



NOT REPORTABLE

CASE NO: SA 105/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ROBERT DOUGLAS WIRTZ

First Appellant

WINDHOEK RENOVATIONS CC

Second Appellant

LH EQUIPMENT SALES CC

Third Appellant

and

JOHANNES ERASMUS VAN WYK

First Respondent

HARDROCK EARTHWORKS CC

Second Respondent

Coram: SMUTS JA, ANGULA AJA and UEITELE AJA

Heard: 11 April 2023

Delivered: 28 April 2023

Summary: Appellants approached the High Court on an urgent basis seeking a wide ranging interim relief in the form of an interim interdict against the respondents pending the finalisation of an action between the parties. The first respondent, (with the first appellant are sole members of the second and third appellants – which are close corporations in the ratio of 51:49 in respect of the second appellant and an equal membership in the third appellant) instituted an action against the appellants seeking the termination of the business relationship by terminating his membership of the close corporations against a division of their assets and a range of ancillary relief. The

appellants sought an interim interdict in terms of paragraph 3.1 of the notice of motion on the return date to operate pending the final determination of the action. On 20 November 2020, the court *a quo* made an order granting the appellants interim relief sought in paragraph 3.1.3, but refusing the relief sought in paragraphs 3.1.1 and 3.1.2 and reasons for the order followed on 8 December 2020. The appellants timeously filed their notice of appeal against the order in terms of rule 7(3)(a) of the Rules of this Court on 8 December 2020. The appellants however did not file their supplemented notice of appeal within the required 14 day period specified in rule 7(3)(a) – they only did so on 22 January 2021 (some two weeks later). A condonation application for this non-compliance was only lodged on 6 March 2023 seeking ‘to the extent necessary, reinstatement of the appeal’ – more than two years later. The condonation application was opposed by the respondents.

The issues for determination are firstly; whether this Court should grant condonation for the late filing of appellants’ supplementary notice of appeal and reinstate the appeal, and secondly; whether appellants required leave to appeal the order of the court *a quo*.

Appellants submit that their failure to bring the condonation application timeously was due to an ‘oversight’ which was discovered by counsel when briefed to prepare heads of argument. Respondents argued that the failure to comply with the rules was a deliberate election by the appellants to not comply with the rules of court; that the supplemented notice of appeal does not comply with rule 7(3) in that the lengthy notice does not clearly set out the specific different grounds of appeal and the findings of fact and conclusions of law objected to; and that the relief sought in paragraph 3.1 was of an interlocutory nature pending the finalisation of the action and that leave to appeal was required.

Held, whilst the delay in filing the supplemented notice of appeal was not excessive at all, the explanation provided for doing so is weak, lacked specificity and evinces conduct of consciously not complying with the rule, compounded by the failure to bring an application for condonation without delay afterwards. The delay in bringing the condonation application – of more than two years – merely ascribed to as being an ‘oversight’ is highly unsatisfactory especially in the context of where the practitioner is fully aware of the non-compliance with the rule.

Held that, this court has repeatedly stated that a condonation application should be brought without delay once a party is aware of the non-compliance with the rules and that a 'full, detailed and accurate explanation' is to be provided.

Held that, given the dual nature of the requirement of showing good cause in condonation applications, (an acceptable explanation and prospects of success), this can mean at times that strong prospects of success can make up for a weak and insufficient explanation. In determining this application for condonation, it is appropriate to consider the prospects of success on appeal (whether leave to appeal was required).

Held that, the wide ranging interim relief sought in the urgent application was in essence to put in place a raft of temporary measures pending the determination of the main action akin to a dissolution of a partnership when terminating the membership in the close corporations to bring about the termination of the relationship which has gone awry. The nature of the temporary relief and order sought in paragraph 3.1 is directed at doing that and is thus interlocutory.

Held, the court having found that the order dismissing of the interim relief sought in paragraph 3.1 and 3.2 is an interlocutory order, leave to appeal was thus required in terms of s 18(3) of the High Court Act 16 of 1990. The condonation application cannot succeed for this reason alone. This appeal could not properly serve before the court without leave.

The matter is accordingly struck from the roll with costs.

APPEAL JUDGMENT

SMUTS JA (ANGULA AJA and UEITELE AJA concurring):

Introduction

[1] At issue in this matter is whether the appellants required leave to appeal against the order given by the High Court. This issue arises in the following way.

[2] The appellants approached the High Court on an urgent basis seeking wide ranging interim relief in the form of an interim interdict against the respondents pending the finalisation of an action between the parties.

[3] By way of background, the first appellant and first respondent are the sole members of the second and third appellants which are close corporations in the ratio of 51:49 in respect of the second appellant and having equal membership in the third appellant. Shortly stated, the first appellant and first respondent are in dispute with each other concerning those business entities. The first respondent instituted an action against the appellants, essentially seeking a termination of the business relationship by terminating his membership of the close corporations against a division of their assets and a range of ancillary relief. This dispute provides the context within which the appellants sought interim interdicts pending the determination of that action.

[4] Much of the factual matters raised in the proceedings is no longer relevant and is not referred to. That is because an order was made by agreement on 9 October 2020 when the matter was first called and in which the respondents consented to a final order addressing the bulk of the interim relief sought against them but not including the relief sought in paragraph 3.1 of the notice of motion.

[5] In terms of the order made by agreement, the interim interdict sought in paragraph 3.1 of the notice of motion was resolved on an interim basis until the return date of 20 October 2020 when the parties would 'be at liberty to make submissions upon the question whether such relief should be made final or be replaced with relief as proposed by either the applicants or respondents'.

[6] Exercising their right to replace that interim relief, the appellants sought an interim interdict in terms of paragraph 3.1 of the notice of motion on the return date to operate pending the final determination of the action.

[7] The relief sought in paragraph 3.1 is to be read with the introductory portion of paragraph 3 and is as follows:

'3. Directing and ordering that a rule *nisi* be issued calling upon the respondents to show cause on a date to be determined, why an order in the following terms should not be made, pending the final determination of the disputes between the parties in case number HC-MD-CIV-ACT-OTH-2020/02046, or in any arbitration proceedings to which the disputes between the parties may be referred to upon the dismissal and/or stay such action:

'3.1 Interdicting and restraining first respondent, with immediate effect, from:

3.1.1 performing any action nor duty, of whatsoever nature, in his capacity as member of second and third applicant, and/or on behalf of the second and third applicant;

3.1.2 having any access to the premises or offices of the second and third applicants, or to any of the documents, records, data, client lists, and any further confidential data and/or information of the second and third applicants;

3.1.3 making available any information of whatsoever nature, concerning the affairs of second and third applicants, or any of their client information or operational statistics or data to second respondent.'

[8] This was the relief sought by the appellants on the return date of 20 October 2020.

[9] Prior to the return date, the respondents filed a counter-application. The respondents however conceded at the hearing on 20 October 2020 that it was not well worded and did not move for an order in those terms. The appellants sought its dismissal with costs as well as an interim interdict in the terms set out in paragraph 3.1.

[10] After reserving judgment, the High Court made the following order on 20 November 2020, only granting the interim relief sought in paragraph 3.1.3 but refusing the relief sought in paragraphs 3.1.1 and 3.1.2:

‘1. The relief sought in paragraphs 3.1.1 and 3.1.2 of the notice of motion is dismissed.

2. Pending finalisation of the dispute between the parties in case number HC-MD-CIV-ACT-OTH-2020/02046, or of any arbitration proceedings to which the dispute between the parties may be referred, the first respondent is interdicted and restrained from making available to the second respondent, any information of whatsoever nature concerning the affairs of the second and third applicants, or their client information or operational statistics or data.

3. The first applicant is ordered to pay the first respondent’s costs of the application (as it relates to the order sought in paragraph 3.1 of the notice of motion), such costs to include the costs of one instructing and one instructed counsel.’

[11] Reasons for the order followed on 8 December 2020.

[12] On 8 December 2020, the appellants timeously filed a notice of appeal against the order in terms of rule 7(3)(a) of the rules of this Court. The appellants did not however timeously file their supplemented notice of appeal within the required 14 day

period specified in rule 7(3)(a) and only did so on 22 January 2021, some two weeks late.

[13] On 6 March 2023, the appellants filed an application for condonation and also seeking 'to the extent necessary, reinstatement of the appeal'.

Condonation application

[14] As occurs with unfortunate frequency in this court, we have a condonation application before us which is to be first considered.

[15] The appellants' instructing legal practitioner states in his affidavit in support of the condonation application that on 8 December 2020 when reasons were provided, appellants' counsel was no longer in office and was already on annual leave. The reasons were sent by email to instructed counsel at that time. The instructing practitioner asserts that he had no forwarding address for counsel. He himself went on leave on 15 December 2020 until 14 January 2021. On his return from leave, he took the matter up with instructed counsel who he says had returned from leave 'during the same week'. The supplemented notice was filed on 22 January 2021. The condonation application was however only lodged on 6 March 2023.

[16] The instructing practitioner's explanation for bringing the application more than two years later in March 2023 is to the effect that it was an 'oversight' which was discovered by counsel when briefed to prepare heads of argument on appeal. The oversight arose, he says, in the context of 'six sets of litigious procedures pending between the parties'.

[17] The application for condonation is opposed by the respondents. They assert that the delay in providing the supplemented notice of appeal evinces a deliberate election not to comply with the rules. The point is also taken that there was an undue delay in bringing the application for condonation – of more than 2 years.

[18] The respondents also take the point in their written heads of argument that the relief sought in paragraph 3.1 was of an interlocutory nature pending the finalisation of the action and that leave to appeal was required. The point is also taken in their written argument that the supplemented notice of appeal does not comply with rule 7(3) in that the lengthy notice does not clearly set out the specific different grounds of appeal and the findings of fact and conclusions of law objected to.

[19] Whilst the delay in filing the supplemented notice of appeal was not excessive at all, the explanation provided for doing so is weak and evinces conduct of consciously not complying with the rule, compounded by the failure to bring an application for condonation without delay afterwards. The appellants' instructing practitioner took no steps to address the issue from 8 December to 15 December 2020. No attempt is made to trace counsel. No specificity is provided as to counsel's whereabouts and there is no assertion that he was without email and cellphone contact. The reasons had after all been emailed to instructed counsel. No communication is made to the respondents' practitioner to apprise him of a potential delay. No information is provided as to when instructed counsel was able to consider the reasons and no precise dates are given as to his absence from and return to office. The explanation thus lacks specificity. But the delay in bringing the condonation application – of more than two years – merely ascribed to as being an 'oversight' is

highly unsatisfactory especially in the context of where the practitioner is fully aware of the non-compliance with the rule.

[20] As has been repeatedly made clear by this court, a condonation application should be brought without delay once a party is aware of the non-compliance with the rules and that a 'full, detailed and accurate explanation' is to be provided.¹

[21] In this instance, the appellants' practitioners were not only aware of their non-compliance but proceeded with their course of conduct knowing that they would not comply with rule 7. In those circumstances, one would at the very least have expected the late supplemented notice to be accompanied by a condonation application. Given the conscious non-compliance with the rule, the practitioner would have been aware of the need to apply for condonation simultaneously when filing of the supplemented notice or at the latest very soon afterwards. Instead, this only occurred more than two years later. An unexplained 'oversight' is said to be the cause of this.

[22] This remissness and neglect on the part of appellants' practitioner is unacceptable. Given the dual nature of the requirement of showing good cause in condonation applications, (an acceptable explanation and prospects of success), this can mean at times that strong prospects of success can make up for a weak and insufficient explanation. In determining this application for condonation, it is appropriate to consider the prospects of success on appeal.

[23] I thus turn to the prospects of success.

Is the High Court order appealable without leave?

¹ *Arangies t/a AutoTech v Quick Build* 2014 (1) NR 187 (SC) para 5.

[24] The respondents submit that the order of the High Court dismissing the application for the interim interdict sought in paragraph 3.1 of the notice of motion is interlocutory and requires leave to appeal in terms of s 18(3) of the High Court Act 16 of 1990. If this were to be the case, the appeal would fall to be struck and the condonation application would fail for this reason.

[25] Section 18(3) 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.'

[26] The leading judgment of this Court on this question is *Di Savino v Nedbank Ltd*.² In that matter, the Chief Justice conducted a comprehensive survey and analysis of prior decisions of this court and leading cases in South Africa before and after the procedure in respect of appeals was amended in South Africa in 1982. The Chief Justice concluded that the meaning to be given to s 18(3) is:³

'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 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.'⁴

² *Di Savino v Nedbank Namibia Ltd* 2017 (3) NR 880 (SC).

³ See also *Prime Paradise International Ltd v Wilmington Savings Fund Society FSB & others* 2022 (2) NR 359 (SC) paras 98-100.

⁴ Paragraph 51.

[27] A judgment or order dismissing an application for an interim interdict meets the first requirement is thus appealable. The question arises as to whether the relief which was refused by the court below is interlocutory in nature.

[28] Subsequent to *Di Savino*, this court in *Government of the Republic of Namibia v Phillipus*⁵ in following *Di Savino*, further explained the nature of interlocutory orders for the purpose of s 18(3) thus:

[10] The court in *Di Savino* found that a wide meaning is to be accorded to interlocutory orders and is 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. 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*. 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 CC v Chair, Tender Board of Namibia, Knouws NO (in his capacity as Provisional Liquidator of Avid Investment Corporation (Pty) Ltd) v Josea & another* and again emphasised in *Di Savino*. 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 same time. 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. It is in order to minimise interlocutory skirmishes that rule 32(11) of the High Court Rules caps costs in interlocutory proceedings.’

⁵ *Government of the Republic of Namibia v Phillipus* 2018 (2) NR 581 (SC) (*Phillipus*). See also *Prime Paradise* para 98-100.

And

[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 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.’

[29] The term ‘interlocutory’ in s 18(3) is thus employed in a wide and general sense,⁶ which is helpfully explained by Corbett, JA in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*,⁷ as opposed to simple or purely interlocutory orders:

‘(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

⁶ *Fillipus* paras 10 and 11.

⁷ *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 at 549F-550A.

- (ii) those, known as “simple (or purely) interlocutory orders” or “interlocutory orders proper”, which do not.’

[30] This court in *Prime Paradise*⁸ concluded that interlocutory orders for the purpose of s 18(3) would accordingly refer to all orders incidental to the main dispute, preparatory to or during the process of litigation and include those which have a final and definite effect upon the main dispute but which do not finally dispose of the main action.

[31] In this matter, the relief sought by the appellants in paragraph 3.1 is for an interim interdict pending the determination of the specified action between the parties directed at terminating the relationship of the parties in their joint business as conducted through the close corporations, the second and third appellants. The fact that the presiding judge in the High Court applied the test for final interdicts in dismissing the relief sought in paragraph 3.1.1 and 3.1.2 does not change the nature of the actual relief sought. It remained an application for an interim interdict, pending the determination of the action proceedings between the parties. Indeed, one of the primary grounds of appeal raised by the appellants is that the court *a quo* applied the wrong test to the application for that relief, by applying the requirements for a final interdict instead of the test for an interim interdict. The relief sought in subparagraphs 3.1.1 and 3.1.2 did not finally dispose of a substantial or any portion of the relief claimed and to be determined in the main action. The relief would furthermore be of a temporary duration, pending the determination of the action. As was held by Strydom CJ, the refusal of an interim interdict in *Wirtz v Orford & another*,⁹ was an interlocutory application in that matter, requiring leave to appeal.

⁸ Paragraph 101.

⁹ *Wirtz v Orford & another* 2005 NR 175 (SC) at 191B-D.

[32] An analysis of the appellants' notice of motion reveals that it thus sought wide ranging interim interdict against the respondents requiring them to desist from engaging in conduct on behalf of entities or in competition with appellants and protecting their confidential client and other information from falling into the hands of the second respondent. The other interim relief was directed at the return of assets, accounting for the finances of the second and third appellants, reinstating tracking facilities on trucks and reinstating employees. These other aspects were resolved between the parties on a final basis by agreement before the return date. What remained was the appellants seeking an interim interdict concerning competition issues and protecting alleged confidential information raised in paragraph 3.1. pending the finalisation of the trial action.

[33] Counsel for the appellants argued that the relief sought in paragraph 3.1 related to unfair competition and was not a portion of the relief sought in the main action. It is correct that the main action does not seek relief relating to competition issues but the interim relief is directed at maintaining and protecting the *status quo* in respect of the second and third appellants, pending their dissolution with the essential aim of maintaining the value and integrity of the trading entities and the duties of the principles to them. The wide ranging interim relief sought in the urgent application was in essence to put in place a raft of temporary measures pending the determination of the main action akin to a dissolution of a partnership when terminating the membership in the close corporations to bring about the termination of the relationship which has gone awry. The nature of the temporary relief and order sought in paragraph 3.1 is directed at doing that and is thus interlocutory.

[34] I thus conclude that the order dismissing the interim relief sought in paragraph 3.1 and 3.2 is an interlocutory order and that leave to appeal was required in terms of s 18(3). The condonation application cannot succeed for this reason alone, given that the appeal itself could not properly serve before us without leave. The matter is accordingly to be struck from the roll with costs for this reason alone.

[35] The appellants also sought to appeal against the failure on the part of the court below to award them costs in respect of the abortive counter-application, despite having expressly sought those costs in the court below. Counsel for the appellants correctly accepted that if we were to find that the order sought to be appealed against (in respect of paragraph 3.1) was interlocutory, then leave to appeal would be required against the failure to make the costs order sought.¹⁰ Given the conclusion we have reached concerning the need for leave to appeal in respect of the interlocutory order sought to be appealed, leave to appeal against the refusal to accord the appellants' their costs in respect of the counter-application was accordingly required. That has not been sought or granted. It likewise cannot serve before us.

Defective notice of appeal?

[36] The respondents raise a further impediment against the granting of condonation. It is contended that the supplemented notice of appeal does not comply with rule 7(3) in that it fails to set out the specific grounds of appeal and in respect of each ground, identify the findings of fact and conclusions of law objected to as is required in peremptory terms in rule 7(3).

¹⁰ *Namibia Grape Growers and Exporters Association & others v The Ministry of Mines and Energy & others* 2004 NR 194 (SC) 221E-G.

[37] The appellants' supplemented notice of appeal runs into 25 pages of text and attaches the transcript of oral argument on 20 October 2020. It is a lengthy and rambling document lacking in coherence.

[38] Given the conclusion we have reached concerning the need for leave to appeal, it is not necessary for the purposes of this matter to determine whether the supplemented notice of appeal fails to comply with rule 7(3).

[39] As to the question of costs, counsel for the appellants was asked if any cost order were to be made against the appellants whether it should not be made against the first appellant, as was done in the High Court, given the fact that the second and third appellants are in essence jointly owned by the first appellant and first respondent and given the dispute between them. Counsel expressed the view that an order of joint and several liability would suffice. Although that would be the usual practice, it would seem to me that it would not be appropriate to do so in this matter because of the nature of the dispute between the parties and the nature of the ownership of the second and third appellants. The costs should accordingly be borne by the first appellant.

Order

[40] The following order is made:

- (a) The application for condonation is dismissed with costs.
- (b) The appeal is struck from the roll with costs.

- (c) The cost orders in paragraphs (a) and (b) include the costs of one instructing and one instructed counsel and are to be paid by the first appellant.

SMUTS JA

ANGULA AJA

UEITELE AJA

APPEARANCES

APPELLANTS:

TA Barnard

Instructed by Dr Weder, Kauta &
Hoveka Inc.

RESPONDENTS:

PCI Barnard

Instructed by Cronjé Inc