REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: HC-MD-CIV-ACT-OTH-2021/03944

In the matter between:

HIGH POWER HOLDINGS INVESTMENT (PTY) LTD	**1ST APPLICANT**
EUGENE LOTTERING	**2nd APPLICANT**
WISEMAN KHUMALO	**3RD APPLICANT**

and

IMPRINT INVESTMENT (PTY) LTD	**1ST DEFENDANT**
PSP LOGISTICS (PTY) LTD	**2ND DEFENDANT**
BPLC MANAGEMENT CONSULTANTS (UK) LIMITED	**3RD DEFENDANT**
VEIINASTOCKS HOLDING GROUP INTERNATIONAL (PTY) LTD	**4TH DEFENDANT**
NAMIBIA EQUITY MINING CC	**5TH DEFENDANT**
PASCAL INVESTMENT CC	**6TH DEFENDANT**
ABUID KATJAITA	**7TH DEFENDANT**
ALFRED MBAHA	**8TH DEFENDANT**
JACQUELINE PRINCE	**9TH DEFENDANT**
JUNFA XIE	**10TH DEFENDANT**
MICK MUTANGA	**11TH DEFENDANT**
PANDULENI SHIMUTWIKENI	**12TH DEFENDANT**
RAUNA HANGHUWO	**13TH DEFENDANT**
STEVEN KARIAZU	**14TH DEFENDANT**

BEN KAUARI **15TH DEFENDANT**

IYALOO MWANINGANGE **16TH DEFENDANT**

Neutral citation: *High Power Holdings Investment (Pty) Ltd v Imprint Investment (Pty) Ltd* (HC-MD-CIV-ACT-OTH-2021/03944) [2022] NAHCMD 476 (14 September 2022)

Coram: PARKER AJ

Heard: **6 September 2022**

Delivered: **14 September 2022**

Flynote: Appeal – Application for leave to appeal from ruling that refused applicants' application to amend their pleading – Authorities on leave to appeal reviewed – Court finding that submission of applicants' counsel goes against the long line of authorities on application for leave to appeal.

Summary: Appeal – Application for leave to appeal – Applicants' application to amend pleading was refused – In a full and reasoned ruling court found that the proposed amendment introduced a new cause of action – Applicants applied for leave to appeal the refusal of the amendment – Court had found in respect of the amendment application that applicants had failed to show that the proposed amendment arises out of the same facts or substantially the same facts as the cause of action in respect of which relief has already been claimed in the action already instituted – Consequently, the court refused the amendment – In the instant matter applicants sought leave to appeal from the court's ruling refusing the amendment – Court found that applicants failed to establish that in the exercise of the court's discretion in the case to be appealed from was not on judicial grounds and for a sound reason on the basis that it was tainted with caprice or bias or the application of the wrong principle to support applicants' contention that a reasonable possibility exists that another court would reach a different conclusion and that there are reasonable prospects of success on appeal – Consequently, leave to appeal refused.

Held, not sufficient to state that reasonable possibility exists that another court would reach a different conclusion. Applicant must also indicate clearly reasonable prospects of success.

Held further, proof that a reasonable possibility exists that another court would reach a different conclusion and that there are reasonable prospects of success on appeal lies in establishing that the exercise of the court's discretion in the case to be appealed from was not on judicial grounds and for a sound reason on the basis that it was tainted with caprice or bias or the application of the wrong principle.

Held further, where the proposed amendment introduced a new cause of action such amendment would be allowed only if the new cause of action arises out of the same facts or substantially the same facts as the cause of action in respect of which relief has already been claimed in the action already instituted based on the *res gestae* rule of evidence.

Held further, applicants' counsel's submission in support of the application goes against the authorities on application for leave to appeal.

ORDER

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1. The application is dismissed with costs in terms of rule 32 (11) of the rules of court, including costs of one instructing counsel and one instructed counsel.

2. The application for leave to appeal is finalized and is removed from the roll.

RULING

PARKER AJ:

[1] This is an application for leave to appeal the 3 August 2022 ruling of the court in an application to amend pleadings. In his submission, Mr Narib referred the court to *Frenkel & Co. v Johannesburg Municipality*.[1] There, the court held that the court had no power to allow an amendment that proposed to introduce a new cause of action. I will call it the *Frenkel* rule. Mr Narib submitted that the *Frenkel* rule is not rigid. I accept Mr Narib's submission. At all events, a reading of the 3 August 2022 ruling refusing the proposed amendment will show any careful reader that the court accepted that the *Frenkel* rule is not rigid; and the court did not apply the rule strictly. In that regard, Mr Rukoro referred the court to paragraph 11 of the 3 August 2022 ruling and the illustration the court put forth in paragraph 9 of the ruling to illustrate in clear terms the view of the court that the *Frenkel* rule ought to be applied with a qualification. And I discussed the qualification. With respect, the qualification debunks Mr Narib's submission regarding the *Frenkel* rule.

[2] Mr Narib had another string to this bow. The bone and marrow of Mr Narib's submission is this. In counsel's view the refusal to allow an amendment when a new cause of action is proposed 'is on prejudice'; that is, prejudice to the opposite party. Therefore, if no prejudice is established, the court ought to exercise its discretion in favour of allowing the amendment.

[3] Mr Narib's submission has two obstacles in its way. The first is that this consideration does not always appear to determine the matter. But, more important, on the papers, it did not become necessary to consider the issue of prejudice in the determination of the amendment application. It follows inexorably that *Delport v Alweendo*,[2] referred to me by Mr Narib, is of no assistance on the point under consideration.

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[1] 1909 TH 238.

[2] NAHCMD 550 (30 November 2015).

[4] Mr Narib's submission on prescription stands in the same boat. On a parity of reasoning, *Hartzenberg v Standard Bank Namibia Limited*[3] is of no assistance on the point under consideration.

[5] By the same token, *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd* (2),[4] also referred to the court by Mr Narib, is of no assistance on the point under consideration. The reason is that that case concerns basically a situation where no cause of action existed at the time when the summons was issued and the exercise of the court's discretion to allow an amendment aimed at completing a cause of action.

[6] In all this, it should be remembered, the present application for leave to appeal is in respect of the court's 3 August 2022 ruling and the reasons therefor. After all, it is from that ruling that an appeal is sought. These conclusions lead me to next level of the enquiry.

[7] The present application turns on two crisp issues, namely, (1) whether the ruling made on 3 August 2022 is appealable; and (2) whether it is a deserving case where in the discretion of the court leave to appeal ought to be granted. If the ruling is not appealable that is the end of the matter. If, on the other hand, it is appealable, then the burden of the court is to decide whether in the exercise of its discretion it ought to grant the leave to appeal sought by applicants (plaintiffs in the action). Respondents (defendants in the action) have moved to reject the application. Mr Narib represents applicants; and Mr Rukoro represents respondents.

[8] As respects the issue of whether the ruling is appealable, the court need not look any further than the Supreme Court's decisions in *Di Savino v Nedbank Namibia Ltd*[5] and *Marmorwerke Karibib (Proprietary) Limited v Transnamib Holdings Limited.*[6] In *Marmorwerke Karibib (Proprietary) Limited*, the Supreme Court sets out concisely in these words when a 'judgment or order will generally be appealable':

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[3] *Hartzenberg v Standard Bank Namibia Limited* NASC (13 November 2015).
[4] *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd* (2)1976 (1) SA 100 (WLD).
[5] *Di Savino v Nedbank Namibia Ltd* 2017 (3) NR 880 (SC).
[6] *Marmorwerke Karibib (Proprietary) Limited v Transnamib Holdings Limited* Case No. SA 92/2020 (Judgment delivered on 27 May 2020).

'[33] A judgment or order will generally be appealable if it possess the well-known three characteristics of appealability: (a) it is final in effect and not susceptible to alteration by the court of first instance; (b) it is definitive of the rights of the parties, ie. it must grant definite and distinct relief; and (c) it disposes of at least a substantial portion of the relief claimed in the main proceedings. This court has also held that where the court the judgment or order appealed from had erroneously interpreted a rule or statute and its wrong interpretive decision was final and unalterable by it, such decision is appealable.'[7]

[9] For the sake of neatness, I shall call the four characteristics set out in para 33 of *Marmorwerke Karibib (Proprietary) Limited* 'the Shivute characteristics. I now proceed to apply the Shivute characteristics to the facts of the present case.

[10] In the present case, I find that the order in the 3 August 2022 ruling possess the first three characteristics. The fourth Shivute characteristics does not arise in the present case. The order made there is final in effect and not susceptible to alteration by the court of first instance. It is definitive of the rights of the parties because the order granted definite and distinct relief, namely, a final determination that applicants cannot amend their pleading and the upholding of respondents' rejection of the proposed amendment. Consequently, the order is appealable. And since the order is interlocutory, applicants are properly before the court for the court to decide whether to grant them leave to appeal the order.[8]

[11] Regarding applications for leave to appeal, I said the following in *S v Nowaseb*:

'It has been stated in a long line of cases that in an application of this kind the applicant must satisfy the court that he or she has reasonable prospects of success on appeal.'[9]

[12] I stated further there:

'[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)

[7] Para 33.
[8] *Marmorwerke Karibib (Proprietary) Limited*, para 32.
[9] *S v Nowaseb* 2007 (2) NR 640 (HC) para 1.

must disabuse his or her mind of the fact that he or she has no reasonable doubt as to the guilt of the accused. The judge must ask himself or herself whether, on the grounds of appeal raised by the applicant, there is a reasonable prospect of success on appeal, in other words, whether there is a reasonable prospect that the court of appeal may take a different view.'[10]

[13] That is not all. I stated also – and this is crucial:

'But, it must be remembered, "The mere possibility that another court might come to a different conclusion is not sufficient to justify the grant of leave to appeal".'[11]

[14] In *S v Sikosana*, Diemont JA states, correctly in my view thus:

'If he (the Judge) decides to refuse the application he must give his reasons …. It may be that his reasons for his refusal will appear from the reasons for convicting … but where he decides to grant the application his reasons for so doing are less likely to be found in his judgment.'[12]

[15] It is worth noting that although these authorities were pronounced in criminal matters, I see no good reason why the authorities there should not apply with equal force to civil and labour matters. Indeed, the authorities were approved and applied in *Shilongo v Vector Logistics (Pty) Ltd*.[13] I respectfully adopt the dicta by Diemont JA in *S v Sikosana*.

[16] In the instant matter, the court delivered a full and reasoned ruling running into eight pages of A4-size sheets of paper. It serves no useful purpose to match the passages of the ruling to the grounds of the present application seriatim. To do so will amount to a mere rehearsal of the reasons given for the order that was granted.

[17] Furthermore, it has been held:

'The principles justifying interference by an appellate Court with the exercise of an original jurisdiction are firmly entrenched. If the discretion has been exercised on judicial

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[10] Ibid para 2.
[11] Loc. cit.
[12] *S v Sikosana* 1980 (4) SA 559 (A) at 562H-563A.
[13] *Shilongo v Vector Logistics (Pty) Ltd* [2014] NALCMD 33 (7 August 2014).

grounds and for sound reason, that is, without caprice or bias or the application of a wrong principle, the appellate Court will be very slow to interfere and substitute its own decision. See *R v Joannou* 1957 (4) SA 385 (FC) at 386D. It is not enough that the appellate Court considers that, if it had been in the position of the lower court, it would have taken a different course.

In this case it is not possible to hold that EBRAHIM J acted upon a wrong principle or was affected by extraneous matters. The reasons given for the refusal are substantial and convincing and, if I had heard the application, my decision would not have differed from his.'[14]

[18] From the authorities, I hold that the burden of the applicants, if they wish to succeed, is: (1) to establish that a reasonable possibility exists that the Supreme Court would reach a different conclusion; and (2) to indicate clearly that they have reasonable prospects of success on appeal. (*S v Nowaseb*)[15]

[19] That is not all. This is crucial: In pursuit of discharging that burden, applicants must establish that the exercise of the court's discretion in refusing the amendment was not on judicial grounds and for a sound reason on the basis that it is tainted with caprice or bias or the application of a wrong principle. In that regard, it must be borne in mind: 'It is not enough that the appellate court considers that, if it had been in the position of the lower court, it would have taken a different course.'(*Paweni*)[16]

[20] I have carefully considered applicants counsel's submission. The gravamen of counsel's submission is that the law on amendment that proposes a new cause of action is not 'crystal clear'; and counsel refers to issues of prejudice and prescription. I do not agree with counsel's bold pronouncement. In any case, I have said previously that issues of prescription and prejudice should not detain this court in the instant leave to appeal application. And I have reiterated the point that the *Frenkel* rule is not rigid; and it was not applied in the 3 August 2022 ruling unbendingly without qualification.

[21] Consequently, Mr Narib's submission that because the law is not crystal clear we should 'give it try' by granting leave to appeal has with respect, no merit, as Mr

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[14] *Paweni and Another v Acting Attorney-General* 1985 (3) SA 720 (ZS) (per Gubbay JA) at 724H-J.
[15] See paras 11-13 above.
[16] See para 17 above.

Rukoro submitted. Mr Narib's submission goes against the authorities, some of which I have discussed previously, on the entrenched principles and requirements which a court determining an application for leave to appeal ought to consider.

[22] I repeat what I said previously. The proof that a reasonable possibility exists that the Supreme Court would reach a different conclusion and that there are reasonable prospects of success on appeal lies in establishing that the exercise of the court's discretion in refusing the proposed amended was not on judicial grounds and for a sound reason on the basis that the refusal is tainted with caprice or bias or the application of a wrong principle. (*Paweni*)[17]

[23] I find no such proof placed before the court for applicants to succeed in their application. It must be said: The reasons that were given for the refusal of the amendment are substantial and supported by authorities. Applicants have not put up anything substantial and sufficient to assail those reasons and the authorities, as Mr Rukoro submitted. Plaintiffs/Applicants cannot, therefore, succeed.

[24] It may be said in parentheses that the court's refusal of the amendment did not mean that plaintiffs (applicants) had been turned away from the seat of the judgment of the court forever with no remedy in sight in respect of plaintiffs' allegation that the 23 December 2021 meeting was unlawful. As Mr Rukoro submitted, plaintiffs (applicants) could, if so advised, sue on the peculiar facts of the 23 December 2021 meeting.

[25] Doubtless, plaintiffs/applicants do not say they need to amend their pleading to complete the cause of action in the summons already filed. Where an applicant needed to amend his or her pleading to complete the cause of action in the summons already filed, a court might, not shall, all things being equal, allow the proposed amendment.[18]

[25] Based on these reasons, the application fails; whereupon I order as follows:

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[17] Ibid.

[18] See *Barclays Bank International v African Diamond Exporters (Pty) Ltd (2) at 103F-104B*.

1. The application is dismissed with costs in terms of rule 32 (11) of the rules of court, including costs of one instructing counsel and one instructed counsel.

2. The application for leave to appeal is finalized and is removed from the roll.

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C Parker

Acting Judge

APPEARANCES:

PLAINTIFFS/APPLICANTS:	G NARIB Instructed by Shakwa Nyambe & Company Incorporated, Windhoek
DEFENDANTS/RESPONDENTS:	S RUKORO Instructed by Williams Legal Practitioners Windhoek