CASE NO.: SA 08/2002

IN THE SUPREME COURT OF NAMIBIA

In the matter between

JOHANNA ADRIANA ROSSOUW APPELLANT

And

COMMERCIAL BANK OF NAMIBIA LIMITED RESPONDENT

CORAM:	Strydom, C.J., O'Linn, A.J.A. *et* Chomba, A.J.A.
HEARD ON:	04/10/2002
DELIVERED ON:	24/01/2003

APPEAL JUDGMENT

STRYDOM, C.J.: After argument was heard the Court struck the matter off the roll with costs and indicated that reasons would be provided at a later stage. What follows are the reasons of the Court.

The appellant, as applicant, applied in the Court *a quo* for the rescission of a judgment that was obtained by the respondent. I will, for the sake of convenience, further refer to the parties as they appeared in that Court. Mr. Bloch represented the applicant and Mr. Coetzee the respondent.

At the hearing of the matter, before Teek, JP, a point *in limine* was taken by the respondent in terms of Sub-rule (4) of rule 62, to the effect that the applicant failed to comply with the provisions of the sub-rule in that an index of the proceedings was not timeously, or at all, served on the respondent. After argument was heard, the point *in limine* was upheld and the matter was struck from the roll with costs. (See in this regard cases such as Smith v Wattrus NO, 1981 (2) SA 206 (TPD), Star Marine Yacht Services v Nortier, 1993 (1) SA 120 (SECLD) and Commercial Bank of Namibia Ltd v Oshikango Vehicles CC and Another, unreported judgment by Hoff, J, delivered on 14 September 2001.) The appeal is mainly against the finding of the Court that the applicant did not comply with the provisions of the rule.

When the matter was argued before us, Mr. Coetzee, took a further point *in limine,* namely that the order by the Court *a quo,* to strike the matter from the roll, was not a judgment or order as envisaged by sec. 18(1) of the High Court Act, Act 16 of 1990, (the Act), and that at best for the applicant the order was interlocutory and in terms of sec. 18(3) of the Act, it was incumbent on the applicant to have obtained leave to appeal from the Court *a quo* or, if leave was refused, to petition and obtain leave from this Court.

Mr. Bloch immediately conceded that the point *in limine* was a good one and that before noting an appeal in this matter application should have been made for leave to appeal. Counsel, however, submitted that there were special and extraordinary circumstances as a result of which this Court should use its inherent jurisdiction to grant special leave.

The submissions made by Mr. Coetzee, and the concession by Mr. Bloch as to the necessity to obtain leave to appeal, seem to me to be correct. According to sec. 18(1) of the Act an appellant in civil proceedings has a right of appeal to the Supreme Court against a judgment or order of the High Court. Sub-sec. (3) however provides 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."

As far as the meaning of the words 'judgment or order' in sec 18(1) is concerned, this Court, in the case of Andreas Vaatz and Another v Ruth Klotzsch and Others, unreported judgment of this Court, delivered on 11/10/2002, accepted the meaning ascribed to similar words contained in Act

No 59 of 1959, as amended, by the South African Courts. To be an appealable judgment or order, three attributes were required according to Erasmus, Superior Court Practice, (A1 – 43), where the following was stated:

> "The Supreme Court of Appeal held that a 'judgment or order' is a decision which, as a general rule, has three attributes:
>
> (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, i.e. 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."

A ruling is the antithesis of a judgment or order. (See Zweni v Minister of Law and Order, 1993 (1) SA 523 (AD) at 536 A-C). Because of the concession, made by Mr. Bloch, it is not necessary to deal at any length with the status of an order whereby a matter is struck from the roll. Suffice it to say that tested against the above requirements it certainly is not a judgment or order as envisaged by sec 18(1) of the Act. The failure of the applicant to comply with the rule of the High Court is a procedural step only and can be corrected as the application was not refused on its merits. Whether a matter, which was struck

from the roll on the basis of a procedural failure, is at all appealable is in my opinion doubtful. However, for purposes of this case I shall accept that it is so. At best for the applicant this is a matter which falls squarely within the provisions of sec 18(3) of the Act and it is therefore necessary for the applicant to obtain the leave of the Court *a quo* and, failing that, leave from this Court, to bring the matter on appeal.

Faced with this problem Mr. Bloch urged the Court to grant special leave to appeal to the applicant. In this regard Counsel relied on Herbstein and van Winsen: The Civil Practice in the Supreme Court of South Africa, 4th Ed., p 863 and the case of Enyati Colliery Ltd and Another v Alleson, 1922 AD 24. Both these authorities stated that the Court would only come to the assistance of an appellant in an instance where it was necessary to prevent grave and substantial injustice. Assuming that this Court may have the same inherent jurisdiction to come to the aid of an appellant in order to redress substantial and grave injustice, I am of the opinion that the present instance is not such a matter. Mr. Bloch relied on mainly two issues in terms whereof he urged the Court to grant special leave to appeal to the applicant. The first is that notwithstanding negotiations between the two sets of legal practitioners, after the Notice of Appeal was given on 22nd March 2002, and the exchange of various letters the respondent's legal practitioners at no stage alerted the applicant or her legal practitioner to the fact that leave to appeal was necessary in this instance. Everybody accepted that the 'appeal' was in order. If the legal practitioners can be blamed for one's own failure to read the rules of Court then I would at least expect to see evidence that they deliberately

kept quiet and led their opponent into a trap. There is no such evidence and the point was taken for the first time when Counsel, Mr. Coetzee, drafted his heads of argument. The inference is strong that the instructing legal practitioners for the respondent were also unaware of what the position was and that they were only alerted thereto when Mr. Coetzee drew their attention to that fact.

The second contention of Mr. Bloch was based on the fact that the applicant would now have to pay unnecessary costs if the matter was struck from the roll. This is in my opinion not special or extraordinary. These unnecessary costs could have been averted by applying for leave to appeal or, in the first instance, the failure to comply with the rules could have been corrected which would have obviated the need to bring the matter on appeal.

In the result the Court made the following order:

The appeal is struck from the roll with costs.

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STRYDOM, CJ.

I agree,

_____

O’LINN, A.J.A.

I agree,

_____

CHOMBA, A.J.A.

COUNSEL ON BEHALF OF THE APPELLANT:	MR. B. BLOCH
Instructed by:	B. Bloch Attorneys
COUNSEL ON BEHALF OF THE RESPONDENT	MR. G.S. COETZEE
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