



**REPORTABLE**

CASE NO: SA 50/2016

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**GOVERNMENT OF THE REPUBLIC OF NAMIBIA**

**Appellant**

And

**JUNIAS FILLIPUS**

**Respondent**

**Coram:** DAMASEB DCJ, SMUTS JA and FRANK AJA

**Heard:** 15 March 2018

**Delivered:** 6 April 2018

**Summary:** This is an appeal related to the dismissal of a special plea by the Government of the Republic of Namibia (appellant), in respect of the respondent's, (Fillipus Junias) claim for malicious prosecution.

Respondent was arrested on 27 July 2010 by Sgt Amatundu of the Namibian Police in connection with the rape and murder of the late Ms Magdalena Stoffels. He remained in custody for a period of 191 days when the charges against him

were withdrawn. On 8 May 2013, he instituted the present action against the appellant for damages for wrongful arrest (claim 1), unlawful detention (claim 2) and malicious prosecution (claim 3). Appellant raised special pleas in the court *a quo*, raising non-compliance with s 39 of the Police Act against each of the three claims. Respondent had instituted the claims more than 12 months after the cause of action had arisen as is required by s 39. The court *a quo* upheld the special pleas in respect of claims 1 and 2, but dismissed the special plea against claim 3. The court reasoned that a claim of malicious prosecution is in a different category to claims 1 and 2. According to the court *a quo* prosecution is malicious or otherwise at the instance of the Prosecutor-General and not the Namibian Police and that compliance with s 39 would not be required

The question was raised as to whether leave to appeal is required in an appeal against the dismissal of a special plea akin to prescription in the form of non-compliance with s 39 of the Police Act 1990.

Leave to appeal – appellant referring to authorities decided at a time when the s 20(2)(b) of the then applicable Supreme Court Act, 1959 argued that the special plea is a self-contained defence which is conclusive of the issue and is thus not interlocutory as the court *a quo* could not revisit its decision on that special plea.

These authorities were no longer applicable following a new system emerging in South Africa with the introduction of Act 105 of 1982 which diminished the distinction between simple interlocutory orders and other orders.

*Di Savino* was applied. It had found that a wide meaning is to be accorded to interlocutory orders and thus includes all orders upon matters ‘incidental to the main dispute, preparatory to, or during the progress of the litigation’ – and not merely, what have been described as “simple” or “pure” interlocutory orders. In developing Namibia’s own jurisprudence, this court in *Di Savino* interpreted section 18(3) of the High Court Act, 1990 to the effect that interlocutory orders are not appealable except with leave.

*Held that*, a wide and general meaning of interlocutory orders would refer to all orders incidental to the main dispute, preparatory to or during the progress of litigation and include those which have a final and definitive effect upon the main action but which do not finally dispose of the main action.

*Held that*, interlocutory orders which are appealable require leave to appeal.

*It is further held that*, the order of the court *a quo*, although appealable, was interlocutory in nature. This means that leave was required and appellant failed to acquire that. In the circumstance, the appeal stands to be struck from the roll.

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## APPEAL JUDGMENT

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SMUTS JA (DAMASEB DCJ and FRANK AJA concurring):

[1] At issue in this matter is whether leave to appeal is required in an appeal against the dismissal of a special plea akin to prescription in the form of non-compliance with s 39 of the Police Act, 1990 (the Police Act).<sup>1</sup>

#### Factual background

[2] The plaintiff was on 27 July 2010 arrested by a certain Sgt Amatundu of the Namibian Police in connection with the rape and murder of the late Ms Magdalena Stoffel. The plaintiff remained in custody for a period of 191 days until the charges were withdrawn against him. On 8 May 2013 he instituted the present action against the Government of the Republic of Namibia for damages for wrongful arrest (claim 1), unlawful detention (claim 2) and malicious prosecution (claim 3).

#### The pleadings

[3] The plaintiff proceeded against the Government on the basis of vicarious liability, alleging that Sgt Amatundu and a Warrant Officer Snewe had acted in the course and scope of their employment with or furthering the interest of the Government.

[4] The Government admitted the arrest and detention of the plaintiff but denied their wrongfulness as well as denying malicious prosecution.

[5] The Government raised special pleas based on non-compliance with s 39 of the Police Act against each of the three claims. The action was instituted more than 12 months after the cause of action had arisen as is required by s 39. The special pleas were upheld in respect of claims 1 and 2, but dismissed in respect of

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<sup>1</sup> Act 19 of 1990.

claim 3. The High Court reasoned that a claim of malicious prosecution is in a different category to claims 1 and 2. The court stated that a prosecution is malicious or otherwise at the instance of the Prosecutor-General and not the Namibian Police and that compliance with s 39 would not be required.

[6] The Government noted an appeal against the dismissal of this special plea. The respondent did not file a cross appeal in respect of the upholding of the special pleas against claims 1 and 2 and also did not oppose this appeal.

Leave to appeal required or not?

[7] After the appellant's heads of argument were lodged, the court enquired from the parties whether leave to appeal was required or not, especially in view of this court's recent judgment in *Di Savino v Nedbank Namibia Limited*.<sup>2</sup>

[8] Detailed supplementary heads of argument were subsequently filed on behalf of the Government on this issue.

[9] In *Di Savino*, Shivute CJ conducted a detailed survey and analysis of decisions of this court and the leading cases in South Africa before (and after) the procedure of appeals had been amended in 1982. The Chief Justice concluded that the meaning to be given to s 18(3) of the High Court Act is as follows:<sup>3</sup>

'It would appear to me therefore that the spirit of s 18(3) is that before a party can pursue an appeal against a 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

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<sup>2</sup> Case No SA 82/2014. Unreported 7 August 2017.

<sup>3</sup> Act 16 of 1990.

must first be obtained even if the nature of the order or judgment satisfies the first requirement. The test whether a judgment or order satisfies the first requirement is as set out in many judgments of our courts as noted above and it is not necessary to repeat it here.<sup>4</sup>

[10] The court in *Di Savino* found that a wide meaning is to be accorded to interlocutory order and to include all orders upon matters ‘incidental to the main dispute, preparatory to, or during the progress of the litigation’ – and not merely, what have been described in especially South African cases as “simple” or “pure” interlocutory orders. But they would also need to have the characteristics of appealability in order to qualify for leave.<sup>5</sup> The defining features of the vexed issue of appealability have been considered in several appeals which have served before this court and are usefully referred to in *Di Savino*.<sup>6</sup> Thus, interlocutory orders which are appealable require leave to appeal.

[11] There are sound policy reasons for restricting appeals in interlocutory matters as is done in s 18(3) by requiring leave of the High Court. These have been previously articulated by this court in *Shetu Trading v Tender Board of Namibia*,<sup>7</sup> *Knouwds, NO v Josea and another*<sup>8</sup> and again emphasised in *Di Savino*.<sup>9</sup> Central to these considerations is the avoidance of piecemeal appellate disposal of the issues in litigation with the unnecessary expense involved. It is generally desirable that all issues are resolved by the same court at one and the

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<sup>4</sup> Para 51.

<sup>5</sup> In *Arandis Power (Pty) Ltd v President of the Republic of Namibia and Others* Case No 40/2016 unreported, 16 March 2018.

<sup>6</sup> At paras 37-45. See also *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 531-533 and *Shetu Trading v Tender Board of Namibia* 2012 (1) NR 162 (SC) at paras 19-20.

<sup>7</sup> At paras 20–21.

<sup>8</sup> 2010 (2) NR 754 (SC).

<sup>9</sup> At para 43.

same time.<sup>10</sup> This rationale finds eloquent expression in the new rules of the High Court which place emphasis on speedy finalisation of cases with minimum delay and costs. It is a regrettable fact of litigation in our country that interlocutory skirmishes both delay and add to the costs of litigation.<sup>11</sup> It is in order to minimise interlocutory skirmishes that rule 32(11) of the High Court Rules caps costs in interlocutory proceedings.

[12] In the supplementary heads of the appellant, it is correctly contended that the order of the High Court is appealable. The appellant also contended that the order of the High Court was not of an interlocutory nature and would not require leave.

[13] Ms Machaka, who together with Mr Shimakeleni appeared for the appellant, argued that the special plea is a self-contained defence which is conclusive of the issue and is thus not interlocutory because the High Court could not revisit its decision on that special plea. In support of her argument, Ms Machaka referred to decisions of the South African Appellate Division in *Labuschagne v Labuschagne*, *Labushagne v Minister van Justisie*<sup>12</sup> and *Smith v Oosthuizen*<sup>13</sup> which concerned appeals against the dismissals of special pleas in similar legislation then applicable in South Africa. That court in both instances grappled with the question as to whether the orders in question dismissing the special pleas were appealable or not and correctly concluded that such an order was appealable. The court in

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<sup>10</sup> *Guardian National Insurance Co Ltd v Searle* NO 1999 (3) SA 296 (SCA) at 301 cited in *Shetu* at para 20.

<sup>11</sup> Rule 1(3)(b) speaks to the need for saving costs and timely disposal of cases by limiting interlocutory proceedings to what is strictly necessary. Rule 19 (c) in turn imposes an obligation on litigants to 'limit interlocutory proceedings to what is strictly necessary in order to achieve a fair and timely disposal of a case'.

<sup>12</sup> 1967 (2) SA 575 (A).

<sup>13</sup> 1979 (3) SA 1079 (A).

each instance concluded that such an order had the hallmarks of appealability because the issue in question had been finally decided by the court *a quo* when relief was refused.

[14] Both of these cases were decided at a time when s 20(2)(b) of the then applicable Supreme Court Act, 1959<sup>14</sup> referred to interlocutory orders in a provision similar to s 18(3) of the Act. At that time the position of interlocutory orders in this context (of appealability under that Act) was extensively canvassed by Corbett JA and summarised in the following way:<sup>15</sup>

- (a) In a wide and general sense the term "interlocutory" refers to all orders pronounced by the Court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation. But orders of this kind are divided into two classes: (i) those which have a final and definitive effect on the main action; and (ii) those, known as "simple (or purely) interlocutory orders" or "interlocutory orders proper", which do not . . .
- (b) Statutes relating to the appealability of judgments or orders (whether it be appealability with leave or appealability at all) which use the word "interlocutory", or other words of similar import, are taken to refer to simple interlocutory orders. In other words, it is only in the case of simple interlocutory orders that the statute is read as prohibiting an appeal or making it subject to the limitation of requiring leave, as the case may be. Final orders, including interlocutory orders having a final and definitive effect, are regarded as falling outside the purview of the prohibition or limitation.' (Reference to authorities omitted).'

[15] The Chief Justice in *Di Savino*, after referring to the above passage, placed the legislative provisions in their context:

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<sup>14</sup> Act 59 of 1959.

<sup>15</sup> In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977(3) SA 534 (A).



'Herbstein and Van Winsen<sup>16</sup> opine that the underlying policy of statutory provisions prohibiting or limiting appeals against interlocutory orders is to discourage piecemeal appeals with the attendant expense and inconvenience. The learned authors further observe that:

'The former express reference to interlocutory orders in section 20(2)(b) of the Supreme Court Act has been deleted. This means that there is no longer such a thing as an interlocutory order within the meaning of the Supreme Court Act. Nevertheless, the broad concept "interlocutory order" retains its relevance in the context of appealability."<sup>17</sup>

[16] The importance of the distinction between simple interlocutory orders and other orders diminished in South Africa after a new system of appeals was introduced by Act 105 of 1982 in South Africa, as is pointed out in *Di Savino*.<sup>18</sup>

[17] Leave to appeal was then required in all civil appeals (other than appeals in terms of particular statutes).

[18] As is pointed out in *Di Savino*, when the High Court Act was passed in 1990, leave to appeal was required in all civil appeals in South Africa where there was no longer reference to interlocutory orders in its legislation governing appeals. As is also pointed out by the Chief Justice in *Di Savino*, the Namibian jurisprudence on s 18 has evolved in the context of the different legislative provisions applying in Namibia and South Africa, with Namibia proceeding to develop its own jurisprudence in the area, with this court interpreting s 18(3) to the effect that interlocutory orders are not appealable except with leave. That is after all by giving effect to the clear wording of s 18(3) with its different wording which

<sup>16</sup> Cilliers et al *The Civil Practice of the High Courts of South Africa*, 5<sup>th</sup> ed (2014) Vol 2 at 1204

<sup>17</sup> At para 31.

<sup>18</sup> At para 47.

meant that Namibian courts would not need to grapple with what the Chief Justice in *Di Savino* described as the 'convoluted dichotomy' of what may or may not amount to 'simple' interlocutory orders. Had the Namibian legislature intended that the term interlocutory in s 18(3) would mean only 'simple' interlocutory orders, as is the consequence of Ms Machaka's argument, the use of the term in s 18(3) would have been superfluous. This is because a simple interlocutory order would not constitute a judgment or order for the purpose of s 18(1) and not be appealable for that reason. There is a presumption against the legislature using words which would be superfluous.

[19] The inclusion of the term interlocutory in s 18(3) indicates that the usual wide meaning is to be given to the term so that its inclusion would have effect and not to interpret it narrowly by restricting the meaning to 'simple' interlocutory orders as had been done in South Africa, explained by Corbett JA as quoted in para 14 above. The reliance upon *Labuschagne* and *Smith* would accordingly not avail the appellant. Nor would the reliance upon *Constantia Insurance Co Ltd v Nohamba*<sup>19</sup> avail the appellant. That matter concerned whether the declaratory order dealing with a defence of prescription or lapsing of a claim was appealable or not for the purpose of constituting a 'judgment or order' for the purpose of s 20(1) of the Supreme Court Act, 1959. There can be no question as to the correctness of the finding that the order was appealable. That was the question determined by that court.

[20] With reference to the useful definition by Corbett JA quoted in para 12 above, a wide and general meaning of interlocutory orders would refer to all orders

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<sup>19</sup> 1986 (3) SA 27 (A).

incidental to the main dispute, preparatory to or during the progress of litigation and include those which have a final and definitive effect upon the main action but which do not finally dispose of the main action.

[21] The clear implication of Ms Machaka's submission, relying on the South African cases, is that as long as a defence raised will, if upheld, destroy the claimant's case, it is not interlocutory. On this approach it matters not what effect the order sought would have on the speed and economy with which the case is finalised in the court system. If this argument finds favour, on what basis can it be said, for example, that an application for summary judgment is not interlocutory? For if it were denied, it robs the applicant of an opportunity to kill off a defence to a claim. Denial of an application for summary judgment stands on no different footing as the denial of the special plea raised by the appellant and intended to destroy a claim. Therefore, the test cannot solely be, as suggested on behalf of the appellant, the nature of the defence or procedural advantage sought, but also the effect of the procedure engaged during the cause of a matter on the overall conduct of the case.

[22] An order which does not finally dispose of an action would thus be interlocutory. On the other hand upholding a special plea of prescription resulting in the dismissal of the main action, and thus finally disposing of the action would not be an interlocutory order. In this way an interpretation is given to s 18(3) which results in the term interlocutory having effect and not being superfluous.

[23] As was also emphasised by O'Regan AJA in *Shetu*, not all interlocutory orders would be appealable with leave.<sup>20</sup> Even if leave is granted by the High Court, this would not dispose of the issue. The question of appealability remains an issue for the appellate court to determine, if it is itself in issue. The interlocutory order would also need to have the hallmarks of appealability to constitute a 'judgment or order' to be appealable.

[24] It follows that once an order is interlocutory, leave to appeal is required provided that the order itself is appealable.

[25] Was the order of the High Court interlocutory? In my view it was.

[26] The special plea was dismissed. That aspect was incidental to the main dispute. Even though the High Court would not revisit that aspect, it could ultimately be raised on appeal when the matter is finalised. But crucially, it did not finally dispose of the plaintiff's action. It was, as has been stressed, certainly appealable – having the hallmarks of appealability. But as it was interlocutory in nature, leave was required. It had not been sought. This means that the matter is to be struck from the roll. As the appeal was not opposed and with the respondent assisted by the Legal Aid Directorate, it follows that no cost order should be made.

[27] The following order is made:

1. The appeal is struck, from the roll.

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<sup>20</sup> At para 24.

2. The matter is referred back to the High Court for further case management.

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**SMUTS JA**

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**DAMASEB DCJ**

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**FRANK AJA**

APPEARANCES

APPELLANT:

C Machaka, assisted by A  
Shimakeleni

Of Government-Attorney