granted if it appears to the Judge that there is no reasonable prospect of success. And it has been said that in the exercise of his or her power, the trial Judge (or, as in the present case, the appellate Judge) must disabuse his or her mind of the fact that he or she has not reasonable doubt as to the guilt of the accused.”

[11] In *Communications Regulatory Authority of Namibia v Mobile Telecommunications Company*,⁷ it was said:

⁵ *Elifas and others v Asino and Others* 2020 (4) NR 1030 (SC) para 15-17.

⁶ *Shilongo v Vector Logistics* (LCA 27/2021) [2014] NALCMD 33 (7 August 2014).

⁷ *Communications Regulatory Authority of Namibia v Mobile Telecommunications Company* (HC-MD-CIV-ACT-OTH-2019/01367) [2021] NAHCMD 213 (07 May 2021).

[7] The test in applications for leave to appeal is whether there are reasonable prospects that another court may come to a different conclusion. Normally, leave to appeal is granted where the court is of the opinion that the appeal would have reasonable prospects of success or if there are some good reasons why the appeal should be heard, including circumstances where there are conflicting judgments on the matter under consideration.'

[12] It is apparent from the above authorities that the applicable test in an application for leave to appeal is not that another court will come to a different conclusion, but rather that there are reasonable prospects of success on appeal.

Analysis of grounds

[13] It may be so that this is the first matter where contempt of court proceedings are brought before court on summons as opposed to notice of motion. But this is not the test. There is no substance in an application for leave based on the premise that another court may come to a different conclusion, particularly because the approach taken by this court is novel. Whether it leaves a bad taste in one's mouth or not, the test remains that there must be reasonable prospects of success on appeal.

[14] In *casu*, the defendants complain about contempt in action proceedings and not motion proceedings as provided for in rule 74(1) as the basis on which they allege that the particulars of claim do not disclose a cause of action or that a cause of action cannot be sustained. What is clear from the defendants' qualms is that they are mute on any of the allegations raised in the particulars of claim. It begs the question therefore that why then do the defendants argue that the particulars of claim do not disclose a cause of action without analysing the averments in the particulars of claim.

[15] This court, in the judgment under attack by the defendants, found that rule 74(1) is directory and therefore based on the authorities cited therein, found that where disputes of facts are foreseeable as in this matter, the plaintiff was justified to institute contempt of court proceedings on summons. The defendants argued that this constituted an irregularity. I do not agree for reasons stated in the main judgment.

[16] I hold the view that the instituting of action proceedings is more beneficial to the defendants than motion proceedings. This is fortified by the fact that in action proceedings,

witnesses who accused the defendants of committing an offence will be called to testify and be subjected to cross examination by the defendants in order to test their evidence as of right, as opposed to just exchange of affidavits on oath. Lest we forget that the test in determining whether one is in contempt of court or not is that of proof beyond reasonable doubt which raises the bar high. The possibility of referral of the matter brought on notice of motion to oral evidence on a particular portion in terms of rule 67 cannot, in my view be equated to the action proceedings where the accused has the constitutional right to cross examine the accuser and the accuser's witnesses. I therefore conclude on this subject that the claim by the defendants that any disputes of facts in this matter can be resolved by invoking rule 67 and therefore action proceedings are not warranted is misplaced.

Conclusion

[17] In view of the findings stated above, I am of the opinion that the defendants have failed to establish reasonable prospects of success on appeal.

[18] It is well established in our law that costs follow the cause and I have not been convinced to depart from this tried and tested principle. The plaintiff has succeeded to ward off the application for leave to appeal and deserves to be awarded costs. I however do not find justification to award costs beyond the cap provided for in rule 32 (11).

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

1. The defendants' application for leave to appeal to the Supreme Court against the order and judgment of this court for the dismissal of the exception is refused.
2. The defendants are ordered to pay the plaintiff's costs for opposing the application for leave to appeal, jointly and severally, the one paying the other to be absolved subject to 32 (11).
3. The matter is postponed to 02 November 2021 at 14:00 for a case planning conference.
4. The parties must file a joint case plan on or before 28 October 2021.

Judge's signature:	Note to the parties:
O Sibeya Judge	Not applicable

Counsel:**Plaintiff:**

Mr R Heathcote, SC
assisted by Ms C E Van Der Westhuizen
Instructed by Etzold-Duvenhage
Windhoek

Defendants:

Mr W Boesak
Instructed by ENSAfrica
Windhoek