



NOT REPORTABLE

CASE NO: SA 9/2023

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

NORBERT HERCULES

Appellant

and

**NAMIBIA SUBTECH DIVING AND MARINE (PTY)
LTD**

Respondent

Coram: DAMASEB DCJ, SMUTS AJA *et* MAKARAU AJA

Heard: 20 June 2025

Delivered: 24 July 2025

Summary: This is an appeal against two judgments and orders of the High court dated 25 February 2022 and 15 December 2022 respectively.

The judgment and order of 25 February 2022 related to an interlocutory application brought by the appellant in which the High Court dismissed his application for the upliftment of the bar and his application to re-open the pleadings in order to file a replication to challenge the constitutionality of s 3(1)(b) of the Employees' Compensation Act 30 of 1941.

Following the High Court's decision to dismiss the application, the appellant at a case management hearing recorded that at the hearing of the special plea he would abide by the decision of the court with the reservation of the right to appeal any ruling made.

The special plea was later heard and determined, giving rise to the judgment and order of 15 December 2022 which upheld the respondent's special plea.

The notice of appeal was filed out of time and the appellant filed an application to condone that late filing and for reinstatement of the appeal.

The court was left to determine whether it was competent for the appellant to seek to appeal against the judgment in the interlocutory application without first seeking leave to appeal from the High Court after its ruling and instead proceed with the hearing of the special plea several months thereafter.

Held that, the interlocutory order declining the appellant leave to re-open the pleadings in order to file a replication to challenge the constitutionality of s 3(1)(b) of the Act is akin to an application to amend pleadings which is refused. Such an order is plainly appealable but because it is interlocutory, leave to appeal is required from the High Court. If that were refused, it would have been open to the appellant to petition the Chief Justice for leave to appeal.

Held further that, there is no 'right' to reserve if that ruling is left unchallenged. In the absence of a challenge, that issue had been finally determined. It is not open to a party to abide a judgment or ruling yet reserve the right to appeal in this manner. Furthermore, if a ruling proceeds on an unopposed basis, it would ordinarily not be open to a party to appeal against it.

Held further that, if the appellant was aggrieved by the refusal to permit the filing of a replication, his remedy was then to seek leave to appeal so that the special plea could be heard and determined on the pleadings as sought by him and not in the manner attempted in this appeal.

Held that, the procedure followed by the appellant is not competent and the appeal as formulated lacks any prospects of success.

The application for condonation and reinstatement was dismissed and the appeal was struck from the roll with no order as to costs.

APPEAL JUDGMENT

SMUTS AJA (DAMASEB DCJ and MAKARAU AJA concurring):

[1] The appellant's notice of appeal dated 27 January 2023 sought to appeal against two judgments and orders delivered on 25 February 2022 and 15 December 2022 respectively.

[2] The judgment and order of 25 February 2022 related to an interlocutory application by the appellant in which the High Court dismissed his application for the upliftment of the bar and his application to re-open the pleadings to afford the appellant to replicate to the respondent's special plea (of 15 February 2018).

[3] The special plea was then heard and the judgment and order of 15 December 2022 upheld the respondent's special plea.

[4] The notice of appeal was filed out of time and the appellant has filed an application to condone that late filing and for reinstatement of the appeal.

[5] This matter comes a long way. It is apposite first to set out the litigation history of this matter before turning to those judgments and orders.

Litigation history

[6] The appellant instituted a delictual claim for damages against the respondent, his erstwhile employer, in late August 2016. The claim arises from an accident which occurred on 6 September 2013 during his employment as a diver. The appellant claims that the respondent was negligent in causing that accident and claims N\$3 018 049 in damages.

[7] The respondent filed a special plea to the action on 15 February 2018. The special plea raised s 7(a) of the Employees' Compensation Act 30 of 1941 (the Act), contending that the action was precluded by s 7(a) of the Act. In support of this contention, the respondent pleaded that the appellant had submitted a claim for compensation to the Social Security Commission (SSC) under the Act and that the SSC had accepted liability for the claim around 30 September 2013. The special plea further states that this acceptance was on the basis of a special arrangement as provided for in s 3(1)(b) of the Act in terms whereof the respondent's employees earning more than the statutory threshold set in s 3(2)(b) were still insured under the Act.

[8] By virtue of the special arrangement, it was pleaded that the appellant was and remains an 'employee' as defined in s 3 of the Act. It was further pleaded that the appellant's permanent disablement was assessed at a degree of 46 per cent and that the SSC rendered and continued to render payments to the appellant in respect of a pension, medical expense refund and/or temporary disablement pay out.

[9] The special plea proceeded to invoke s 7(a) of the Act which is to the effect that no action at law shall lie by an employee or any dependant (of an employee) in respect of an injury due to an accident resulting in the disablement or death of such an employee. The respondent pleaded that the appellant's action was debarred by s 7(a).

[10] The respondent also pleaded over on the merits, denying negligence.

[11] Subsequent to the special plea and plea, the appellant was on 12 June 2018 ordered to file a joinder application and his replication to the special plea on or before 20 July 2018. That time period was extended by agreement between the parties' legal representatives because the appellant was said to be awaiting counsel's opinion on the special plea. There had been several postponements on this score dating back to May 2017 and repeated in status reports in April 2018 and May 2018.

[12] The appellant's erstwhile legal practitioner withdrew as his practitioner of record on 13 August 2018 without filing any further process.

[13] On 3 January 2019, the respondent filed an application to amend its pleadings. The appellant was unrepresented at that time. On 11 February 2018, the appellant's current legal practitioner of record was appointed as *amicus curiae*. The respondent's application to amend was dismissed and leave to appeal that decision was refused.

[14] The parties subsequently agreed in a case management report dated 2 September 2020 that specific discovery be completed by 21 September 2020 and that the special plea would be heard separately. On 21 February 2021 discovery was eventually given by the respondent concerning its application for a special arrangement under s 3(1)(b) of the Act.

Application to re-open pleadings to replicate to the special plea

[15] On 21 May 2021, the appellant gave notice that he intended to apply to re-open the pleadings so that he could replicate to the special plea. On 26 May 2021, the respondent indicated that it would oppose such an attempt.

[16] The appellant's application for that relief dated 7 July 2021 then followed. It was opposed.

[17] The application referred to the respondent's application to the SSC for a special arrangement. It was pointed out that it was unspecific as to the employees affected or their categories of work. The appellant claimed he had not been informed of this arrangement prior to being employed and said he would not have agreed to it and that the respondent could not include him in such application without the opportunity to be heard. The appellant also claimed in his application to re-open pleadings that s 3(1)(b) was in conflict with the Constitution in that it violated his rights under Arts 8, 12, 16 and 18 of the Constitution and wanted to replicate to that effect.

[18] In its opposition to this application, the respondent objected to the appellant's delay in bringing the application, referring to periods where the delay was unexplained. It criticised the explanation provided and took the point that neither the SSC nor the Attorney-General were joined to the proceedings. It was also stated that the appellant had claimed from the SSC and accepted moneys paid by the SSC to him. The respondent also took the point that the application did not address the prospects of success of the appellant's claim. For these reasons, the respondent sought the dismissal of the application.

The High Court's judgment of 25 February 2022

[19] In its reasoned judgment of 25 February 2022, the High Court referred to *Gurirab v Government of the Republic of Namibia & others*¹ where this Court held that a litigant can invoke the Constitution at any time during litigation. The High Court further held that, if a constitutional challenge were to be properly pleaded, then the delay in mounting it would be less important.

[20] The court however found that the appellant was required to show that it had a *bona fide* case on the merits of his claim which he had not done in his application. The court also found that the appellant had failed to disclose to the court that he had applied for and received remuneration from the SSC under the Act and that his explanation concerning his lack of knowledge of the special arrangement was 'unconvincing and not credible'. The court further found that the SSC and the Attorney-General should have been joined to the proceedings.

¹ *Gurirab v Government of the Republic of Namibia & others* 2006 (2) NR 485 (SC) at 494.

[21] Given these unsatisfactory features, the High Court dismissed the application to re-open the pleadings to file a replication and referred the matter for further case management.

The judgment and order of 15 December 2022

[22] Further case management proceeded and the parties agreed to the setting down of the respondent's special plea. The court proceeded to set down the respondent's special plea for hearing on 12 October 2022. The High Court on 15 December 2022 delivered judgment upholding the respondent's special plea.

Notice of appeal

[23] On 27 January 2023, the appellant noted an appeal and sought to do so against both judgments (25 February 2022 and 15 December 2022). That notice was filed seven days late on 27 January 2023 and the appellant has brought an application for condonation and reinstatement.

Condonation and reinstatement application

[24] This application was filed on 1 February 2023, a few days after the notice of appeal was filed at the High Court. In it, the appellant stated that he 'could not' appeal against the ruling of 25 February 2022 because of its interlocutory nature and was then unable to advance constitutional argument when the special plea was heard on 12 October 2022 and stated that he would abide the decision of the court on the special plea but reserved his 'right' to appeal.

[25] The explanation proffered for the delay in filing the notice of appeal was that the legal practitioner handling the matter had incorrectly assumed that the period between 15 December and 15 January is excluded when calculating the time for delivery of process in this Court. As soon as it was realised that this assumption was unfounded, the notice of appeal was filed. The delay was limited to seven court days.

[26] The application for condonation and reinstatement is opposed.

[27] The test for condonation applications is well settled. The appellant is required to establish that his explanation for the delay is reasonable and acceptable, and secondly that the appeal enjoys prospects of success.

[28] Both sides had filed written argument dealing with condonation and only in respect of the judgment of 25 February 2022 and not that of 15 December 2022.

[29] The question arises as to whether it is competent for the appellant to seek to appeal against the judgment of 25 February 2022 in this manner, without first timeously seeking leave to appeal from the court below after that ruling and instead proceed with the hearing of the special plea several months later.

[30] Counsel on both sides addressed this issue and the judgment of 25 February 2022.

[31] Counsel for the appellant accepted that it was open to the appellant to apply for leave to appeal after the High Court dismissed the application to re-open pleadings and for leave to file a replication. Appellant's counsel further contended that the High Court was duty-bound to consider the constitutionality of s 3(1)(b) when hearing the special plea as the court was aware that its constitutionality had been challenged. Counsel however acknowledged that the point had not been argued at the hearing of the special plea (and understandably so because it was raised by the pleadings).

[32] As to the reasoning in the judgment of 25 February 2022, appellant's counsel argued that the delay in bringing the application was minimal after the respondent's application for a special arrangement was made known to him. Counsel also pointed out that the court did not find that the constitutional challenge did not raise a *bona fide* defence and that the court misdirected itself in failing to address the constitutionality of the provision providing for a special arrangement. Counsel also contended that the cost order was inapposite.

[33] Counsel for the respondent argued that leave to appeal the order of 25 February 2022 should have been sought and that it was not open to the appellant to raise the issue after the special plea had been determined on the pleadings.

[34] As to the merits of the application to re-open the pleadings to introduce a replication, counsel for the respondent argued that the court was justified in refusing it, given the lengthy delays which preceded it. Counsel correctly did not persist with the joinder point raised in those proceedings. Counsel however

asserted that the appellant was required to make out a case on the merits of the claim which had not been done.

Was it competent for the appellant to seek to challenge the 25 February 2022 ruling in this way?

[35] The interlocutory order declining the appellant leave to re-open the pleadings in order to file a replication to challenge the constitutionality of s 3(1)(b) of the Act is akin to an application to amend pleadings which is refused. Such an order is plainly appealable but because it is interlocutory, leave to appeal is required from the High Court.² If that were refused, it would have been open to the appellant to petition the Chief Justice for leave to appeal.

[36] That order is appealable because of its final and definitive effect upon the main action. Once determined, it meant that that issue was finally disposed of – whether the pleadings should be re-opened to file a replication to the special plea, an apposite manner in challenging the constitutionality of s 3(1)(b) of the Act. That attempt was finally disposed of when the application was refused and no leave to appeal was sought. The matter would then move on for the special plea to be determined without a replication. The same would occur where an attempt is made to introduce a new defence in a plea which is then refused. If unchallenged, the trial would proceed on the pleadings in their unamended form – without that defence being raised on the pleadings.

² *Di Savino v Nedbank Namibia Ltd* 2017 (3) NR 880 (SC); *Municipal Council of Windhoek v Pioneerspark Dam Investment CC* 2021 (3) NR 670 (SC).

[37] It does not assist the appellant that at the subsequent case management hearing, he recorded that at the forthcoming hearing of the special plea he would abide the decision of the court with the reservation of the right to appeal any ruling made. There is no 'right' to reserve if that ruling is left unchallenged. In the absence of a challenge, that issue had been finally determined. It is not open to a party to abide a judgment or ruling yet reserve the right to appeal in this manner. Furthermore, if a ruling proceeds on an unopposed basis, it would ordinarily not be open to a party to appeal against it.

[38] The refusal to grant leave to re-open the pleadings is in any event not a basis upon which to attack the ruling on the special plea. Nor is it raised in that manner by the appellant. Once leave to file a replication to the special plea was refused, the determination of the special plea was then to be determined on the basis of the pleadings which served before the court. A right to subsequently appeal against that ruling could not be 'reserved' as the appellant would have it. The right (to apply for leave to appeal) would need to be exercised after the ruling of 15 February 2022 was given. It could not be 'reserved' for the future.

[39] The special plea was then determined on the basis of the pleadings as they stood at the time. The correctness of that decision (upholding the special plea) is not challenged on appeal but rather the refusal several months prior to decline leave to file a replication to it. The appellant however in oral argument contended that it was inappropriate for the court *a quo* to have considered the special plea without first addressing whether s 3(1)(b) passes constitutional muster, being aware that it had previously been raised. But that question did not serve before the

court then. Nor did the appellant raise that issue at the hearing of the special plea or argue that the court should decline the special plea in view of its obligation to satisfy itself that s 3(1)(b) passes constitutional muster. On the contrary, the court could have inferred that the appellant no longer persisted with the point because he had not challenged the refusal to permit a replication. The court could not be said to have erred in not addressing the point in the circumstances.

[40] The point remains that if the appellant was aggrieved by the refusal to permit the filing of a replication, his remedy was then to seek leave to appeal so that the special plea could be heard and determined on the pleadings as sought by him and not in the manner attempted in this appeal.

[41] It follows that the procedure followed by the appellant is not competent and the appeal as formulated lacks any prospects of success.

[42] As a consequence, the application for condonation and reinstatement must fail.

Costs

[43] The appellant is the recipient of legal aid on appeal. It follows that no order of costs should be made in these proceedings. During the proceedings in the High Court, counsel for the appellant appeared *amicus curiae*. The order of the court *a quo* making an adverse cost order against the appellant was inapposite and would need to be corrected.

Order

[44] The following order is made:

1. The application for condonation and reinstatement is dismissed.
2. The appeal is struck from the roll.
3. No order as to costs is made.
4. The order of the High Court is corrected by deleting paragraph 2 and replacing it with the following:

‘2. There is no order as to costs.’

SMUTS AJA

DAMASEB DCJ

MAKARAU AJA

APPEARANCES

APPELLANT:

N Marcus

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Office

RESPONDENT:

D Obbes

Instructed by Koep & Partners