NOT REPORTABLE

CASE NO.: I 2400/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE COUNCIL OF THE MUNICIPALITY OF THE CITY OF WINDHOEK	**Plaintiff/Respondent**

and

DB THERMAL (PTY) LIMITED	**1st Defendant/Applicant**
ZITON (PTY) LIMITED	**2nd Defendant/Applicant**

***CORAM*: PARKER J**

Heard on: 2010 June 7

Delivered on: 2010 August 13

JUDGMENT

PARKER J: [1] This is an application for leave to appeal by the applicants (defendants in the action that was instituted in August 2000, and in which action the present respondent is the plaintiff). In the applications to amend that was heard by me on 2 October 2009 and judgment delivered on 28 October 2009 ('the 28 October 2009 judgment'), I said then that for the sake of clarity, I would refer to the applicant as 'the

plaintiff' and the 1st and 2nd defendants as 'the defendants'. I shall refer to the parties in like manner in the present proceedings: the applicants remain as the defendants, and the respondent remains as the plaintiff. The defendants are represented by Mr. Kemack SC, assisted by Mr. Dicks, and the plaintiff is represented by Mr. Tötemeyer SC, assisted by Ms Schneider.

[2] In an answer from the bench as to what the application that was heard by this Court on 12 October 2009 was, Mr. Kemack answered, 'My Lord … it was an interlocutory application.' Indeed, for the defendants it is an interlocutory application and my order interlocutory; hence the bringing of the instant application for leave to appeal in terms of s. 18 (3) of the High Court Act, 1990 (Act No. 3 of 1990). Mr Tötemeyer argued the opposite way briefly that the Court made a ruling that the plaintiff's application may proceed unopposed. It did not grant the applications for amendments. Furthermore, counsel argued that the ruling made by the Court 'decided no definite application for relief – it is merely a direction as to the manner in which the case should proceed, and is thus not an order in the legal sense, which falls within the meaning of the words 'judgment or order' in section 18 of the High Court Act No. 16 of 1990.

[3] Section 18 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 subjected 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 granted by the Supreme Court.

[4] I do not, with respect, accept Mr. Tötemeyer's argument. The argument is, with the greatest deference, over simplistic to the point of being fallacious. I did make a ruling in

the 28 October 2009 judgment in which I upheld the plaintiff's first point *in limine* which was brought to the Court by way of an elaborate answering affidavit and replied to in equally elaborate replying affidavits and argued extensively and fully by counsel – senior counsel for that matter. Having upheld the point *in limine*, in the result, I did make an order in the following terms, apart from costs:

> (1) The defendants' affidavits in opposition to the plaintiff's amendment applications are struck off.
>
> (2) The plaintiff's amendment applications are to proceed on unopposed basis.

Doubtless, that is not a ruling on some simple matter argued by counsel from the bar without any papers having been filed before hand.

[5] In *De Beers (Pty) Ltd v Jacobus Izaaks* Case No. LCA 28/2008 (Unreported), I held that a decision of the erstwhile district labour court (Windhoek) granting approval for the lodging of a complaint by the respondent out of time was interlocutory. There I reasoned as follows:

> It has been said authoritatively in 22 *Halsbury* (3 edn): para 506 that an order which does not deal with the final rights of the parties is termed "interlocutory"; and "it is an interlocutory order, even though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals." Thus, the fact that an order is conclusive as to the subordinate or preliminary matter with which it deals does not make such order conclusive of the main dispute or conclusive of the final rights of the parties, which a decision in due course is to determine. (*Re Gardner, Long v Gardner* (1894) 71 LT 412 (CA); *Blakey v Latham* (1889) 43 Ch D 23 (CA); *Kronstein v Korda* [1937] 1 All ER 357 (CA); *Guerrera v Guerrera* [1974] 2 All ER 460 (CA); *Salter Rex & Co. v Ghosh* [1971] 2 QB 597 (CA)) As Lord Esher, MR stated in *Standard Discount Co v La Grange* (1877) 3 CPD 67 (CA) and *Salaman v Warner* [1891] 1 QB 734 (CA), the test was the nature of the application to the court; and not the nature of the order which the court made.

[6] The test enunciated by Lord Esher MR in *La Grange* supra is in a way in tune with the test enunciated by Harms AJA in *Zweni v Minister of Law and Order* 1993 (1) SA 523 at 532I and approved by Strydom CJ in *Andreas Vaatz and Another v Ruth Klotzsch and Others* Case No. SA 26/2001 (Unreported) at p. 13. There, Strydom CJ stated, '… "not merely the form of the order must be considered but also, and predominantly, its effect."'

[7] Thus, to argue, as Mr. Tötemeyer does, that the order is not an order in law within the meaning of s. 18 (3) of the High Court is to split semantic – not legal – hairs without any justification whatsoever. It follows that on the authority of both *De Beers (Pty) Ltd v Jacobus Izaaks* supra and *Andreas Vaatz and others v Ruth Klotzsch and other*s supra, that the order I made in the 28 October 2009 judgment is an order, albeit an interlocutory order within the meaning of s. 18 (3) of the High Court Act, is put beyond doubt.

[8] In his submission, Mr. Kemack referred me to some principles enunciated in some South African cases on the point under consideration. I am looking particularly at the principle that the approach nowadays 'has been directed more to doing what is appropriate in the particular circumstances, than to elevating the distinction between orders that are appealable an those that are not.' (*National Director of Public Prosecution v King* (Unreported); and *Zweni* supra) From what I have said previously, this principle cannot take the defendants case any further than it is. In *Andreas Vaatz and another v Ruth Klotzsch* supra Strydom CJ accepted counsel's argument that in Namibia under s. 18 (3) of the High Court Act all interlocutory orders are appealable provided leave to appeal is obtained, while in South Africa the position seems to be that simple or pure interlocutory orders are not appealable and where relevant this difference must be kept in mind when dealing with authority on the point. This high judicial instruction is significant in these proceedings. Thus, without doing any injustice to Mr. Kemack's industry, I must, however,

say that it is not necessary to refer to those authorities. I have already held that the order I made in the 28 October 2009 judgment is an interlocutory order and so the defendants are entitled in terms of s. 18 (3) of the High Court Act to apply for leave to appeal that order.

[9] This conclusion effectively disposes of Mr. Tötemeyer's argument that the said ruling did not in any manner have the effect of disposing of any portion of the relief claimed in the main proceedings and so the application for leave to appeal is ill-conceive and stands to be struck from the roll with costs. With the greatest deference to Mr. Tötemeyer, counsel's submission is not well founded. Yes, indeed, the ruling I gave and the order I made thereanent do not dispose of any portion of the action; and that is why, as I have held previously, that order is interlocutory within the meaning of s. 18 (3) of the High Court Act. That being the case, this application for leave to appeal in terms of s. 18 (3) of the High Court Act is indubitably properly before this Court.

[10] Having so concluded, what remains to be determined is whether the defendant's have made out a case for the grant of the relief sought; namely, leave to appeal the order of 28 October 2009 (the order). I now proceed to determine the application for leave to appeal against the order.

[11] In *Lasarus Tutu Nowaseb v State* 2007 (2) NR 630 at 640H-641A, I distilled the following principles from the authorities that I had reviewed; that is to say –

> … an application for leave to appeal should not be granted if it appears to the Judge that there is no reasonable prospect of success. And it has been said that in the exercise of his or her discretion, the trial Judge … must disabuse his or her mind of the fact that he or she has no reasonable doubt as to the guilt of the accused. The Judge must ask himself or herself whether, on the grounds of appeal raised by the applicant, there is a reasonable prospect of success on appeal; in other words, whether there is a reasonable prospect that the court of appeal may take a different

> view … But, it must be remembered, "the mere possibility that another Court might come to a different conclusion is not sufficient to justify the grant of leave to appeal." (*S v Ceaser* 1977 (2) SA 348 (A) at 350E)

[12] Further on in *Nowaseb* supra at 642-C, the Court approved as correct statement of law the following passage *in S v Sikosana* 1980 (4) SA 559 (A) at 562H-563A:

> If he (the Judge) decides to refuse the application he must give his reasons (see s. 316 (6) of Act 51 of 1977). It may be that his reasons for his refusal will appear from the reasons for convicting (*R v White* 1952 (2) SA 538 (A) at 540) but where he decides to grant the application his reasons for so doing are less likely to be found in his judgment.

[13] The authorities that this Court reviewed and cited with approval in *Nowaseb* supra, as I have said, concern criminal appeals. But I do not see any good reason why the legal principles enunciated there cannot apply to civil appeals with necessary modifications required by context. That is the manner in which I approach the determination of the present application.

[14] The first peg on which Mr. Kemack hangs the defendants' application is this. It 'is reflected in the Namibian cases … that it is not necessary for the deponent to any affidavit to have authority to act as a witness just as is not necessary for a person who steps in the witness box.' With the greatest deference to Mr. Kemack, I fail to see how this proposition of law can advance the case of the defendants in these proceedings. First, that has never been the case of the plaintiff; and, indeed, in his submission, Mr. Tötemeyer actually says so, and that is why he reminded the Court of the Court's own decision on the point in *Wlotzkasbaken Home Owners Association and another v Erongo Regional Council and others* 2007 (2) NR 799. Second, and this is significant, that is also my view as I expressed

it in *Wlotzkasbaken Home Owners Association and another v Erongo Regional Council and others*, supra; and I referred to it in my judgment in which the order of 28 October 2009 was made. What this amounts to inexorably is that Mr. Kemack sees an issue that is not in dispute and very unnecessarily proceeds to argue in resolution of the selfsame issue which does not exist. It does not exist because it is not an issue that divides the parties. Thus, in my opinion and with the greatest respect, Mr. Kemack's effort in this regard is a purposeless enterprise on any pan of scale and by any account. That being the case, it is otiose to pay any heed to the authorities referred to me by Mr. Kemack on this point. Another equally purposeless burden Mr. Kemack has taken upon himself concerns what he asks rhetorically, 'My Lord the question then is, do you need to put in a new Power of Attorney for every single opposition to an interlocutory application?' The 28 October 2009 judgment against which Mr. Kemack seeks leave (on behalf of the defendants) to appeal does not deal with that question. For reasons given in the judgment (at para. 15), I did not find it necessary to deal with the plaintiff's objection in that regard.

[15] The point which has relevance and which is purposeful in these proceedings is that concerning the plaintiff's objection challenging the authority of the deponent, Uli Weiler, to oppose the applications. I gave a fully-reasoned judgment, supported by authorities, when I upheld the plaintiff's first point *in limine* which deals with a challenge of Uli Weiler's authority to oppose the plaintiff's applications for amendment.

[16] In our rule of practice the principle is now entrenched that the institution of proceedings and the prosecution thereof must be authorized and where that authority is challenged sufficient proof acceptable in law must be placed before the Court, for instance, in terms of Rule 63 of the Rules of Court. What is more, *pace* Mr. Kemack, the authorities do not differentiate between 'substantive application' and 'interlocutory one'. The authorities say 'institution of proceedings and prosecution thereof'; that is, all proceedings

(e.g. *Wlotzkasbaken Home Owners Association and another v Erongo Regional Council and others* supra, at 805F-806C, approving *Ganes and another v Telecom Namibia Ltd* supra at 615G-H). In the 28 October 2009 judgment, I made the factual finding that no such proof credible and acceptable in law had been placed before me. I do not think any appeal court acting carefully and judicially will find that that decision is wrong, and so take a different view thereanent.

[17] As I saw it, there had been a material breach of important and purposeful requirements under Rule 63; requirements which I described as 'efficacious and protective'. In that regard, I added that given the nature of the circumstances of the case, which I described in the judgment I said then, 'I would be throwing away caution to the wind; caution, that typifies the object of Rule 63 of the Rules of Court, and, more important, that would not be in the interest of justice or of the parties, particularly of the plaintiff …' (para. 14 of the 28 October 2009 judgment).

[18] As to costs; I exercised my discretion as explained in para. 16 of the 28 October 2009 judgment, when I awarded costs in line with the well-established rule that unless special circumstances existed costs should follow the event. What is more, both Mr. Tötemeyer and Mr. Kemack were one in their invitation to me then that 'I should determine costs here and now as respects the hearing of the plaintiff's points *in limine*.' That is what I did. I upheld the plaintiff's first point *in limine*; and that disposed of the applications, and costs followed as a matter of course, as aforesaid.

[19] I have demonstrated in the aforegoing that I have given considerable thought objectively to the application for leave to appeal. And disabusing my mind, as far as is

humanly possible, of the fact that I had found for the plaintiff in respect of the plaintiff's first point *in limine* which disposed of the interlocutory applications brought by the plaintiff and which resulted in the order I made, I am not at all satisfied that there are reasonable prospects that the Supreme Court may take a different view. It follows that in my judgement the defendants have failed to show that there are reasonable prospects of success on appeal.

[20] In the result, the application for leave to appeal is dismissed with costs; such costs to be paid by the defendants jointly and severally, the one paying the other to be absolved; and such costs to include costs occasioned by the employment of one instructed counsel.

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PARKER J

COUNSEL ON BEHALF OF THE PLAINTIFF/RESPONDENT:

Adv. R. Tötemeyer SC

Adv. Schneider

Instructed by: LorentzAngula Inc.

COUNSEL ON BEHALF OF THE 1ST AND 2ND DEFENDANTS/APPLICANTS:

Adv. Kemack SC

Adv. G Dicks

Instructed by: Engling, Stritter & Partners