

UNREPORTABLE

CASE NO: SA 38/2013

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

HAW RETAILERS CC t/a ARK TRADING

First Appellant

COASTAL HIRE CC

Second Appellant

and

TUYENIKALAO NIKANOR t/a NATUTUNGENI

Respondent

PAMWE CONSTRUCTION CC

Coram: MAINGA JA, SMUTS JA and CHOMBA, AJA

Heard: 8 July 2015

Delivered: 7 August 2015

APPEAL JUDGMENT

SMUTS JA (MAINGA JA and CHOMBA AJA concurring):

[1] The appellant filed a notice of appeal against a judgment of the High Court delivered on 17 April 2013.

[2] The appellant was the first applicant in an application headed 'Interlocutory Application' against the respondent described as Tuyenikalao Nikanor trading as Natutungeni Pamwe Construction CC.

[3] The main relief sought in this interlocutory application was to interdict the respondent so described from proceeding with execution for an amount of N\$64 601,85 in respect of a taxed bill of costs. The applicants also sought a declaratory order that the costs order in question had been set off against a larger claim which the first applicant (appellant) had against the respondent so described.

[4] The substance of the main relief sought against the respondent was thus interlocutory. This was also reflected in the form of the application. A shortened form was used which was served on the respondent's legal practitioner.

[5] The costs award, taxed in the sum of N\$64 601, 85, was in respect of opposition to an unsuccessful sequestration application brought against the respondent. The applicants in the interlocutory application contended that this costs award should be set off against the first applicant's (appellant's) claim of N\$173 753,81 against the respondent which the appellant said was owing as a result of a default judgment granted in his favour in the Magistrate's Court. After payment was demanded in respect of the allocutur in the amount of N\$64 601,85, the applicants approached the High Court to interdict any execution in respect of that amount by reason of the appellant's claim of N\$173 753,81.

[6] After argument had been delivered on the affidavits, the High Court directed the parties to address an issue as to whether the respondent had paid an amount of N\$150 000 in reduction of the judgment debt of N\$173 753,81. After further affidavits were filed, the High Court found that this sum had been so paid and that the appellant was not entitled to the main relief and dismissed the application with

costs. The High Court further directed that the appellant pay the amount of N\$8547, 11 to the respondent after considering whether debts had been set off or not.

[7] The interlocutory application brought by the appellant as first applicant was dismissed with costs. Although the court made a further order directing him to pay the amount of N\$8547, 11 to the respondent, the primary relief sought (and refused) was for the interlocutory order. The second applicant in the interlocutory application has not sought to appeal against the judgment of the court below.

[8] The appellant filed a notice of appeal against the 'whole judgment' of the court below. No leave to appeal was sought.

[9] Section 18(3) of the High Court Act, 1990¹ provides:

'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'.

[10] In this instance, the court had not granted an interlocutory order but had refused one. The effect as against the applicants in the application was thus final.

¹Act 16 of 1990.

[11] In this appeal, the appellant is represented by Mr Grobler. There is no appearance for the respondent.

[12] Whilst the order dismissing the application has the attributes of being appealable² in the sense of being final in effect as against the appellant, the question nevertheless arises as to whether leave to appeal is required under s 18(3), given the fact that the order sought and refused was interlocutory.

[13] When this question was canvassed during oral argument with Mr Grobler, he merely asserted that leave was not required without referring to any authority. The appealability of interlocutory matters is a vexed issue.³ Without the benefit of full argument on this issue, it would be preferable not to express a view on this issue if there were to be another issue in this appeal which is dispositive of this matter.

[14] In my view there is. The citing of the respondent as a person trading as a close corporation is totally inept. The ineptitude is compounded on the facts of this matter. It would appear that the close corporation traded as such. The appellant had in fact obtained a judgment against it as well as against Ms Nikanor. The relief sought in the application was not to seek to hold Ms Nikanor liable for the debts of the close corporation but instead essentially to interdict both legal personalities in the conflated way set out. When this was raised with Mr Grobler, he referred to the sequestration application which had also curiously been brought against Ms

²See *Aussenkehr Farms (Pty) Ltd and Another v Minister of Mines and Energy and Another* 2005 NR 21 (SC); *Shetu Trading CC v Chair, Tender Board of Namibia and Others* 2012 (1) NR 162 (SC) para 25.

³*Shetu Trading CC v Chair, Tender Board of Namibia and Others supra* para 22.

Nikanor trading as the close corporation. That application was however dismissed for lack of proper service upon the respondent. The Judge-President did not need to further consider the issues raised in it.

[15] The respondent in the interlocutory application squarely took the point in the answering affidavit that citation of the respondent was inept and asked that the application should be struck from the roll with costs for that reason. The applicants did not address this incompetent citation and instead persisted with the application.

[16] That point was well founded. The application should have been dismissed or struck from the roll with costs for this reason.

[17] It follows that it is not necessary to further canvas the issues between the parties, except to state that the second order directing payment should not have been granted when dismissing the application by reason of the inept citation of the respondent.

[18] It further follows that the appeal is dismissed and the order of the court below amended to read:

‘The application is dismissed with costs’.

MAINGA JA

CHOMBA AJA

APPEARANCES

APPELLANT:

ZJ Grobler

Instructed by Grobler & Co

RESPONDENT:

No appearance