

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: Expedite Aviation CC and Dr Rudi Van Vuuren and Namibia Development Corporation Stefan Michaels	 Plaintiff Defendant 1st Third Party 2nd Third Party	Case No: I 1669/2015 Division of Court: Main Division Heard on: 17 October 2022
Heard before: Honourable Mr Justice Usiku	Delivered on: 31 October 2022	
Neutral citation: <i>Expedite Aviation CC v Van Vuuren</i> (I 1669/2015) [2022] NAHCMD 594 (31 October 2022)		
Order:		
<ol style="list-style-type: none">1. The application for leave to appeal is dismissed.2. The defendant is ordered to pay the plaintiff's costs occasioned by the application for leave to appeal, such costs to include costs of one instructing and one instructed legal practitioner.3. The matter is postponed to 23 November 2022 at 15:15 for status hearing.4. .The parties shall file a joint status report on or before 16 November 2022.		

Reasons for order:

USIKU J

Introduction

[1] For convenience sake, the parties are referred to as they are in the main action. This is an application by the defendant for leave to appeal against an order handed down by this court on 19 September 2022.

Background

[2] On or about 18 May 2022, the defendant reported, in a status report, that it had (through the plaintiff) requested certain JBS Helicopters in the United Kingdom to furnish it with copies of certain log-books relating to a certain helicopter, the subject matter in the dispute between the parties. The plaintiff had indicated that it had sold the helicopter (including all log-books relating to the helicopter) to a third party. The defendant then intimated that it intended to bring an application to dismiss the plaintiff's claim.

[3] On or about 2 June 2022, the defendant's legal practitioners addressed a letter to the plaintiff's legal practitioners, stating among other things that:

- (a) despite several demands, the plaintiff has refused or failed to produce the log-books in question;
- (b) in the circumstances, the defendant will not have a fair hearing; and,
- (c) the appropriate approach is for the defendant to bring an application for the court to dismiss the plaintiff's claim.

[4] The letter then ends with the following sentences:

'Kindly take note that this is an engagement in terms of Rule 32(9) of the Rules of the High Court. Further, kindly revert to us on the proposal stated above not later than 7 June 2022.'

[5] On or about 7 June 2022, the plaintiff's legal practitioners responded to the above letter, indicating, among other things, that the plaintiff is not in possession of the relevant log-books and that the same are not under the plaintiff's control. The plaintiff's legal practitioners also expressed doubt on whether the defendant's letter amounted to an 'engagement in terms of rule 32(9)'.

[6] On 9 June 2022, the defendant filed its report in terms of rule 32(10) stating, among other things, that:

- (a) the defendant had requested the court for permission to bring an application to dismiss the plaintiff's claim;
- (b) the court had ordered the defendant to comply with rule 32(9) and (10) before such application is instituted;
- (c) the defendant had on 2 June 2022, engaged the plaintiff in terms of rule 32(9);
- (d) on 7 June 2022 the plaintiff replied, in essence persisting that it cannot make the log-books available for inspection. In the circumstances, the dispute between the parties cannot be resolved amicably; and that,
- (e) the defendant shall proceed to prepare its intended application.

Application to compel

[7] On 22 June 2022, the defendant brought an application seeking an order in the following terms:

'1. Directing the plaintiff to take the necessary steps to make all the log-books and all the log-cards of the Hughes 369 A-V5 HUG helicopter ("the helicopter") or duly certified copies thereof, at the plaintiff's own cost, available in the Republic of Namibia within a period of thirty (30) calendar days from the date of court order, so that the defendant's expert can inspect them.

2. In the event the plaintiff failed to make all the log-books and all the log-cards available as set out in prayer 1, supra, authorizing the defendant to approach the Honourable Court on the same papers for the plaintiff's claim (action) under case number I 1669/2015 to be dismissed.

3. Directing that the plaintiff pays the costs of this application (in the event the plaintiff opposes this application), including the costs of one instructing and two instructed counsel.

4. Granting the defendant such further or alternative relief as the Honourable Court may deem fit.'

[8] In his founding affidavit, and in oral argument, the defendant asserts that in bringing the

present application, the defendant is enforcing his constitutional rights guaranteed under Article 12(1) of the Namibian Constitution. The defendant contends that the refusal by the plaintiff to allow him to inspect the log-books of the helicopter deprives him of a right to a fair trial within the meaning of article 12(1). Therefore, the defendant argues that the refusal by the plaintiff to make available the required log-books breaches the defendant's fundamental right to a fair trial.

[9] In opposition to the abovementioned application, the plaintiff argued, amongst other things, that there has been non-compliance with the provisions of rule 32(9) and (10) and that for that reason the application be struck from the roll.

[10] The plaintiff contended that it had no idea that the application that the defendant referred to in its letter dated 2 June 2022 would be an application to compel based on defendant's constitutional rights. The plaintiff, therefore, submits that the defendant did not make any meaningful attempt to engage the plaintiff as contemplated in terms of rule 32(9).

[11] After hearing both parties on the issue of whether or not there was compliance with rule 32(9), the court made an order in the following terms:

1. The defendant's application to compel specific discovery is struck from the roll, for lack of compliance with the provisions of rule 32(9).

2. The defendant is ordered to pay the costs of the plaintiff, such costs to include costs of one instructing and one instructed counsel. It is further ordered that such costs not be capped in terms of rule 32(11).'

[12] In giving its reasons for the aforesaid order, the court remarked that it has read the papers filed of record and has listened to oral arguments by the parties. In terms of the rule 32 (10) report filed by the defendant, it is indicated that the defendant had engaged the plaintiff in terms of rule 32(9) before instituting an application to dismiss the plaintiff's claim. However, the application that was ultimately brought before court is not the application in respect of which the purported rule 32(9) engagement was conducted. It is apparent from the papers filed of record and from the parties' oral arguments, that there was no rule 32(9) engagement in respect of the application to compel discovery, that is now brought before court. The court therefore made the above order.

Application for leave to appeal

[13] Aggrieved by the aforesaid order, the defendant, through its counsel, requested for leave to appeal, at the time of the said order or judgment.

[14] As to the statement of the grounds for leave to appeal, counsel for the defendant indicated that:

- (a) the above court order is appealable, because the court made an authoritative finding on the interpretation of rule 32(9). The court has interpreted the rule to mean that if you ask for a dismissal, then you must ask for a dismissal if that was what was discussed in the rule 32(9) procedure. That is a wrong interpretation and on that basis alone the appeal will succeed;
- (b) it appears that the managing judge had already a judgment written out which he read immediately the parties argued the matter. That in itself is not a fair trial, it is a farce, coming to argue where the court has already got a judgment noted which says what the outcome is; and,
- (c) the defendant also asks for leave to appeal against the costs order.

[15] The plaintiff opposes the defendant's application for leave to appeal on the following grounds:

- (a) the order in respect of which the application for leave to appeal is brought, is not appealable. An order striking an application from the roll for want of compliance with the provisions of rule 32(9) and (10) can never be 'final and unalterable'. It is always open to a party whose interlocutory application was struck from the roll to again launch such application upon proper and full compliance with the provisions of rule 32(9) and (10);
- (b) the order striking the application from the roll was not an 'interpretive decision'. The court merely gaged whether the attempts by the defendant to comply with the provisions of rule 32(9) and (10) were proper attempts. The defendant's attempted engagement in respect of an application 'to dismiss' could and would not facilitate a process that could lead to amicable resolution of the ultimate application launched by the defendant based on defendant's constitutional rights, and,
- (c) the defendant did not present any reason why the costs order made should be

reversed on appeal.

[16] The plaintiff, therefore, submits that the application for leave to appeal be dismissed with costs and such costs not be capped under the provisions of rule 32(11).

Analysis

[17] It is trite that an applicant for leave to appeal is required to persuade the court, firstly that the order or judgment to be appealed against, is appealable, and if so, secondly that there are reasonable prospects of success on appeal. The first issue to be determined at the outset is whether the judgment or order handed down by this court on 19 September 2022 is appealable.

[18] The attributes of an appealable order are that the decision in question must:

- (a) be final;
- (b) be definitive of the parties' rights; and,
- (c) have the effect of disposing at least a substantial portion of the relief claimed in the main proceedings.¹

[19] In my opinion, the order made by this court on 19 September 2022 did not decide the merits of the application that was before court. It is merely a ruling on a matter of procedure, namely that the defendant did not comply with the provisions of rule 32(9). Such ruling is not final, and does not have the effect of disposing of a substantial issue between the parties. Furthermore, such ruling is not definitive of the parties' rights. I am therefore of the opinion that the order in respect of which application for leave to appeal is sought, is not appealable.

[20] In the event that I am wrong in my opinion that the order in question is not appealable, and that such an order amounts to an authoritative finding on the interpretation of rule 32(9), as contended by the defendant, and therefore meets the criterion of finality, I am of the opinion that even on that score, the application for leave to appeal cannot succeed, on account that the defendant has not established the basis for the conclusion that there are prospects of success on appeal.

[21] The defendant also seeks to appeal against the costs order granted by this court on 19 September 2022. However, the defendant fails to specify the grounds on which he attacks the

¹ *Knouwds NO v Josea* 2010(2) NR 754 (SC) para 10.

costs order. An applicant for leave to appeal is required to set out the grounds of appeal succinctly and with clarity, in order to enable the court and the opposing party to discern the case the applicant seeks to make out. The provisions of rule 115, which requires the statement of grounds of appeal, appear to be peremptory, and the non-compliance therewith renders the application for leave to appeal defective, insofar as the leave to appeal is sought against the costs order.

[22] In regard to the criticism that by counsel for the defendant that the court had already a judgment written out and that the defendant did not have a fair trial, such criticism is unwarranted. The record of proceedings will indicate that counsel for the defendant had already started alleging that the court has made up its mind to dismiss the defendant's application, even before the order in question was delivered. The purported ground of appeal based on unfair trial, as alluded to by the defendant is but an attempt to redirect attention away from the relevant issues, namely whether there was compliance with rule 32(9), or not, by introducing irrelevant issues, namely that the court read the order or judgment that was handed down, as appears on the record. Both parties had put forth their respective arguments, insofar as compliance or non-compliance with rule 32(9) was concerned. The court had listened to and had considered the arguments put forth and then thereafter made its decision, which the defendant is not happy with. The issue of whether the order handed down was read or not, is irrelevant, and cannot constitute a valid ground of appeal. The ground of appeal to the effect that the defendant did not have a fair trial, because the court read its decision, lacks merit.

Conclusion

[23] In view of my findings above, I am of the opinion that the application for leave to appeal falls to be dismissed on the basis that the impugned order is not appealable.

[24] If I am wrong in regard to my finding that the order in question is not appealable, I am still of the view that the application for leave to appeal stands to be dismissed on account that the defendant has not established the basis for the conclusion that he has reasonable prospects of success on appeal.

[25] As regards the issue of costs, the plaintiff requests that the costs order to be granted not be limited as contemplated under the provisions of rule 32(11). When the court granted a costs order uncapped by the provisions of rule 32(11) when the court struck the application from the

roll, it considered among other things that the application launched by the defendant was voluminous, having well over 400 pages. The same cannot be said of the application for leave to appeal. At the present moment I do not see the justification for an uncapped costs order. Furthermore, no such justification was shown during argument. I shall therefore not grant an uncapped costs order for the foregoing reasons. I shall grant an ordinary costs order in favour of the defendant.

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

1. The application for leave to appeal is dismissed.
2. The defendant is ordered to pay the plaintiff's costs occasioned by the application for leave to appeal, such costs to include costs of one instructing and one instructed legal practitioner.
3. The matter is postponed to 23 November 2022 at 15:15 for status hearing.
4. .The parties shall file a joint status report on or before 16 November 2022.

Judge's signature	Note to the parties:
B Usiku Judge	Not applicable
Counsel:	
Plaintiff:	Defendant:
TA Barnard SC (with him S Horn) Instructed by Theunissen, Louw & Partners, Windhoek	R Heathcote (SC) (with him S Akweenda (SC)) Instructed by Francois Erasmus and Partners, Windhoek
Non-appearance Philip Swanepoel Legal Practitioners	Non-appearance Evert Gous Legal Practitioners