

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Practice Directive 61

RULING

Case Title: Erwin Namwira Mpasi Katewa and University of Namibia	Applicant	Case No: HC-MD-CIV-MOT-GEN- 2019/00375
	Respondent	Division of Court: High Court, Main Division
Coram: HONOURABLE LADY JUSTICE CLAASEN		Heard: 26 July 2023
		Delivered: 10 August 2023
Neutral citation: <i>Katewa v University of Namibia</i> (HC-MD-CIV-MOT-GEN-2019/00375) [2023] NAHCMD 491 (10 August 2023)		
Order: 1. The condonation application is refused.		

2. The applicant is ordered to pay the respondent's cost occasioned by the condonation and leave to appeal applications, to be capped in terms of rule 32(11).
3. The application for leave to appeal is struck off the roll.
4. The matter is postponed to 23 August 2023 at 8h30 for a status hearing.
5. The parties to file a joint status report no later than 18 August 2023.

Ruling:

CLAASEN J :

[1] The applicant (defendant in the main matter) approached this court for leave to appeal against a ruling in an application to amend pleadings brought by the respondent (plaintiff in the main matter). The said ruling granted the application for amendment of pleadings, with costs to be capped in terms of r 32(11).

[2] Apart from the leave to appeal, the applicant also seeks condonation for the late filing of this application, leave to withdraw the application for leave to appeal filed on 29 May 2023 and accepting the application for leave to appeal that was filed on 02 June 2023 as well as costs in the event that it is opposed.

[3] The court invited the parties to argue both applications as prospects of success have a bearing on the question as to whether leave to appeal ought to be granted. The test for leave to appeal is whether another court may come to a different conclusion on the matter in question.¹

[4] Although the condonation application and the application for leave to appeal was opposed, during the arguments, the respondent no longer took issue with the condonation. Counsel for the applicant however correctly argued that he nevertheless still has to satisfy the

¹ *David Bruni N.O. v The Honourable Minister of Finance* (HC-MD-CIV-MOT-GEN-2017/00144) [2019] NAHCMD 305 (27 August 2019).

requirements for that. An applicant that seeks condonation has to provide a reasonable explanation for the delay and persuade the court that there are prospects of success.²

[5] The explanation proffered is that the legal practitioner had confused the applicable rules and had erroneously harbored under the impression that the matter resort under the rule 7(1) of the Rules of the Supreme Court instead of rule 115(2) of the Rules of the High Court. The applicant is three days late with its application, which is not an excessive time period.

[6] As for the second leg of the test, counsel for the applicant summarized the two grounds of appeal as pertaining to the issue of prescription and the issue of costs of the amendment application. He construed a certain sentence in this court's ruling on the amendment of pleadings as constituting a final pronouncement as to the issue of prescription.³ In support of his contention he cited *Stroud v Steel Engineering Co Ltd and another*⁴ wherein it was stated that when prescription is not common cause, an application for the amendment of a claim whereby a new cause of action is introduced, is normally not the place to attempt to have that issue decided. He also referred to *Negongo v Nampost Limited*⁵ wherein a ruling was made on a special plea of prescription after it had been argued.

[7] Counsel for the respondent argued that there is no merit in the application for leave to appeal. He submitted that it is not possible to construe the particular sentence that counsel for the applicant referred to as being a final pronouncement on prescription, especially since further along it is categorically stated that the applicant will be afforded the chance to plead again to the amended particulars.⁶ He also argued that the *Negonga* matter does not support the applicant

² *S v Nakale* 2011(2) NR 599 (SC).

³ *University of Namibia v Katewa* (HC-MD-CIV-MOT-GEN-2019/00375) [2023] NAHCMD 216 (24 April 2023) Para 12.

⁴ *Stroud v Steel Engineering Co Ltd and another* 1996 (4) SA 1139 (W).

⁵ *Negongo v Nampost Limited* (HC-MD-CIV-MOT-GEN-2017/01174)[2018] NAHCMD 60 (19 March 2018).

⁶ *University of Namibia v Katewa* (HC-MD-CIV-MOT-GEN-2019/00375) [2023] NAHCMD 216 (24 April 2023) Para 14.

as the special plea was dismissed. He also referred to the applicable principles as set out in *Hartzenberg v Standard Bank Namibia Limited*⁷ on which reliance was placed during the arguments in the hearing of the amendment of pleadings and there is no need to rehash it here.

[8] As for the adverse cost order, counsel for the applicant argued that the costs order should have been granted in favour of the defendant, who is burdened with the prejudice by the additional pleadings to be filed again. Counsel for that respondent argued that normally cost follows the event. He submitted that amendment applications constitute an exception to the preceding rule, as the party that seeks the indulgence ought to pay. However, he qualified that by saying that when a party who opposes has no good grounds to do so, it is within the court's discretion for such a party to bear the costs. In the current matter before court he argued that the main objection in the amendment application was the prescription issue, whilst the defendant knew that they can plead afresh, which justifies the adverse cost order.

[9] In contemplation of the ground pertaining to prescription, there is no merit in the contention that it was a final pronouncement by the court on the issue. It cannot be, as there was no special plea of prescription for the court to have made a final pronouncement on that. The issue of prescription was raised by the defendant (respondent in the application for amendment of pleadings) as part of the contention that a new claim will come about if the amendment is permitted. As such the court had to answer to that argument in the ruling. Finally, it was categorically clear in the ruling at para 14 that the defendant can plead again and that is why timelines for further exchange of pleadings were given. At this juncture there is nothing that prohibits the defendant from raising a special plea of prescription, if it is so inclined, where after a court will adjudicate on the matter once it is trial ready.

[10] This court has asked both counsel to address the issue as to whether the interlocutory cost order⁸ in question is final and appealable and whether the court is *functus officio* on that.

⁷ *Hartzenberg v Standard Bank Namibia Limited* (SA 57-2014) [2015] NASC (13 November 2015).

⁸ Given on 24 April 2023.

The responses by both counsel were that rule 103 of the High Court Rules permits a cost order to be varied in certain instances.

[11] In returning to the main issue, it is my view that no other court will come to a different conclusion in respect of the matter, which have a bearing on the applicant's prospects of success in the condonation application. Evidently, when condonation is required, that has to be dealt with first. It is my considered view that there are no prospects of success and the application for condonation stand to fail. Having refused the condonation application it is no longer necessary to deal with the application for leave to appeal.

[12] In the result the following order is made:

1. The condonation application is refused.
2. The applicant is ordered to pay the respondent's cost occasioned by the condonation and leave to appeal applications, to be capped in terms of rule 32(11).
3. The application for leave to appeal is struck off the roll.
4. The matter is postponed to 23 August 2023 at 8h30 for a status hearing.
5. The parties to file a joint status report no later than 18 August 2023.

Judge's signature	Note to the parties:
	Not applicable.
Counsel:	
Applicant	Respondents
<p>N. MHATA Of Nambili Mhata Legal Practitioners Windhoek</p>	<p>H. HAMUNYELA Of Samuel & Company Legal Practitioners Windhoek</p>