



**NOT REPORTABLE**

CASE NO: SA 16/2019

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**ALEX MABUKU KAMWI KAMWI**

**Appellant**

and

**MINISTER OF LANDS AND RESETTLEMENT**

**First Respondent**

**COMMUNAL LAND BOARD OF ZAMBEZI**

**Second Respondent**

**CHIEF KISKO MAIBA LISWANI III**

**Third Respondent**

**LUCKSON MAHOSHI CHIKA**

**Fourth Respondent**

**PHILLEMUN MUNICHEZE NASILELE**

**Fifth Respondent**

**SIMASIKU RAYMOND SILUZUNGILA NTOMWA**

**Sixth Respondent**

**CHARLES LISULO**

**Seventh Respondent**

**BENSON NTOMWA**

**Eighth Respondent**

**ALBERT SHAMUKUNI**

**Ninth Respondent**

**NCHINDO SIMASIKU**

**Tenth Respondent**

**SAMUELE BUCHANE (MAKANGARA) SIMATAA**

**Eleventh Respondent**

**Coram:** SHIVUTE CJ, SMUTS JA and HOFF JA

**Heard:** 15 March 2021

**Delivered:** 29 March 2021

**Summary:** The appellant brought an application to evict the fourth to eleventh respondents and their families in the court *a quo*. The respondents raised points of

law under rule 66 of the High Court Rules (ie the defective service on the second respondent, the Communal Land Board of the Zambezi Region) and that the area from which the appellant sought to evict them was not properly described. The High Court found that service upon the second respondent was not in accordance with the its rules; that it was fatally defective and a nullity and that the application should be served properly. As a consequence, the High Court struck the application from the roll with costs due to appellant's failure to properly effect service upon the second respondent. Appellant's appeal is against this order.

On appeal, the respondents brought an application in terms of s 14(7) of the Supreme Court Act 15 of 1990 read with rule 6 of the Supreme Court Rules for the dismissal of the appeal on grounds that the appeal is frivolous, vexatious and/or without merit. Appellant opposed this application. The respondent argued that the order of court sought to be appealed is of an interlocutory nature and it required leave of the court *a quo*.

*Held that*, s 14(7) of the Supreme Court Act 15 of 1990 does not apply to an order of an interlocutory nature. In interlocutory matters, leave to appeal is required in terms of s 18(3) of the High Court Act 16 of 1990.

*Held that*, the test whether an order is appealable is set out by the Supreme Court in *Di Savino v Nedbank Namibia Limited* 2017 (3) NR 880 (SC).

*Held that*, the order by the High Court to strike the matter from the roll does not meet the requisites as set out in *Di Savino* for an appealable order. The order lacked the hallmark of finality and is not definitive of the rights of the parties and it certainly did not have the effect of disposing of any portion of the relief claimed.

*Held further that*, given the fact that the order was not appealable, the further question as to whether leave to appeal was required does not arise and was in any event not sought or granted.

*Held*, this matter not brought within the ambit of s 18(3) of the High Court Act 16 of 1990, stands to be struck from the roll with costs. The matter is referred back to the High Court for further case management.

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## APPEAL JUDGMENT

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SMUTS JA (SHIVUTE CJ and HOFF JA concurring):

[1] The appellant approached the High Court in application proceedings seeking the eviction of the fourth to eleventh respondents as well as their families and all persons claiming occupation of the area in question through those respondents.

[2] The fourth to eleventh respondents opposed the application. They are together referred to as the respondents for present purposes, although the appellant withdrew against the ninth respondent in the court below.

[3] The respondents did not file an answering affidavit, having repeatedly failed to do so timeously. They however raised points of law under rule 66 of the High Court Rules. They raised points concerning the service of the application. Firstly, it was contended that there was defective service on another respondent cited as second respondent, the Communal Land Board of the Zambezi Region (the board). The point was also taken that service on fourth, seventh and ninth respondents was defective as it had been effected upon the fifth respondent, the headman of the area, purportedly in terms of rule 8(2)(b) of the High Court Rules. The respondents also took the point that the area from which the appellant sought to evict them was not properly described. Although the respondents brought an

application under s 14(7) of the Supreme Court Act<sup>1</sup> for the dismissal of the appeal, referred to below, heads of argument were not filed on their behalf. Nor was there any appearance for them even though no notice of withdrawal was filed by their legal practitioner of record.

[4] The High Court found that the service upon the board had not been in accordance with the High Court Rules and was fatally defective and a nullity and that the application should be served properly. The court then for that reason struck the application from the roll and directed that the appellant pay the respondents' costs as the appellant had been forewarned long in advance as to this point and had not rectified the defective service.

[5] The appellant noted an appeal against the court's ruling. The respondents thereafter brought an application under s 14(7) of the Supreme Court Act read with rule 6 of this court's rules for the dismissal of the appeal on the grounds of being frivolous, vexatious and/or without merit. That application was opposed and declined, with its costs being costs in the appeal. As will soon become apparent, s 14(7) does not apply to these proceedings.

[6] In that application, the respondents' practitioner took the point that the order of the court sought to be appealed is of an interlocutory nature and required leave of the court below. Section 14(7) however does not apply to an order of an interlocutory nature or where an order is not appealable, given the wording of s 14(7)(a) which expressly states that it applies to civil proceedings where no

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<sup>1</sup> Act 15 of 1990.

leave to appeal is required. As for interlocutory matters, leave to appeal is required in terms of s 18(3) of the High Court Act.<sup>2</sup> This subsection provides:

‘(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] When the appellant was invited to address this court on whether the striking of his application by the High Court was a procedural matter and at best for him interlocutory, his response was that the principle in s 18 was that whenever the High Court sits as a court of first instance, an appeal lies as of right to this court. The appellant referred to a decision of this court in support of this contention, *Mentoor v Usebiu*<sup>3</sup>. The appellant’s citation from this case is however selective and without an appreciation of the different context [where the High Court had in that matter sat as a court of appeal requiring for a further appeal under s 18(2)]. In the *Mentoor* case, the Chief Justice explained the ambit of s 18 in the following way:

[7] In deciding the issue stated above the starting point is s 18 of the High Court Act 16 of 1990 (the Act). Section 18(1) grants a right of appeal against a judgment or order given by the High Court in civil proceedings whether sitting as a court of first instance or a court of appeal to the Supreme Court ‘except in so far as this section otherwise provides’.

[8] Section 18(2) of the Act is of direct application to the facts of the case and provides ‘otherwise’ as follows:

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<sup>2</sup> Act 16 of 1990 (the High Court Act).

<sup>3</sup> Case No SA 24/2015, delivered 19 April 2017 (unreported).

'(2) An appeal from any judgment or order of the High Court in civil proceedings shall lie -

- (a) in the case of that court sitting as a court of first instance, whether the full court or otherwise, to the Supreme Court, as of right, and no leave to appeal shall be required;
- (b) in the case of that court sitting as a court of appeal, whether the full court or otherwise, to the Supreme Court if leave to appeal is granted by the court which has given the judgment or has made the order or, in the event of such leave being refused, leave to appeal is granted by the Supreme Court.'

[9] According to s 18(2)(a), if the High Court sits as a court of first instance in civil proceedings, an appeal against a judgment or order of the High Court lies as of right to this court. This, however, is not the case where the High Court has sat as a court of appeal. In such a circumstance, a judgment or order of the High Court is not appealable as of right. Leave to appeal to the Supreme Court must first be sought and obtained from the High Court. However, if leave to appeal is refused by the High Court, then the Supreme Court must be approached with a petition for leave to appeal. See *M Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz Megabuilt v Kurz* 2008 (2) NR 775 (SC). See also s 14 of the Supreme Court Act 15 of 1990.'

[8] Section 18(3) is another instance where that section provides otherwise – creating another exception to the general principle of the right to an appeal from the High Court in civil proceedings. It does so in respect of interlocutory matters. It expressly requires that no judgment or order of an interlocutory nature is appealable to this court except with leave of the High Court. Interlocutory orders can thus only be appealed against with leave of the High Court. But interlocutory orders can only be appealed against if they are appealable.

[9] The leading judgment of this court on this issue is that of the Chief Justice in *Di Savino v Nedbank Namibia Ltd*<sup>4</sup> which 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.'

[10] The order by the High Court to remove the matter from the roll for a lack of service does not meet either requirement. In the first instance, the ruling itself was not appealable because it does not have the attributes of an appealable order. Those were set out in *Zweni v Minister of Law and Order*<sup>5</sup> and applied by this court in *Di Savino*<sup>6</sup> and are namely (i) the decision must be final in effect and not susceptible to alteration by that court; (ii) it must be definitive of the rights of the parties, ie by granting definite and distinct relief, and (iii) it must have the effect of disposing of at least a substantial portion of the relief claimed in those proceedings.

[11] This court in *Di Savino* then determined that once it is decided that an order is appealable, then the second requirement is considered – whether or not the order is interlocutory. If so, then leave of the High Court is required under s 18(3) of the High Court Act.

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<sup>4</sup> 2017 (3) NR 880 (SC) para 51.

<sup>5</sup> 1993 (1) SA 523 (A).

<sup>6</sup> Para 16 and in *Shetu Trading CC v Chair, Tender Board of Namibia & others* 2012 (1) NR 162 (SC).

[12] In this matter, the High Court found that service on the board was fatally defective and a nullity and for that reason struck the matter from the roll. That order does not meet the requisites already set out for an appealable order. The order lacks the hallmark of finality and is not definitive of the rights of the parties and certainly did not have the effect of disposing of any portion of the relief claimed, let alone a substantial portion. Given that the order was not appealable, the further question as to the requirement of leave to appeal<sup>7</sup> does not arise – which in any event was not sought or granted.

[13] This order sought to be taken on appeal is accordingly not an appealable order within the ambit of s 18(3) of the High Court Act and the matter is bound to be struck from the roll. This was also the basis for dismissing the application under s 14(7) which did not apply because the order sought to be taken on appeal was not appealable and thus not an appeal for the purpose of s 14(7).

[14] As there is thus no appeal properly before us, it is not necessary to decide the issue of service which served before the High Court.

[15] As for costs, the order in respect of the unsuccessful s 14(7) application was to the effect that the costs of that application would be costs in the appeal and thus depend upon the outcome of the appeal. The appeal is unsuccessful as it is to be struck from the roll. The respondents who brought that application are accordingly to be awarded their costs. Even though, the respondents were not represented in court when the matter was argued, they are entitled to the costs incurred for attendances actually undertaken in opposing the appeal. The extent of

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<sup>7</sup> In terms of s 18(3) of Act 16 of 1990.



those attendances would be a matter for the taxing master but would not include any costs relating to the date of hearing, given the absence of any appearance and the unexplained failure to have filed any notice of withdrawal.

[16] The following order is made:

(a) The appeal is struck from the roll with costs, including the costs of the s 14(7) application.

(b) The matter is referred back to the High Court for further case management consistent with this judgment.

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**SMUTS JA**

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**SHIVUTE CJ**

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**HOFF JA**

APPEARANCES

APPELLANT:

In person

RESPONDENTS:

No appearance