



NOT REPORTABLE

CASE NO: SA 78/2016

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MUNICIPAL COUNCIL OF WINDHOEK

Appellant

and

PIONEERSPARK DAM INVESTMENT CC

Respondent

Coram: MAINGA JA, SMUTS JA, and FRANK AJA

Heard: 13 June 2018

Delivered: 22 June 2018

APPEAL JUDGMENT

SMUTS JA (MAINGA JA and FRANK AJA concurring):

[1] The preliminary issue raised in this appeal is whether leave to appeal is required in an appeal against a decision of the High Court refusing the appellant's application to amend its plea.

Factual background

[2] The parties to these proceedings entered into a lease agreement in 2003. The respondent disputes the appellant's notice cancellation of the lease and asserts that it constitutes a repudiation alternatively a material breach of the lease agreement. The respondent claims in its action that it is entitled to cancel the agreement and seeks an award of damages in excess of N\$100 million from the appellant.

[3] The appellant filed a plea and subsequently twice gave notice of an intention to amend it. Both notices were objected to. An application to amend was brought in respect of the second notice and was dismissed by the High Court on 25 November 2016. The appellant noted an appeal against the dismissal of the application to amend its plea.

Leave to appeal required or not?

[4] In its written argument the respondent has taken the preliminary point that the dismissal of the application to amend is an interlocutory order as envisaged by s 18(3) of the High Court Act¹ and that leave to appeal is required – either by the High Court or this court in the event of refusal by the High Court.

¹ Act 16 of 1990.

[5] The appellant did not seek leave to appeal. In the absence of leave, Mr Heathcote on behalf of the respondent argued that the appeal should be struck from the roll with costs, including those of two instructed counsel.

[6] This court in *Di Savino v Nedbank Namibia Limited*² was also seized with a matter where an appellant sought to appeal against the dismissal of an application to amend his plea. This court found that the order appealed against was of an interlocutory nature and that leave to appeal was required by s 18(3). In the absence of leave to appeal, the appeal was struck from the roll with costs in that appeal. After conducting a detailed survey and analysis of authorities, the Chief Justice concluded:

‘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.’³

[7] The court in *Di Savino* held that an application to amend does not dispose of a matter to finality and that an order refusing such an application, as occurred in this instance, is interlocutory and that leave to appeal is required by s 18(3).

² 2017 (3) NR 880 (SC).

³ At para 51.

[8] The *Di Savino* judgment was given on 7 August 2017 and has since been reported. It has also since been followed by this court on two subsequent occasions.⁴

[9] Mr Marcus who represented the appellant did not question the correctness of the approach in *Di Savino* but instead argued that the instant matter was distinguishable. He argued that this was because the effect of the refusal of the application to amend in the instant matter was that the appellant was left with no defence and that it meant its defence was dismissed and the matter in effect finalised as a result.

[10] Mr Marcus pointed out that the notice to amend sought to introduce a defence of illegality which the court below had found to be untenable. He said that the defendant/appellant had previously relied upon a lack of authority as its main defence which was omitted from the notice to amend. He said it would no longer be persisted with and that, given the refusal to permit the amendment to introduce a plea of illegality, the (appellant) no longer had a defence to the claim and that the effect of refusing the amendment was to find in favour of the plaintiff/respondent in respect of its claim.

[11] During oral argument, Mr Marcus was referred to the pleadings and the notice to amend which denied the plaintiff's quantum as well as denying that the

⁴ *Henle t/a Namib Game Services v Wildlife Assignment International (Pty) Ltd*, SA 41/2017 and SA 67/2017, 27 March 2018 and *Government of the Republic of Namibia v Phillipus* SA 50/2016, 6 April 2018.

plaintiff had complied with its contractual obligations. As far as the latter denial was concerned, he said it did not comprise a full defence to the merits of the claim.

[12] Mr Marcus could not however point to any statement in the record which inexplicably included the transcript of oral argument where it was stated on behalf of the appellant that the refusal of the amendment would result in its liability on the merits. This was not stated to the presiding judge as is reflected in his order which merely refused the application to amend and postponed the matter for a further case management in the form of a pre-trial conference. Nor was there any indication on the part of the appellant that its defence of lack of authority was abandoned.

[13] The actual effect of the refusal of the application to amend is that the original plea stands. It contains a triable defence on the merits of lack of authority and denying the plaintiff's quantum.

[14] An appeal to this court is confined to the record which does not indicate that the effect of the refusal of the amendment results in finality in the sense of a finding in favour of the plaintiff in respect of the claim. That is also not how the matter was argued before the court below, as is reflected in the record and in the court order. The High Court's order on the papers before us did not finally dispose of the claim.

[15] It would have been another matter entirely had the High Court been approached by way of stated case on the basis of the refusal of the amendment would finally determine the merits of the claim. That did not occur. Nor was the

matter argued on that basis. Nor did the pleadings suggest this in the absence of the abandonment of the other defences.

[16] What is before us was an attempt to amend a plea by introducing a new defence of illegality which the High Court rejected. This is precisely what happened in *Di Savino* where a new defence raising illegality was also unsuccessfully attempted.

[17] The decision in *Di Savino* is thus on all fours with this matter and is to be followed. The order of the High Court was thus plainly interlocutory. Leave to appeal was required. It had not been sought. It follows that the matter is to be struck from the roll.

[18] The only question remaining is one of costs.

[19] The respondent seeks the costs occasioned by the employment of two instructed counsel. Despite the magnitude of the claim, a cost order of that kind is in my view by no means warranted in respect of an order striking the matter from the roll for the reasons provided, given the clarity of reasoning in *Di Savino* and the fact that this matter is for all intents and purposes on all fours with *Di Savino*. It was thus an elementary matter. The appropriate costs order is one of one instructed and one instructing counsel.

[20] The following order is made:

1. The appeal is struck from the roll with costs including those of one instructing and one instructed counsel.

SMUTS JA

MAINGA JA

FRANK AJA

APPEARANCES

APPELLANT:

N Marcus

Of Nixon Marcus Public Law Office

RESPONDENT:

R Heathcote, assisted by B de Jager

Instructed by Nambahu Associates