



REPORTABLE

CASE NO: SA 92/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MARMORWERKE KARIBIB (PROPRIETARY) LIMITED

Appellant

and

TRANSNAMIB HOLDINGS LIMITED

Respondent

CORAM: SHIVUTE CJ, SMUTS JA and ANGULA AJA

Heard on: 7 April 2022

Delivered on: 27 May 2022

Summary: The appellant – as plaintiff – filed a notice to amend its replication to the respondent’s plea in terms of rule 52 of the Rules of the High Court (the Rules). The notice stated that unless objection in writing to the proposed amendment was made within 10 days, the plaintiff would amend its replication. No objection to the proposed amendment was made within the time period stated in the notice. Instead, the respondent’s legal practitioners addressed a letter to the appellant’s legal practitioners informing them that the notice to amend was an interlocutory application and that it would be opposed as it failed to comply with rule 32(9) and (10) of the Rules. The letter set out two bases for the objection. A

notice of intention to oppose the proposed amendment was later filed; out of time. The appellant subsequently filed its replication. The parties expressed differing views on the question whether the notice to amend and the amendment were rule-compliant proceedings or not. They requested the High Court to give directions on the dispute.

The court *a quo* held that the notice to amend and the amendment were improperly before court and struck them out with costs. The High Court reasoned that an amendment to a pleading was an interlocutory matter. Therefore, a party intending to amend a pleading must first apply for directions in terms of rule 32(1) and (4) of the Rules. The court held further that such party must first comply with rule 32(9) and (10) of the Rules before launching the proceeding contemplated under rule 52(1).

On appeal, *held* that rule 52 sets out the self-contained procedure for amendment of pleadings in this way: A party desiring to amend a pleading or document filed in respect of a proceeding must give notice of the intention to amend to all affected parties and the managing judge; the notice must state that unless objection in writing to the proposed amendment is made within 10 days, an amendment will be made. If no objection in writing is made, a party receiving the notice is deemed to have agreed to the amendment;

Held, that as no valid objection was made to the intended amendment within the period set out in rule 52(2), the replication could be amended as of right. A direction from the managing judge would arise only if there was a grounded objection;

Held, only in an instance where a valid objection is made in writing within the period of 10 days, is the party desiring to pursue the amendment required to apply, within 10 days after receipt of the objection, to the managing judge for leave to amend;

Held, that there is no requirement in rule 52 that leave to amend should first be sought and obtained in circumstances where no valid objection to the intended amendment is made;

Held, that the requirement that directions must be sought from the managing judge after a properly motivated or grounded objection to the proposed amendment serves the overall objective of case management just as rule 32 seeks to do. As such, it is not necessary to resort to rule 32 prior to filing the notice of intention to amend a pleading;

Held, that the delivery of the appellant's notice of intention to amend and the amendment of its replication were proper and rule compliant. The appeal was accordingly upheld with costs.

APPEAL JUDGMENT

SHIVUTE CJ (SMUTS JA and ANGULA AJA concurring):

Introduction

[1] The confined question raised in this appeal is whether a plaintiff who files a notice of intention to amend a replication to a defendant's plea in terms of rule 52 of the Rules of the High Court (the Rules) after the close of pleadings is required to seek directions from the managing judge pursuant to sub-rules (1) and (4) of rule 32 of the Rules and must furthermore comply with sub-rules (9) and (10) of that rule in the absence of a timeous objection to the proposed amendment.

Background

[2] The background to the matter may be summarised as follows: As plaintiff, the appellant instituted an action against the respondent, the then defendant. The particulars of claim alleged that the parties had entered into a written agreement

during 1992 or 1993, in terms of which the defendant sold to the plaintiff a certain immovable property for a purchase price of N\$3000, payable on registration of transfer. It was further pleaded that the appellant complied with its obligations and tendered to perform its further obligations as they may become due, but that the respondent failed to transfer the property into the appellant's name. Therefore, the appellant prayed for an order directing the respondent to take the necessary steps to comply with its obligations as set out in the agreement.

[3] The respondent as defendant, raised three special pleas of (a) prescription, (b) non-compliance with s 1(1) of the Formalities in respect of Contracts of Sale of Land Act 71 of 1969 (RSA)¹, and (c) the lack of ministerial approval of the transaction. The court directed that the special pleas be heard and decided first. According to the court *a quo*, this direction had the effect of staying all further proceedings in the action pending the determination of the special pleas. The parties subsequently filed their witness statements in respect of the special pleas. A pre-trial order was made and the matter postponed to 31 January 2020 for the allocation of trial dates.

[4] On 25 November 2019 the appellant filed a notice of intention to amend its replication. It followed the wording of rule 52(2) in that the notice stated that unless objection in writing to the proposed amendment was made within 10 days, the appellant would amend the replication accordingly. The period of 10 days referred to in the notice ended on 11 December 2019. Two days later on 13 December 2019, the respondent's legal practitioners filed a letter dated 9 December 2019,

¹ Repealed in South Africa by that country's Alienation of Land Act 68 of 1981, but still applicable to Namibia.

addressed to the appellant's legal practitioners. It was contended in the letter that the appellant's intended amendment was an interlocutory application, which should therefore comply with sub-rules (9) and (10) of rule 32. The letter further informed the appellant's legal practitioners that the respondent would oppose the intended amendment and set out two bases for the objection. In the first place, it was contended that the action had reached *litis contestatio*. Therefore, any filing of further pleadings could occur only once the party intending to file the pleading had sought and obtained leave of the managing judge. Secondly, it was argued that the intended amendment failed to comply with rule 47 read with rule 45 of the Rules and that as such it was expiable. The letter proposed that directions should be obtained from the managing judge first before proceeding with the matter.

[5] I digress to note that the letter itself did not purport to be an objection to the notice of the intention to amend. On the contrary, it appears to have been intended to forewarn the appellant of the pending opposition or objection to its notice and the intended amendment. I say so for reasons that the letter informed the appellant, first that the respondent 'will oppose your intended amendment . . .', meaning that it was not opposing it in terms of the letter and secondly that the appellant's legal practitioner had briefed 'our instructed counsel to prepare the notice of opposition but due to his unavailability, same could not be filed on even date'. This digressional observation was necessitated by the categorical assertion advanced on behalf of the respondent for the first time in oral arguments that the letter of 9 December 2019 constituted a substantive objection to the notice of intention to amend. It must be observed that this submission flies in the face of the

clear terms of the letter and is so untenable that it stands to be rejected at the outset.

[6] Reverting to the background to the matter, it also so happens that on 13 December 2019, the defendant filed a notice to oppose the appellant's proposed amendment. Undeterred by these obviously ineffectual steps, the appellant filed its amended replication on 16 December 2019. The court *a quo* observed in its ruling that as the parties had expressed divergent views on the propriety or legality of the notice of intention to amend and the subsequent amended replication, 'they requested the court, among other things, to give directions on the dispute'.

[7] The proceedings in which the court made the decision appealed against were therefore not a substantive application but a request for directions. On 31 January 2020, the court identified the issue in dispute and directed the parties to file written heads of argument to assist it to decide the matter. The parties subsequently filed their respective heads of argument, and on 6 May 2020, they filed a written agreement – in terms of a Practice Direction issued by the Judge-President following the COVID-19 outbreak – to have the matter decided without the benefit of oral arguments.

The High Court's approach

[8] Having considered the respective parties' arguments and the relevant rules of the Rules as well as the principles relating to judicial case management, the High Court found, in the first place that an amendment to a pleading contemplated in rule 52(1) was an interlocutory matter in the context of sub-rules (1), (4), (9) and

(10) of rule 32. Therefore, a party wishing to amend a pleading must first apply for directions in terms of rule 32(1) and (4) in respect of the proceeding the party seeks to institute. Secondly, the court held that before launching the interlocutory proceeding in question, the party was required to comply with rule 32(9) and (10).

[9] On the issue of *litis contestatio* or close of pleadings, the court reasoned that the pleadings closed on 13 February 2018 when the parties filed the joint case management report in which it was confirmed that no further pleadings or amendment to pleadings were envisaged. The court held that after the close of pleadings, a party no longer had a procedural right to amend its pleading. Should such party desire to amend a pleading after the close of pleadings, it must first obtain leave of court to do so. The court reasoned that its approach to the issue in dispute was supported by the provisions of rule 3(1), 17(2) and 21(1) which place case management powers firmly in the hands of the court and not of the parties or their legal practitioners. The court concluded that the appellant's notice of intention to amend and its amended replication were not properly before court. They were accordingly struck out. The appeal is before this court with leave of the High Court.

The parties' contestations

[10] The appealability of the decision of the High Court striking out the appellant's notice of intention to amend and its amended replication has become a contentious issue on appeal. As such it is convenient to start first with submissions made on behalf of the respondent on that issue as well as on the merits. This unusual way of considering the submissions of the parties is necessitated by the

fact that despite leave having been granted by the court *a quo*, the respondent persists, as it is entitled to do, in its contention that the matter is not appealable.

[11] The respondent's arguments on the appealability or otherwise of the decision may be summarised as follows: It argues, as it did in the High Court, that the decision by that court did not possess the attributes of an appealable judgment or order as it was a mere ruling on a matter of procedure; unrelated to the merits. All that was required of the appellant to have its replication amended was for it to have complied with the provisions of rule 32. The High Court was not *functus officio* and could always change its order striking out the appellant's notice of intention to amend and its amended replication. Moreover, as the order made by the court below is not erroneous, the ruling is not appealable at all.

[12] On the merits of the appeal, the respondent in essence supports the judgment and order of the court below on the ground that the order was competent and in line with the judicial case management ethos expressed in the Rules which place the control and management of cases firmly in the hands of the court. To adopt the interpretation contended for by the appellant regarding the amendment of pleadings, so the respondent contends, would undermine the overriding objective of judicial case management in that it would place the management of cases back in the hands of the parties or their legal practitioners.

[13] The respondent forcefully argues that an amendment to pleadings, whether by giving notice or bringing a substantive application, is an interlocutory proceeding which is governed by sub-rules (1), (4), (9) and (10) of rule 32. It is the

respondent's further contention that the appellant had been made aware of the objection to its notice to amend the replication. Once it was so made aware, so the respondent contends, the appellant was under an obligation to seek directions from the managing judge in terms of rule 52(4) or to engage the respondent's legal practitioners to seek an amicable resolution to the opposition or objection to the intended amendment in terms of rule 32(9) and (10).

[14] The appellant on the other hand argues, amongst others, as to the appealability of the ruling that the court *a quo*'s decision on the point was final in effect and not susceptible to alteration by it. The decision was also definitive of the rights of the parties on that issue. The appellant maintains that, in any event the court *a quo*'s interpretation of the rules and its conclusion thereon were wrong. The order made by it is incompetent, and therefore appealable even if it is interlocutory. On the merits, the appellant argues, amongst others, that its right to amend its replication had been expressly reserved and a process put in place in the pre-trial draft order to address that eventuality. It is also the appellant's contention that the respondent's objection to the notice of intention to amend was not delivered within the period provided for in rule 52(2) and no condonation for the late delivery was sought or obtained. As it was filed late, so the argument runs, the further process envisaged in rule 52(4) was not triggered and thus nothing precluded the delivery of the amended replication. In any event, so the appellant further contends, the objection to the notice of intention to amend failed to comply with the peremptory requirements of rule 52(4) in that it did not 'clearly and concisely' state the grounds on which it was founded.

Principles pertaining to amendments and consideration of the relevant rules of the Rules of the High Court

[15] According to rule 1(3) of the Rules, 'the overriding objective of the Rules is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively and as far as practicable' by what is set out in rule 1(3)(a) - (f) of the Rules. Rule 17 enjoins the High Court to endeavour to give effect to the overriding objective of judicial case management referred to in rule 1 when it exercises any power given to it under the Rules or in interpreting any other rule of procedure. Rule 32 deals with interlocutory matters and applications for directions and sets out the procedure to be followed in interlocutory proceedings.

[16] Rule 32(1) provides that the managing judge must give directions in respect of an interlocutory proceeding with regard to the date and time of the hearing of the matter, times for filing of heads of argument and generally the speedy finalisation of the matter. Rule 32(4) states in part that in any cause or matter, a party may make application for directions in respect of an interlocutory matter on which a decision may be required.

[17] Rule 32(9) provides that in relation to an interlocutory proceeding, a party wishing to bring such proceeding must, before launching the proceeding in question, seek an amicable resolution thereof with the other party or parties and only after the parties have failed to resolve their dispute, may such a proceeding be referred to the court for adjudication. Rule 32(10) requires a party bringing an interlocutory proceeding to file with the registrar details of the steps taken to have the matter resolved amicably before instituting the proceeding.

[18] As to the principles governing amendments, it is generally established that an amendment may be sought or granted at any stage (even before judgment) as long as it is bona fide.² It is also an established principle that amendments of pleadings are necessary and should be allowed in appropriate cases in order to obtain a proper ventilation of the disputes between the parties for justice to be done.³ The traditional approach is that an application for amendment may be refused if the prejudice caused to the opposing party is not capable of recompense through an appropriate costs order or a postponement.⁴ With the advent of judicial case management in the High Court of Namibia, however, this principle is now subject to the rider that the discretion whether or not to allow an amendment has to be exercised bearing in mind the ethos of judicial case management espoused in the Rules and decided cases. This new approach has been stated by the Full Bench of the High Court in *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC*⁵ in the following ringing terms:

'The changed position under the rules of court at the time the matter was argued and now is that an amendment may be granted at any stage of a proceeding and that the court has discretion in the matter, to be exercised judicially. The common law position that a party may amend at any stage of proceedings as long as prejudice does not operate to the prejudice of the opponent remains, save that, like every other procedural right, it is also subject to the objectives of the new judicial case management regime applicable in the High Court. That includes the

² PT Damaseb, *Court-Managed Civil Procedure of the High Court of Namibia – Law, Procedure and Practice*, Juta, p 141, para 5-062; Rule 52(9) of the Rules.

³ *DB Thermal (Pty) Ltd & another v Council of the Municipality of the City of Windhoek* (SA 33/2010) [2013] NASC 11 (19 August 2013) para 38.

⁴ *Ibid.*

⁵ *I A Bell Equipment Company (Namibia) Limited v Roadstone Quarries CC* (I 601-2013 & I 4084-2010) [2014] NAHCMD 306 (17 October 2014) (*I A Bell*).

imperative of speedy and inexpensive disposal of causes coming before the High Court.⁶

[19] It is abundantly clear that in the present case, the court below sought to advance the ethos of case management in its interpretation of the matter before it. The fundamental question is whether it was correct in its approach on the facts of the matter? The procedure for amending a pleading or document is primarily governed by the provisions of rule 52 of the Rules. The rule provides in the relevant parts as follows:

- '(1) A party desiring to amend a pleading or document filed in connection with a proceeding must give notice to all other parties to the proceeding and the managing judge of his or her intention to amend.
- (2) A notice referred to in sub rule (1) must state that unless objection in writing to the proposed amendment is made within 10 days, the party giving the notice will amend the pleading or document in question accordingly.
- (3) If no objection in writing is made the party receiving the notice is considered as having agreed to the amendment.
- (4) If objection in writing is made within the period referred to in sub rule (2), which objection must clearly and concisely state the grounds on which it is founded, the party desiring to pursue the amendment must within 10 days after receipt of the objection apply to the managing judge for leave to amend.'

[20] The provisions of the rule are plain and ordinarily prescribe a self-contained process that may be paraphrased as follows: A party desiring to amend a pleading

⁶ Para 49.

or document filed in respect of a proceeding must give notice of the intention to amend to the affected party or parties and the managing judge; the notice must state that unless objection in writing to the proposed amendment is made within 10 days, an amendment will be made. If no objection in writing is made within the prescribed period, a party receiving the notice is deemed to have agreed to the amendment. The party giving the notice may then proceed to file the amended pleading.

[21] In this matter, the possible amendment to the parties' pleadings was contemplated by both parties as the right to do so was expressly reserved in a joint draft pre-trial order. Although this right was conditional upon the exchange of 'further witness statements', which did not materialise, it was in any event in the contemplation of the parties that such an eventuality may occur. The parties also agreed to a course of conduct or procedure should a pleading be amended. In that eventuality, the parties agreed to request the convening of a status hearing, to be preceded by the circulation of an 'augmented draft pre-trial order, if necessary' and to be followed by the request for the court to make a new pre-trial order reflecting any amendments made to the pleadings, if necessary.

[22] There is even a stronger reason why the court *a quo's* approach to the interpretation of the rules is erroneous. In filing its intention to amend and in effecting an amendment to its replication, the appellant followed the procedure set out in rule 52 to the letter. As noted earlier, the correspondence forewarning the appellant of the possible objection or opposition to the proposed amendment did not constitute a substantive objection contemplated under rule 52(2). The

substantive objection to the amendment filed subsequent to the writing of the letter was made out of time. No application for condonation for the late filing of the objection had been made. It follows that as no valid objection to the intended amendment was made within the period set out in rule 52(2), the replication could be amended as of right. That this is the position is apparent from the wording of the sub-rule itself.

[23] It is only in an instance where a valid objection is made in writing within the period of 10 days, is the party desiring to pursue the amendment required to apply, within 10 days after receipt of the objection, to the managing judge for leave to amend. This means that a direction from the managing judge would arise only if there was a grounded objection made within the prescribed period. There is no requirement in rule 52 to first seek and obtain leave of the managing judge in circumstances where no valid objection to the intended amendment is made.

[24] Leave to amend must however be applied for if a valid objection is made to the notice of intention to amend. The requirement in rule 52(4) that leave to amend must be sought from the managing judge after a properly motivated or grounded objection to the proposed amendment serves to advance the overall objective of case management just as rule 32, complemented by other rules and case law, seeks to do, in that the court's role in the process when a valid objection is made is entrenched. As such, it is not necessary to resort to rule 32 prior to filing the notice of intention to amend a pleading or document. The provisions of rule 32 are not engaged in circumstances where rule 52 is followed to the letter and there is

no valid or grounded objection to the delivery of a party's notice of intention to amend.

[25] The fact that *lis contestatio* had set in or, in other words, pleadings had closed, did not without more, serve to preclude a party from delivering a notice of intention to amend in strict compliance with the provisions of rule 52. The Rules do not purport to change the common law position that an amendment to a pleading may be sought or granted at any stage of a proceeding, including after *lis contestatio*, subject of course to the considerations that have already been addressed in this judgment.

[26] Moreover, the facts of this matter do not render themselves to an application of the principles set out with erudition and admirable clarity of thought by the Full Bench in *I A Bell*. A judge of the High Court seized with a case the facts of which fit in the principles set out in *I A Bell* is, of course, bound to follow the approach set out in the Full Bench judgment.

[27] The approach to the interpretation of rule 52 and the principles governing amendments set out in this judgment in no way undermines the ethos of case management and/or the profound support this court has rendered to judicial case management through cases including *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd*; ⁷ *Rainier Arangies v Unitrans (Pty) Ltd*; ⁸ *Konrad v*

⁷ *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation* 2012 (2) NR 671 (SC) paras 86 - 90.

⁸ *Rainier Arangies & another v Unitrans Namibia (Pty) Ltd & another* 2018 (3) NR 869 (SC) paras 9 - 11.

Ndapanda,⁹ *Municipal Council of Windhoek v Pioneerspark Dam Investment CC*.¹⁰

That support is reiterated. On the contrary, the interpretation of the rule contended for on behalf of the respondent appears to be an overzealous application of case management principles to a rule that has an in-built mechanism to regulate the process of effecting amendments to pleadings.

[28] Such an interpretation has the unintended consequence of making judicial case management overbearing, which it is not. The interpretation has another unintended consequence of leaving rule 52 truncated. For example, the initial process permitted by rule 52(1) – being the delivery of a notice of intention to amend – would be rendered nugatory as what a party should presumably first do is seek leave to file its notice of intention to amend despite the absence of a timeous and properly objection to the proposed amendment.

[29] The interpretation would also effectively proscribe the permissible amendment of a pleading on an unopposed basis as the phrase ‘a party receiving the notice is considered as having agreed to the amendment’ in rule 52(3) would be rendered a superfluous appendage to the rule. This is untenable as such interpretation would in turn offend the principle against the use of superfluous words in legislation.

Appealability of the decision disallowing the notice and the amendment

⁹ *Konrad v Ndapanda* 2019 (2) NR 301 (SC) para 16 – 17.

¹⁰ *Municipal Council of Windhoek v Pioneerspark Dam Investment CC* (SA 78-2016) [2018] NASC (22 June 2018).

[30] As this court pointed out in *Shetu Trading CC v Chair, Tender Board of Namibia*,¹¹ the fact that leave to appeal was granted by the High Court does not put an end to the question whether a judgment or order is appealable. This is so, because a ruling may not be converted into an appealable ‘judgment or order’ simply by the grant of leave to appeal.¹² Therefore, the question of appealability, if persisted with, remains an issue on appeal.¹³ As noted earlier, the question whether the order striking out the appellant’s notice of intention to amend and the amendment of its replication remains an issue for decision on appeal. It is on that issue that the focus turns next.

[31] In granting leave to appeal, the High Court gave the following reasons: The essence of the order it made was dispositive of the issue in dispute between the parties; the court was *functus officio* on that issue; the merits of the applicability or otherwise of rule 32 to the appellant’s matter has been finally decided; the right of the appellant to bring an amendment had been finally determined and it may not approach the court on the same issue again; the substance of the order it made raised a procedural issue of importance to the jurisprudence in the area of case management which had not hitherto been decided by our courts, and the interpretation of the rules is a matter on which another court may come to a different conclusion.

[32] Section 18(3) of the High Court Act 16 of 1990 restricts appeals against interlocutory orders. The section provides that appeals against interlocutory orders

¹¹ *Shetu Trading CC v Chair, Tender Board of Namibia* 2012 (1) NR 162 (SC) (*Shetu*) para 24.

¹² *Op. cit.* para 41.

¹³ *Government of the Republic of Namibia v Phillipus* 2018 (2) NR 581 (SC) (*Phillipus*) para 23.

are possible only with the leave of the court that had given the judgment or made the order or in the event that leave is refused by that court, the Supreme Court grants leave upon petition for leave to appeal. The policy consideration informing this requirement has been stated to be the avoidance of piecemeal appellate disposal of the issues in litigation with the unnecessary expense involved.¹⁴ As was held in *Di Savino v Nedbank Namibia Ltd*,¹⁵ the scheme of s 18(3) is that the judgment or order sought to be appealed against must have the characteristics of an appealable judgment or order and where the judgment or order is interlocutory, leave to appeal is required.¹⁶

[33] A judgment or order will generally be appealable if it possesses 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.¹⁷ This court has also held that where the court the judgment or order appealed from had erroneously interpreted a rule¹⁸ or statute¹⁹ and its wrong interpretive decision was final and unalterable by it, such decision is appealable.

[34] While the decision of the court below may not meet all the three traditional characteristics of appealability described above, the court *a quo* was correct to have granted leave to appeal in an obviously interlocutory decision. It is self-

¹⁴ *Fillipus* para 11.

¹⁵ *Di Savino v Nedbank Namibia Ltd* 2017 (3) NR 880 (SC).

¹⁶ Para 51. See also *Arandis Power (Pty) Ltd v President of the Republic of Namibia & others* 2018 (2) NR 567 (SC) para 16.

¹⁷ *Shetu* para 18.

¹⁸ *Namibia Financial Exchange v CEO of NAMFISA* 2019 (3) NR 859 (SC).

¹⁹ *Prosecutor-General v Taapopi* 2017 (3) NR 637 (SC).

evident from the reasons given for the grant of leave to appeal that the High Court was alive to the possibility that its interpretation of the relevant rules could be problematic and that the appellate court may come to a different conclusion on the matter. As earlier found, the approach to the interpretation of the relevant rules adopted by the court *a quo* is erroneous. The erroneous interpretation led the court to an incorrect conclusion upon which it made the order that followed. The decision is not susceptible to alteration by the court *a quo*. There was a final determination concerning a novel issue of importance regarding the proper approach to amendment of pleadings in the era of case management which had hitherto not been decided by our courts. In those circumstances, the decision is appealable and is properly before us.

Conclusion

[35] In the result, it has been found that the approach of the court below to the interpretation of the relevant rules and the principles governing a party's right to amend a pleading is erroneous and unalterable by it. The interlocutory decision rendered by the court below was appealable even on the basis that the interpretative decision is erroneous and unalterable by the court *a quo*. As the approach of the court below to the interpretation of the relevant rules is found to be erroneous, the appeal should be upheld. The court *a quo* should have found that the appellant's notice of intention to amend and the amendment of its replication were proper and rule compliant.

Order

[36] The following order is accordingly made:

- (a) The appeal is upheld with costs, such costs to include the costs of one instructing legal practitioner and two instructed legal practitioners.
- (b) The order of the court *a quo* is set aside and substituted for the following order:
- i. The notice of intention to amend the replication and the plaintiff's replication are not void or invalid and are properly before court.
 - ii. The defendant is directed to pay the plaintiff's costs occasioned by the defendant's opposition and objection to the above-mentioned documents (including the costs associated with the preparation of heads of argument, indexing and pagination of the court file and the preparation of bundles of authorities).'
- (c) The matter is referred to a status hearing to be convened by the managing judge for its further management.

SHIVUTE CJ

SMUTS JA

ANGULA AJA

APPEARANCES

APPELLANT:

R Totemeyer (with him D Obbes)

Instructed by Kinghorn Associates

RESPONDENT:

S S Makando

Instructed by Conradie & Damaseb