

Practice Directive 61
"ANNEXURE 11"

IN THE HIGH COURT OF NAMIBIA

Case Title: SWAKOPMUND URANIUM (PTY) LTD v ETTIENNE GERHARD LUBBE	Case No: HC-MD-CIV-ACT-CON-2018/04815
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: Honourable Mrs Justice Rakow, AJ	Date of hearing: 9 July 2020
	Date of order: 9 July 2020
Neutral citation: <i>Swakop Uranium (Pty) Ltd v Lubbe</i> (HC-MD-CIV-ACT-CON-2018/04815) [2020] NAHCMD 281 (9 July 2020) Having read the record of proceedings as well as submissions made by counsels for the applicants and the respondent:	
IT IS HEREBY ORDERED THAT: a) Leave to appeal is herewith granted	
Reasons for order:	
<u>Background</u> [1] The Applicant in this matter is Swakop Uranium (Pty) Ltd, a company with limited liability, duly incorporated in terms of the laws of Namibia. The application for leave to appeal relates to an order of this court upholding a special plea which was raised by the Respondent, who is an adult male and the sole member of Rensburg Motor Sales CC, previously known as Lubbe Motor Group CC, who is currently represented by Ian Robert Mc Laren of Bruni & Mc Laren, duly appointed liquidators of Rensburg Motor Sales CC, who is then also the 1st Defendant in the main action. This application for leave to appeal is not opposed by Mr. Lubbe. [2] The averment in the particulars of claim is that the Applicant/Defendant, represented by Kallie le Roux and/or Gerson Katjiangua, purchased a forklift from Lubbe Motor Group CC for the amount of N\$763 770.26 during December 2016 from the 1st Defendant who was represented by the 2nd Defendant, Etienne	

Gerhard Lubbe (Lubbe). The Plaintiff then realized that the forklift was not suitable for the purpose it was purchased and on or about the 13th of October 2017, they entered into an agreement with Lubbe Motor Group CC represented by Lubbe in that it would purchase another forklift from them, an Aisle Master forklift for the amount of N\$1 245 763.93 and that the previous forklift will be returned to Lubbe motor Group CC and the purchase amount of the previous forklift would be utilized as part payment for the new forklift, to wit N\$763 770,26. The new forklift was however never delivered by the Lubbe Motor Group CC and it is therefore indebted to the Plaintiff in the amount of N\$763 770.26 which they seek to recover.

[3] To these allegations, the 2nd Defendant, Lubbe, filed a special plea indicating that he never signed surety for the debts incurred by Lubbe Motor Group CC, which is now in liquidation and therefore, unless the corporate veil is pierced, cannot be held personally liable for such debts. As the Plaintiff did not approach this court, upon application, seeking an order specifically granting relief in terms of the provisions of Section 64 of the Close Corporations Act, 26 of 1988 for piercing the corporate veil, the Plaintiff's claim against the 2nd Defendant in his personal capacity should be dismissed.

[4] The court followed the *Teichmann Plant Hire (Pty) Ltd v Coetzee*¹ judgement of Justice Masuku in which in essence the specific section was interpreted by the learned judge as follows:

'In the premises, I am of the considered view that a party seeking judgment based on the invocation of the provisions of s.64 must have first sought and obtained a declarator from the court that the member concerned knowingly traded in one or more of the manners set out in s. 64.'

[5] This special plea was upheld by the court and is now the subject of the application for leave to appeal.

Leave to appeal:

[6] The court first needs to decide whether the current order is indeed an appealable order as contemplated in s 18(3) of the High Court Act, 16 of 1990. This section reads as follows:

'(3) 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.'

[7] In deciding whether an order or judgement is appealable, in the *Di Savino v Nedbank Namibia Ltd*²

¹ (HC-MD-CIV-ACT 2016-03173) [2017] NAHCMD 61 (8 March 2017).

² 2017 (3) NR 880 (SC).

matter, Shivute CJ referred to the three attributes that must be present to identify an appealable judgement or order as follows:

'The three attributes counsel for the appellant referred to are those set out in the decision of the South African Appellate Division in *Zweni v Minister of Law and Order 1993 (1) SA 523 (AD)* and as endorsed in many judgments of this court, namely that (i) the decision must be final in effect and not susceptible to alteration by the Court of first instance; (ii) it must be definitive of the rights of the parties, ie. it must grant definite and distinct relief; and (iii) it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.'

Applying the above to the current matter before court, the court finds that the upholding of the special plea in this instance indeed meet the three attributes as set out in the *Zweni* matter and is therefore an appealable order.

[8] The next consideration is whether there is a reasonable prospect of success or put differently, whether another court may come to a different conclusion than what this court arrived at. In this instance the arguments on the relevant legal principles before court were of such a nature that I am of the opinion that another court may come to a different conclusion.

I therefore make the following order:

- (i) Leave to appeal against the whole judgment of 12 May 2020 is granted.
- (ii) The costs of the application for leave to appeal shall be costs in the appeal.

E Rakow

Acting Judge

Judge's signature	Note to the parties:
	Not applicable.
Counsel:	
Applicants	Respondent
Adv. Kirsten <i>On instruction of PF Koep & Co</i>	<i>No appearance</i>

