



**REPORTABLE**  
CASE NO. SA 82/2014

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**ANTONIO Di SAVINO**

**APPELLANT**

and

**NEDBANK NAMIBIA LIMITED**

**RESPONDENT**

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

**Heard:** 8 November 2016

**Delivered:** 7 August 2017

**Summary:** The appellant was sued by the respondent bank for the monies lent to a close corporation of which the appellant was a member at the time the loan was advanced to the close corporation. The appellant had signed as a surety for the obligations of the close corporation.

In the course of proceedings, the appellant decided to amend his plea to introduce new defences to the respondent's claim. He brought an application to amend the plea, but the application was dismissed because there was no explanation under oath why the plea was being amended so late in the proceedings.

The appellant appealed against the judgment and order of the High Court dismissing the application for amendment. The appellant did not first seek or obtain leave to

appeal against the order of the High Court, which was interlocutory. It was argued on behalf of the appellant that leave to appeal was not necessary because even though the order dismissing the application for amendment was interlocutory, it was a 'pure' interlocutory order that was final in effect and definitive of the rights of the parties. An order with those characteristics was appealable as of right and no leave was required, so the argument developed.

On appeal, the court held that the structure of s 18(3) of the High Court Act 16 of 1990 is that for a party to appeal against a judgment or order of the High Court, two requirements must be met. Firstly, the judgment or order must be appealable and secondly if the judgment or order is interlocutory, leave to appeal against such judgment or order must first be obtained from the High Court and if that court refuses to grant leave, leave should be obtained from the Supreme Court by way of a petition to the Chief Justice. It was further held that the application for amendment was interlocutory and as such the appellant required leave to appeal to the Supreme Court. As no leave had been obtained, the appeal was struck from the roll with costs.

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## APPEAL JUDGMENT

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SHIVUTE CJ (MAINGA JA and SMUTS JA concurring):

[1] This is an appeal against the judgment and order by Miller AJ dismissing an interlocutory application to amend the appellant's plea.

### Background

[2] The respondent instituted action against the appellant and two others on 30 April 2009 to recover from them monies allegedly lent and advanced by it. In Claim

1, the respondent sought to recover the sum of N\$1 997 196, 73; the amount of N\$178 163, 65 in Claim 2, and in Claim 3 the sum of N\$3 628 323, 60 plus compound interest on the said amounts. The respondent's claim against the appellant and the then second defendant is based on the allegation that the two had bound themselves as sureties and co-principal debtors for the obligations of the close corporation, which was cited as the first defendant.

[3] Summary judgment was granted against the close corporation and the second defendant on 08 June 2009 and 19 June 2009 respectively. The case proceeded from then on only against the appellant. Subsequent to a request for further particulars and the response thereto, the appellant filed a plea on 6 May 2013. After the close of pleadings, the case was allocated to a judge and an initial case management conference was scheduled for 15 October 2013.

[4] A joint case management report agreed to by the parties was filed on 10 October 2013 in which it was recorded, amongst others, that 'no further pleadings or amendments are currently considered by the parties.' After the case management requirements had been met by the parties and following a number of postponements, the matter was finally enrolled for hearing from 10 to 13 November 2014.

[5] Meanwhile, the appellant opted to amend his plea. The presiding judge ordered that a notice of amendment be filed not later than 6 June 2014 and then a status hearing was scheduled for 19 June 2014.

[6] On 19 June 2014, the application to amend was enrolled and it became opposed. It was ultimately heard on 21 August 2014. Judgment was reserved until 26 September 2014.

### Special Plea

[7] In his application for amendment, the appellant raised a second special plea while at the same time extending his plea on the merits. The proposed second plea is rather convoluted, but stripped down to its essentials, it amounts to this. The appellant and his wife were married in Italy. When their marriage was solemnised, the couple 'decided on the law of separation of property', which 'decision' may amount to an ante-nuptial contract in Italian law. As the ante-nuptial contract in question had not been executed in Namibia, for the purposes of Namibian law and as against third parties such as the respondent, the couple were married in community of property by virtue of the provisions of s 86<sup>1</sup> read with s 87(2)<sup>2</sup> of the Deeds Registries Act 7 of 1937.

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<sup>1</sup> Section 86 of the Deeds Registry Act, 1937 reads:

'An antenuptial contract executed before and not registered at the commencement of this Act or executed after the commencement of this Act, shall be registered in the manner and within the time mentioned in section eighty-seven, and unless so registered shall be of no force and effect as against any person who is not a party thereto'.

<sup>2</sup> Which reads as follows:

'An antenuptial contract executed outside Namibia shall be attested by a notary or otherwise be entered into in accordance with the law of the place of its execution, and shall be registered in a deed registry within six months after the date of its execution or within such extended period as the court may on application allow.'

[8] As such, the provisions of s 7(1)(h)<sup>3</sup> read with s 7(2)(b)<sup>4</sup> of the Married Persons Equality Act 1 of 1996 were of application to the appellant and his wife. Thus, when the appellant bound himself as surety on behalf of the close corporation, he did not know of the provisions of the Married Persons Equality Act nor did he have the consent of his wife. The wife did not know of the provisions of the Married Persons Equality Act either nor did she know that the appellant had signed the surety. Accordingly, the appellant would plead that the fact that he had signed the deed of suretyship did not create a legal nexus between the common estate in Namibia and the respondent. As such, the appellant or the common estate in Namibia was not liable to the respondent for any monies claimed under the deed of suretyship neither is the appellant liable in respect of any agreement flowing from the suretyship.

[9] The appellant with the amendment, further intends to plead on the merits that it was unconscionable and against public policy to be held liable for the obligations of the close corporation as surety when he had ceased to be a member of the close corporation by the time the action was instituted.

[10] The amendment was opposed principally on two grounds. Firstly, that there was no sufficient explanation by the appellant for seeking to amend his papers very

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<sup>3</sup> Section 7(1)(h) provides:

'Except in so far as permitted by subsection (4) and (5), and subject to sections 10 and 11, a spouse married in community of property shall not without the consent of the other spouse- . . . (h) bind himself or herself as surety;'

<sup>4</sup> Which reads thus:

'The consent required under subsection (1) for the performance of an act contemplated in that subsection may be given either orally or in writing, but the consent required for the performance of an act contemplated in paragraph (h) of that subsection, shall, in respect of each separate performance of such act, be given in writing only.'

late in the proceedings and secondly, that the application to amend was not brought on notice of motion nor was it supported by an affidavit.

#### Findings by the High Court

[11] The High Court dismissed the application essentially on the two grounds raised by the respondent. The court reasoned that there may be unforeseen circumstances leading to pleadings being amended even at an advanced stage of the case. In such a situation, however, there ought to be a full and acceptable explanation under oath for the late application. There was no such explanation.

#### Argument on appeal

[12] In this court, the appeal hearing was dominated by argument on the question of whether or not the appellant required leave to appeal. If this question is resolved in favour of the respondent, the appeal is not properly before this court and as such it will not be necessary to decide the other issues argued by the parties. It therefore behoves us to decide this question first. The appeal was lodged without leave from the court below or from this court in the event that the High Court had refused to grant leave to appeal and now the question for decision is whether the appellant should have sought and obtained leave to appeal to this court.

[13] Counsel for the appellant contended very forcefully that the appellant did not require leave to appeal even though the proceedings giving rise to the appeal were interlocutory and therefore the provisions of s 18(3) of the High Court Act 16 of 1990 were of no application.

[14] Counsel for the appellant argued that the phrase 'interlocutory' in s 18(3) should be read as meaning 'simple interlocutory'. He continued to contend that when one reads in a statute or rule 'interlocutory order' one understands it normally in the context of many types of interlocutory orders. Some of which may be final with all the three attributes of a definitive judgment while others may even be rulings in the wider sense of the word. Counsel submitted that if an interlocutory order has three attributes normally used to determine whether the order in question is final in effect and definitive of the rights of the parties, then even if it is interlocutory in the wider sense, a party does not need leave to appeal because the order in question is final in effect. Counsel argued, with reference to authorities, that an order is purely interlocutory unless it anticipates or precludes some of the relief which would or might be given at the hearing.

[15] Counsel contended that even though the dismissal of the application for amendment was an interlocutory order, because such order has all the three attributes of a final order, it is not a simple interlocutory order. Therefore, so the argument went, it is appealable without leave. Counsel relied for this proposition on the decision of the South African Appellate Division in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A). In the submission of counsel, the point of departure in all the cases decided in this court in which the question of whether or not an order is appealable is what was set out in the *South Cape Corporation* case, namely that where the word 'interlocutory' is used in a statute or rule it means 'simple interlocutory'. Counsel went on to argue that the order dismissing the application for amendment was interlocutory in the

wider context, it was not an interlocutory order as envisaged in s 18(3), because it had all the three attributes of an appealable order.

[16] 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.

[17] On the other hand, counsel for the respondent contended that it is not necessary to give any other meaning to the word 'interlocutory' other than what appears in s 18(3) itself. Counsel further submitted that in Namibia the Legislature saw it fit to frame s 18(3) the way it did. As such, although the earlier South African cases on the point offer guidance, decisions of Namibian courts defining the section should be followed.

[18] Counsel continued to argue, contrary to the submissions made on behalf of the appellant, that the sequence of s 18(3) is such that to determine whether the judgment or order is appealable or not, one should first decide whether the three attributes were present. Once it is determined that the matter is appealable, then an important free standing requirement, namely whether the order was an interlocutory order or not should be considered and decided.

Was leave to appeal from the court *a quo* necessary for this court to hear the appeal?

[19] An application to amend a plea made by one party and opposed by the other party to the suit requires the court to make a definitive decision on whether or not to allow the amendment. Normally, as the granting or refusal of the application to amend does not dispose of the matter to finality, the order refusing the application is interlocutory. The question now is whether leave to appeal is required for the refusal of the application to amend the plea. Central to the determination of this matter is the consideration of 18(3) of the High Court Act 16 of 1990.

#### *History of Interlocutory orders in South African law*

[20] In light of counsel's submissions above, the question for determination is whether Namibian law distinguishes between so-called simple interlocutory orders and interlocutory orders in the wider sense as the word 'interlocutory' is used in s 18(3) of the High Court Act. To attempt to answer this question satisfactorily, one needs to delve into the chequered history of interlocutory orders as distilled from South African decisions on the point. *Steytler N.O. v Fitzgerald* 1911 AD 295 is one of the oldest cases that endeavoured to explain the origin and history of interlocutory orders in South African law. In *Steytler* at 303-304 Lord de Villiers CJ stated in relation to the first question that the court was called upon to decide in that case, namely whether the court was seized with the appeal irrespective of the refusal by the court of first instance to grant leave to appeal:

'As to the first question, distinctions were drawn in the Dutch practice between interlocutory orders which could and those which could not be appealed against. According to some authorities the test as to the right of appeal is, whether the order

has or has not the effect of a definitive sentence, and according to others the test is, whether the order is reparable definitely, that is to say, whether the order, if wrong can be set right by the court making it, by its final sentence. Whichever test was applied the authorities with few exceptions, concurred in holding, that the decision of a court on an exception to its own jurisdiction could be appealed against. In such a case the consent of the court of first instance was not necessary, but under the third section, sub-section (b), of the Union Act No. 1 of 1911, and the 27<sup>th</sup> section of Act 35, of 1896, no interlocutory order is subject to appeal save by the leave of the Court or Judge making the order. The object of this enactment appears to me to have been to enable the Court to grant leave to appeal in cases which, in its opinion are of sufficient importance to justify an appeal, although, under the Dutch practice, no appeal would have lain.

In the case of *Bell v Bell* (1908 T.S., p. 887), the Transvaal Supreme Court held, that a purely interlocutory order, that is, one not having the effect of a final decree, may, at any time before final judgment in the suit be varied or set aside by the Judge who made it, or by any other judge sitting in the same court and exercising the same jurisdiction. In the course of his judgement Innes CJ said: "Neither our Statute Law nor our Rules of Court draw any distinction between the two classes of interlocutory orders. They treat all judgements, decrees or orders as being either interlocutory or final. And it will be convenient in future to follow the same lines and to hold, that the interlocutory orders of our Rules correspond with the simple interlocutory orders of the books; while what Dutch lawyers would have styled interlocutory orders having the force of definitive decrees are to be classed with all other definitive decisions as final judgements. In that way we shall give full effect to our own terminology, while, at the same time, preserving the principles and spirit of the Roman-Dutch procedure". I quite concur in this view, but the difficulty will still remain in each case to say whether a particular order is purely interlocutory or whether it has the force of a definite decree.'

[21] In the same case, De Villiers JP, after an in-depth analysis of the old authorities concluded:

'The result is that the Roman-Dutch law allowed an appeal from three classes of sentences; (1) from a final or definitive sentence (*sententia definitiva*); (2) from

sentences having the force of a final or definitive sentence, sometimes called definitive sentences, but also sometimes called "interlocutory sentences having the force of definitive sentences"; and (3) interlocutory sentences strictly so-called which the judge himself may at any time vary or revoke, but which when once given effect to or executed are from the nature of the case irreparable. All three classes have that finality in them which renders an appeal necessary, although not in all cases strictly imperative. From any of these three classes an appeal lies as a matter of right under Roman-Dutch law. When, therefore, the Legislature says that no appeal will lie from an interlocutory order except with leave of the judge, it only refers to such interlocutory orders strictly so-called, the execution of which is not irreparable in the definitive sentence'.<sup>5</sup>

[22] Counsel for the appellant also relied on *Pretoria Garrison Institutes v Danish Variety Products (Pty) Limited* 1948 (1) SA 839 (A). That case concerned the interpretation of s 83 of the Magistrates' Courts Act 32 of 1944, in the context of the magistrate granting an application by the defendant directing the plaintiff to furnish certain particulars and mulcting the plaintiff in the costs of the application. The question for decision was whether the order of the magistrate was appealable. The court was divided on the issue with a minority (Watermeyer CJ and Centlivres JA) holding that the order had the effect of a final judgment and was therefore appealable. At 847 Watermeyer CJ described the phrase 'interlocutory' as 'a word of uncertain signification which has been used in several varying senses in other legislative enactments and in judgments in South Africa.'

[23] At 848-849, Watermeyer, CJ reasoned that if the magistrate's order compelling the plaintiff to furnish the particulars demanded was intended to be final and would not in the ordinary course come up again for reconsideration in the further

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<sup>5</sup> At 345

proceedings in the case, then it had the effect of a final judgment. The learned Chief Justice then proceeded to consider whether there was any authority supporting or against the conclusion he had reached and prefaced the examination of that question with the following pertinent observation:

‘A very cursory glance at the decisions of South African Courts on the subject of the appealability of orders, other than final judgments, will reveal a great diversity of views and an irreconcilable conflict of decisions.’

[24] A majority in the *Garrison* case held that the magistrate’s order was a ‘simple interlocutory order’ and not appealable, because it did not directly bear upon or dispose of the issues in the action or irreparably anticipate or preclude any of the relief which might be given at the hearing. In arriving at that decision, Schreiner, JA (in whose judgment Tindall, JA and Greenberg JA concurred) referred to the ‘deep-seated’ difficulty of distinguishing ‘simple interlocutory’ orders from other orders<sup>6</sup> and to ‘a lengthy period of doubt and hesitation’ that had characterised South African law on the correct test for the appealability of procedural or preliminary orders. At 869 Schreiner JA observed:

‘It may conceivably be that this uncertainty is illustrated by the difference in emphasis to be found in the passages in the judgments of Innes, C.J., in *Steytler v Fitzgerald* (supra), *Blaauwbosch Diamonds Ltd v Union Government* 1915 AD 599 and *Liquidators Myburgh Krone v Standard Bank of South Africa* 1924 AD 226, to which the Chief Justice [Watermeyer, CJ] has referred. It is unquestionably illustrated by the discussions of the problem in the judgments of De Villiers, J.P., as he then was, in *Dhlamini v Jooste* (1925 OPD 223) and *Gatebe v Gatebe* (1928 OPD 145). But since the decision of this Court in *Globe and Phoenix G.M. Company v Rhodesian Corporation* (1932 AD 146) the test to be applied has appeared with

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<sup>6</sup> At 867

some certainty, whatever difficulty must inevitably remain in regard to its application. From the judgments of Wessels and Curlewis, JJ.A., the principle emerges that a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to 'dispose of any issue or any portion of the issue in the main action or suit' or, which amounts, I think, to the same thing, unless it 'irreparably anticipates or precludes some of the relief which would or might be given at the hearing'.

[25] At 870 Schreiner JA emphasised the need to maintain the jurisprudential approach to the interpretation of the appealability of procedural orders established in earlier cases as in the view of the learned Judge of Appeal, such approach had provided the much-sought-for guidance by inferior courts. In this respect, Schreiner JA referred to the *Globe and Phoenix G.M. Company* case above and observed as follows:

'The earlier judgments were interpreted in that case and a clear indication was given that regard should be had, not to whether the one party or the other has by the order suffered an inconvenience or disadvantage in the litigation which nothing but an appeal could put right, but to whether the order bears directly upon and in that way affects the decision in the main suit. I do not think that we should pass upon the correctness of the interpretation given to the earlier decisions in the *Globe and Phoenix* case or re-examine, in the light of the practice in Roman-Dutch times or earlier, the test which the case has adopted. It has been understood in Provincial Courts as providing the long-sought-for guidance, and I do not see any sufficient reason for depriving them of its assistance.' (Reference to authorities omitted).

[26] The *Pretoria Garrison* case sets out the conundrum which had been faced over the years by the courts in South Africa. At the time it was the interpretation of a provision in the Magistrate's Court Act 32 of 1944 that was the focus of attention. Following the enactment of the Supreme Court Act 59 of 1959 as the Legislature

grappled with the issue of uniformity in appeals to the superior courts, the difficulty of distinguishing between simple interlocutory orders and an order having a final and definitive effect was extended to the interpretation of the provisions of that Act. Clearly, authorities from as far back as 1911 suffered from the malaise experienced by *Steyler*, namely an attempt to reconcile Roman-Dutch common law principles in the wake of statutory provisions introduced over the years. Watermeyer CJ in the *Pretoria Garrison case*<sup>7</sup> describes it better when he says:

' . . . I wish to make two general observations. The first is that in several cases Courts seem to have given little weight to the specific provisions of the relevant statutes conferring a right of appeal and seem to have been content to apply certain general principles which have been enunciated in other cases with regard to the right of appeal from interlocutory orders which existed in Holland in the 16<sup>th</sup>, 17<sup>th</sup> and 18<sup>th</sup> centuries.'

[27] In my respectful view the *Garrison* case only serves to assist courts today in interpreting the relevant statutory legislative enactment in light of historical authorities as far as they may be reconcilable. Where the statutory provision is unambiguous or has been given an interpretation that in substance signifies a departure from the complex dichotomy between 'simple interlocutory orders' and orders having a definitive and final effect, the meaning assigned to such provisions by our courts on the appealability of interlocutory orders should prevail.

*Legislative reforms relating to appeals to the Supreme Court of Appeals in South Africa and South West Africa during the 80's.*

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<sup>7</sup> Page 848

[28] I now propose to describe the legislative reforms introduced in South Africa in the 80's with regard to appeals to that country's Supreme Court of Appeal and I can do no better than to quote the commentary by Erasmus on s 20 of the Supreme Court Act 59 of 1959. Erasmus<sup>8</sup> describes the momentous reforms that were introduced with the amendment of the Supreme Court Act 59 of 1959 first in 1982 and later in 1993 as follows:

'With a view to a proper understanding of the older decisions, it is important to keep in mind that the system of appeals was fundamentally changed by the Appeals Amendment Act 105 of 1982. In its third interim report published in 1981 the Hoexter Commission of Enquiry into the structure and Functioning of the Courts dealt with the heavy workload of the Appellate Division and recommended, *inter alia*, 'a limitation of the right to appeal'. In order to give effect to this recommendation, the Supreme Court Act was amended by the Appeals Amendment Act 105 of 1982 and a limitation was placed on the right of appeal by the requirement that, in proceedings commenced in the Supreme Court, leave to appeal had to be obtained in all cases. The position is now as follows:

- (a) An appeal against the decision of a single judge will lie only with the leave of the court appealed from, or where such leave is refused with the leave of the Supreme Court of Appeal (subsec (4)(b)).
- (b) The court granting such leave to appeal shall direct that the appeal be heard by a full court unless it is satisfied that the appeal requires the attention of the Supreme Court of Appeal, in which case it shall be directed that the appeal be heard by the Supreme Court of Appeal (subsec (2)(a)); but any such direction by a provincial or local division may be set aside by the Supreme Court of Appeal (subsec (2)(b) and (c)).
- (c) An appeal which is to be heard by a full court pursuant to such direction shall be heard, in the case of an appeal from a provincial division, by the full court of the provincial division concerned; similarly in regard to appeals from local divisions other than the Witwatersrand Local Division, and in the case of an appeal from

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<sup>8</sup> Erasmus et al... *Superior Court Practice* (2000) at A1-40 – A1-41

the Witwatersrand Local Division, by the full court of the Transvaal Provincial Division unless the Judge-President of the Transvaal Provincial Division has ordered that it be heard by the full court of the Witwatersrand Local Division (subsec (3)(a), (b) and (c)).

- (d) An appeal lies from a decision of a full court of a provincial or local division sitting as a court of appeal, with the special leave of the Supreme Court of Appeal (subsec (4)(a)).
- (e) An appeal from a decision of a court of a provincial or local division, such court having sat as a court of first instance and not as a court of appeal, will lie with the leave of such court, or if this is refused, with leave of the Supreme Court of Appeal (subsec(4)(b)).
- (f) An appeal from a decision of a court of a provincial or local division, given on appeal to it against the decision of a magistrate's court, will lie with the leave of such court, or if this is refused, with the leave of the Supreme Court of Appeal (subsec (4)(b)).'

[29] A slight but striking feature of the provisions described by Erasmus above is that unlike s 18(3) of our High Court Act, the South African Supreme Court Act no longer refers to 'interlocutory orders'.

*Modern case law on interlocutory orders*

[30] As to case law on the point, there are leading South African cases decided before the legislative reforms referred to above. One of such decisions is the *South Cape Corporation* case relied upon by counsel for the appellant in this matter. *South Cape Corporation* dealt with an application for leave to execute a judgment subject to the furnishing of security *de restituendo*. The application was opposed, and the matter was referred to the Full Bench of the Transvaal Provincial Division. The Full Bench made an order granting leave to execute, subject to the furnishing of security *de restituendo*.

[31] On appeal to the Appellate Division, Corbett JA undertook a thorough review of the authorities on interlocutory orders and on the distinction between simple interlocutory orders and orders having a final and definitive effect on the main action. At 549F-550A the learned Judge of Appeal summarised the legal position as follows:

- '(a) In a wide and general sense the term "interlocutory" refers to all orders pronounced by the Court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation. But orders of this kind are divided into two classes: (i) those which have a final and definitive effect on the main action; and (ii) those, known as "simple (or purely) interlocutory orders" or "interlocutory orders proper", which do not . . .
- (b) Statutes relating to the appealability of judgments or orders (whether it be appealability with leave or appealability at all) which use the word "interlocutory", or other words of similar import, are taken to refer to simple interlocutory orders. In other words, it is only in the case of simple interlocutory orders that the statute is read as prohibiting an appeal or making it subject to the limitation of requiring leave, as the case may be. Final orders, including interlocutory orders having a final and definitive effect, are regarded as falling outside the purview of the prohibition or limitation.' (Reference to authorities omitted)

[32] Herbstein and Van Winsen<sup>9</sup> opine that the underlying policy of statutory provisions prohibiting or limiting appeals against interlocutory orders is to discourage piecemeal appeals with the attendant expense and inconvenience.

The learned authors further observe that:

'The former express reference to interlocutory orders in section 20(2)(b) of the Supreme Court Act has been deleted. This means that there is no longer such a thing as an interlocutory order within the meaning of the Supreme Court Act. Nevertheless, the broad concept "interlocutory order" retains its relevance in the context of appealability.'

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<sup>9</sup> Cilliers et al *The Civil Practice of the High Courts of South Africa*, 5<sup>th</sup> ed (2014) Vol 2 at 1204

[33] In *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 (4) SA 569 (A) Corbett JA, delivering a unanimous judgment of the Court, held at 583I-584A that while an interlocutory order which has a final and definitive effect on the main action is regarded as an appealable judgment or order, the position regarding 'simple interlocutory orders', was not so clear. At 584B-C Corbett JA makes a pertinent observation that the importance of the distinction between simple interlocutory orders and orders having a final definite effect had been diminished as far as appeals from a Provincial or Local Division to the Supreme Court of Appeal of South Africa were concerned. This, so the learned Judge of Appeal reasoned, was due to the appeal system introduced by Act 105 of 1982 which, as already noted, requires that in all appeals in civil proceedings under s 20 of the Supreme Court Act (other than appeals in terms of certain particular statutes), leave to appeal be obtained. I may add that the distinguishing feature of *Van Streepen* is that, unlike in this case, where it is contended that no leave to appeal is required, the appellant was granted leave to appeal by the Appellate Division after the application for leave to appeal was refused by the trial judge.

*Namibian trends and approaches to appeals against judgments and orders of the High Court to the Supreme Court*

[34] With this review of the legal position in South African law, I will now proceed to consider how s 18 of our High Court Act has been interpreted by this Court. I begin this analysis with general observations on differences between South African and Namibian procedural law on appeals. With the advent of Independence, Namibia began developing its own jurisprudence, independent of its colonial master, South Africa. There are now material differences in statutory regimes relating to

appeals in Namibia and South Africa. In South Africa, as noted above, leave to appeal is now required in all appeals while in Namibia appeals from judgments or orders of the High Court are regulated by s 18 of the High Court Act. Furthermore, as already mentioned while there is no longer such a thing as 'interlocutory orders' within the meaning of s 20(2)(b) of the South African Supreme Court Act, in Namibia s 18(3) makes reference to interlocutory orders.

[35] Section 14(1) of our Supreme Court Act 15 of 1990 provides that the Supreme Court has the jurisdiction to hear and determine any appeal from any 'judgment or order of the High Court'.<sup>10</sup> Section 18(1) of the High Court Act 16 of 1990 states that where the High Court sits as a court of first instance, an appeal from a judgment or order of that court in civil matters lies with the Supreme Court as of right. However, where the High Court sits as a court of appeal, leave to appeal against any judgment or order of that court in civil proceedings must first be obtained from the High Court and if refused, leave must be sought and obtained from the Supreme Court by way of a petition to the Chief Justice as provided for under the law.<sup>11</sup>

[36] Section 18(3) of the High Court Act reads as follows:

'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

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<sup>10</sup> The subsection provides in full as follows:

'The Supreme Court shall, subject to the provisions of this Act or any other law, have jurisdiction to hear and determine any appeal from any judgment or order of the High Court and any party to any such proceedings before the High Court shall if he or she is dissatisfied with any such judgment or order, have a right of appeal to the Supreme Court'.

<sup>11</sup> See also *Mentoor v Usebiu* (SA24-2015)[2017] NASC (19 April 2017)

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.’ (Underlining is mine)

[37] As far as I was able to ascertain, in all the cases<sup>12</sup> in which the provisions of s 18(3) of the High Court Act were considered and/or decided, this Court has hitherto been primarily concerned with the question of the appealability of a judgment or order of the High Court and not with the conundrum of the difference between ‘simple’ or ‘pure’ interlocutory orders on the one hand and interlocutory orders having a final and definitive effect on the other that appears to have bedevilled the South African courts for centuries until the position in that country also changed to the requirement of leave to appeal in all civil proceedings.<sup>13</sup> I note, however, that in *Aussenkehr and another v Minister of Mines and Energy and another* 2005 NR 21 (SC) at 33F, where this court was concerned with the question of the appealability of an order refusing an application for urgent mandatory relief, on the basis that the applicant had not established urgency, Strydom CJ who made a significant contribution to the interpretation of s 18 of the High Court Act, clearly *obiter* in the context in which the remarks were made, observed that:

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<sup>12</sup>This Court has considered the appealability of judgments and orders of the High Court in cases including *Vaatz and another v Klotzsch and others*, unreported, Case No. SA 26/2001 delivered 11 October 2002; *Aussenkehr Farms (Pty) Ltd and another v Minister of Mines and Energy and another* above; *Wirtz v Orford and another* 2005 NR 175 (SC); *Handl v Handl* 2008 (2) NR 489 (SC); *Minister of Mines and Energy and another v Black Range Mining (Pty) Ltd* (1) NR 31 (SC); *Knouwds NO v Josea and another* 2010 (2) NR 754 (SC); *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd and others* 2011 (2) NR 469 (SC); *Shetu Trading v Tender Board of Namibia* 2012 (1) NR 162 (SC); *Haw Retailers CC t/a Ark Trading & Others v Tuyenikalao Nikanor t/a Natutungeni Pamwe Construction CC* SA 38/2013, unreported, delivered 7 August 2015 (the appealability of an interlocutory order was raised in this case, but found unnecessary to decide the point). Some of the cases on this list have been sourced from note 3 in *Shetu Trading v Tender Board of Namibia* judgment.

<sup>13</sup> Cf. *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 11A.

‘A refusal to hear a matter on the basis of urgency may, in the Namibian context, be regarded as what was termed a ‘simple interlocutory order’ for which leave to appeal would be necessary in terms of s 18(3) of Act 16 of 1990.’

[38] I will return to this dictum from para [42] below. Earlier in the *Aussenkehr* judgment, Strydom CJ at 30E dealt with the question of whether a ruling by a court that an application brought on the basis of contended urgency was not urgent was ordinarily appealable. The learned Chief Justice answered the question in the negative, adding that at best for the party contending to the contrary such an order may be interlocutory, ‘in which case leave to appeal would be necessary.’

[39] In *Wirtz v Orford and another*<sup>14</sup> counsel for the respondents raised a preliminary point with reference to s 18(3) of the High Court Act that the appeal against the order of the Court *a quo* was not properly before court, as it was an interlocutory proceeding which could only come before the Supreme Court with leave of the High Court or if leave was refused, by special leave of the Chief Justice. Strydom CJ agreed with counsel for the appellant in that case that the dismissal of the interim relief was final in that it could not subsequently be changed by the court that made the decision. The Chief Justice observed, however that such a position is only one of the attributes of a ‘judgment’ or ‘order’, adding pertinently that:

‘In my opinion the order of the Court *a quo* was not decisive of any of the rights of the parties, nor did it dispose of a substantial, or, for that matter, any, portion of the relief claimed by the applicant in the main application. The relief claimed by the

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<sup>14</sup> Cited in note 12 above

appellant in the interim order was procedural in nature, which, by itself, is a strong indication that the relief claimed was interlocutory.<sup>15</sup>

[40] In *Knouwds v NO v Josea & another*<sup>16</sup>, in the course of the discussion of the question whether the order of the High Court in that case was appealable with or without leave, Strydom AJA acknowledged the endorsement by this Court of the definition of the words 'judgment or order' in *Zweni* and reiterated the position of our law at para 10 as follows:

' . . . Generally speaking the attributes to constitute an appealable judgement or order are threefold, namely, the decision must be final, be definitive of the rights of parties or must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceeding. In terms of sec. 18(3) of the High Court Act *interlocutory orders are not appealable as of right and need the leave of that Court or, if that was refused, the leave of the Chief Justice, given by him on petition, to be able to come on appeal.*' (Emphasis supplied)

[41] At para 12 of the *Knouwds* judgment, with reference to the decision of the South African Appellate Division in *Moch*<sup>17</sup>, Strydom AJA observed that situations may arise where the effect of a court's order may be such that it has a final bearing on the rights of the parties. In such an instance, the order is not interlocutory and is appealable as of right.

[42] The above dictum by Strydom CJ was considered in *Shetu Trading CC v Chair of the Tender Board of Namibia & others*<sup>18</sup> and this brings me back to that

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<sup>15</sup> At 191B-C

<sup>16</sup> Note 12 above

<sup>17</sup> Note 13 above

<sup>18</sup> Note 12 above

observation. *Shetu* concerned the question whether the order of the High Court dismissing an urgent application for interim interdictory relief was appealable. Writing for a unanimous Court, O'Regan AJA considered the dictum by Strydom in light of the provisions of s 18 of the High Court Act. Having considered those provisions, O'Regan AJA concluded as follows:

'Given that s 18(3) repeats the words 'judgment or order' which are used in s 18(1) as well, it seems plain that s 18(3) does not expand the scope of 'judgments or orders' against which an appeal will lie; it merely provides that in the cases of certain 'judgments or orders', an appeal will only lie with leave'.<sup>19</sup>

The learned Acting Judge of Appeal went on to observe<sup>20</sup> in the context of the case before the Court that if the High Court had granted leave to appeal against a decision that did not constitute a 'judgment or order' within the meaning of s 18(1), then the Supreme Court was not bound to decide the appeal, adding:

'The court must always first consider whether the decision is appealable. If the decision against which leave to appeal has been granted does not fall within the class of 'judgments or orders' contemplated by s 18(1), then it is not appealable at all'.

[43] At paras 20 and 21 of the *Shetu* judgment O'Regan AJA underscored the underlying policy considerations for preventing appeals on orders that are not final in effect, noting with reference to decisions of the South African Supreme Court of Appeal, that the question of appealability is 'intrinsically difficult', a 'vexed issue' and

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<sup>19</sup> Para 36

<sup>20</sup> At para 38

that the principles set out in *Zweni* are not 'cast in stone' but are 'illustrative and not immutable'.

[44] O'Regan AJA summarised the intrinsic differences between ss 18(1) and (3) of the High Court Act and s 20(4)(a) and (b) of the South African Supreme Court Act 59 of 1959 as follows:

'In citing Erasmus' approach with approval in the *Vaatz* case, this Court noted a difference between the South African High Court Rules and the High Court Act that must be borne in mind. Section 18(1) of the High Court Act provides for a right to appeal against "judgements or orders" of the High Court made in civil proceedings as a court of first instance to this court without leave. Section 18(3) is an exception. It provides that no appeal will lie against a judgment or order that is "an interlocutory order or an order as to costs only left by law to the discretion of the court", except with the leave of the court against whose judgement or order is to be made, or where such leave is refused with the leave of the Supreme Court. The South African Supreme Court Act, 59 of 1959, by contrast, provides that in all civil cases, leave to appeal against a "judgement or order" must be obtained either from the court against whose judgement is to be made, or from the Supreme Court of Appeal (section 20(4)(a) and (b) of the Supreme Court Act, 59 of 1959).'<sup>21</sup>

[45] *Shetu* and other judgments of this Court reviewed above illustrate indubitably that in this jurisdiction the debate has always been whether a particular judgment or order is appealable or not and not about the intricate task of distinguishing between 'simple' or 'pure' interlocutory orders on the one hand and interlocutory orders having a final and definitive effect on the other that appears to have bedevilled the South African courts for centuries. As noted above, the legal position in that country also changed requiring leave to appeal in all civil cases.

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<sup>21</sup> At para 23

[46] The passage in *Aussenkehr* judgment to the effect that a refusal to hear a matter on the basis of urgency may be regarded as a simple interlocutory order requiring leave was not only *obiter* as the facts of the case did not call for the determination of the issue, but the correct approach has been comprehensively explained in *Shetu*.

[47] Counsel for the appellant is entirely correct in his submissions as to the then existing legal position regarding the meaning of 'interlocutory orders' prior to 1982. It is, however, clear that the position did not only change in South Africa now requiring leave to appeal in all civil proceedings, but it is also true to say that the Namibian legislation is now different from that of South Africa. The Namibian jurisprudence on the interpretation of s 18 of the High Court Act has evolved. This it did by distinguishing between 'judgments or orders' and 'interlocutory orders' which require leave to appeal. In this respect, our courts have moved on beyond where the South African courts were prior to the 1982 amendment to that country's Supreme Court Act. It is probably correct to conclude that a distinctively Namibian procedural law has evolved. Our courts have hitherto stayed clear of the spirited debate that had characterised the South African position prior to the 1982 amendment. Even though the broad concept of 'interlocutory orders' has retained its relevance in the context of appealability, it is not necessary to revert to the centuries old debate on the meaning of the word 'interlocutory'. The jurisprudential nuances emanating from the South African approach on the point are difficult to apply in practice. Moreover, as Schreiner JA observed in *Pretoria Garrison* case at 868:

‘No doubt various considerations have predominated in the minds of those responsible at different times for drawing the line at one place or another. The rules of procedure have differed considerably from age to age and country to country, and is hardly to be hoped that any single principle should be deducible as governing appeals from procedural orders everywhere and always’.

[48] The *South Cape* case and other cases upon which the appellant relies for the proposition that he does not need leave to appeal against the order of the High Court were decided in the context of the legislation of the time. As noted above, the wording of our legislation is slightly different in that it still refers to interlocutory orders while the South African legislation no longer does so. This, as I said earlier, is a small but significant difference that should play a role in the approach this Court should adopt. In this jurisdiction, the approach of the Supreme Court has been that interlocutory orders are not appealable except with leave.

[49] It must be presumed that in enacting s 18 of the High Court Act, the legislature must have been aware of the then existing s 20 of the Supreme Court Act 59 of 1959, but saw it fit to word the Namibian section slightly differently, presumably to do away with the convoluted dichotomy of what may or may not amount to ‘simple interlocutory’ orders.

[50] The Supreme Court cases reviewed above were correctly decided on their facts and circumstances and have established an approach that is entirely reconcilable with the approach proposed in this judgment.

[51] 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.

[52] The order given by Miller AJ refusing leave to amend is interlocutory. According to the *South Cape* case the term ‘interlocutory’ refers to all orders pronounced by the court, upon matters incidental to the main dispute, preparatory to, or during the progress of the litigation.<sup>22</sup> It is debatable whether the order refusing leave to amend has had the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. As counsel for the respondent correctly argued, the full extent of the relief claimed by the appellant in the main proceedings, namely his non-liability for the amounts claimed by the respondent remains intact. The fact that some of the multiple grounds upon which he seeks such relief may no longer be available to him does not mean that a substantial portion of the relief has been disposed of. Accordingly leave was required. The order thus being interlocutory, the matter clearly falls within the provisions of s 18(3) of the High Court Act. It was and remains necessary for the appellant to have obtained leave of the High Court. In seeking leave, the appellant would also need to satisfy the High Court that the interlocutory order is appealable upon an application of the test summarised in *Shetu*. If the High Court had refused to grant leave, the appellant

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<sup>22</sup> At 542H-543A-H

could come to the Supreme Court only with leave of this Court. This has obviously not happened. The appellant has clearly not complied with s 18(3) of the High Court Act. The appeal is bound to be struck off the roll. As the appeal is not properly before us, it is not necessary to consider and decide the refusal of the application for leave to amend. It remains to make the order of the Court.

[53] The following order is made:

The appeal is struck from the roll with costs, such costs to include the costs of one instructed and one instructing counsel.

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**SHIVUTE CJ**

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**MAINGA JA**

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**SMUTS JA**

## APPEARANCES

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