



REPORTABLE

CASE NO: SA 80/2022

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ROLAND DONAVAN JACOBS

Appellant

and

ADIDAS (SOUTH AFRICA) (PTY) LTD

Respondent

Coram: DAMASEB DCJ, MAINGA JA and PRINSLOO AJA

Heard: 28 March 2025

Delivered: 21 May 2025

Summary: This is an appeal against a judgment and order of the High Court dismissing a special plea of jurisdiction.

The appellant and the respondent entered into a written agreement in terms whereof the respondent had to supply 'footwear, textiles and sports balls for various sports groups' to the appellant to the value of N\$1 969 903, 49.

The appellant failed to pay N\$1 969 903,49 to the respondent. Respondent instituted an action *a quo*, to which the appellant raised a special plea of

jurisdiction as according to their written agreement they had agreed to the jurisdiction of the Western Cape High Court.

The High Court decided the matter on the papers and without hearing evidence. It noted that it appeared from the papers that the appellant resided in Namibia and that the cause of action arose in Namibia. The High Court also noted that there was no evidence led by the appellant to justify why that court should decline to exercise its jurisdiction and dismissed the special plea with costs.

The appellant appealed the judgment and order of the High Court. On appeal this Court –

Held that, Mr Barnard, who prepared the appellant's heads of argument has no right of audience in Namibia and therefore the appellant has not filed heads of argument. That the appeal is deemed to have lapsed in terms of rule 17(2).

Held that, a notice of appeal is the very foundation on which the case of the appellant must stand or fall.

Held that, there are no grounds of appeal relied on for the appeal and the notice of appeal is defective with the consequence that there was no appeal.

Held that, the special plea was interlocutory or incidental to the main dispute and while this interlocutory order is appealable, leave to appeal was necessary, which the appellant failed to obtain.

Accordingly, the appeal was struck from the roll with costs.

APPEAL JUDGMENT

MAINGA JA (DAMASEB DCJ and PRINSLOO AJA concurring):

Introduction

[1] This appeal is against an order and judgment of the High Court, that court dismissing the appellant's special plea of jurisdiction with costs.

Brief background

[2] The appellant is a major male person, resident in Windhoek, trading as Streethouse Namibia in Windhoek. Respondent (as appears from the name) is a South African company with limited liability established in terms of the laws of South Africa.

[3] The respondent (the plaintiff) sued the appellant (the defendant) in the High Court for products supplied to and ordered by the appellant to the value of N\$1 969 903,49.

[4] The cause of action which arose in Namibia was from a written agreement in terms of which the respondent was to supply 'footwear, textiles and sport balls for various sport groups' to the appellant for sale in various Streethouse stores in Windhoek, Walvis Bay, Swakopmund and Oshakati.

[5] It is alleged that the respondent complied with the terms of the agreement but that notwithstanding written demand, the appellant refused and/or failed and/or neglected to pay the N\$1 969 903,49 or any part thereof to the respondent.

[6] The appellant, among other things, raised a special plea on jurisdiction, in the following terms:

‘(a) defendant pleads that clause 19(k) of the agreement relied upon by the plaintiff provides as follows: -

“The contract and any other contract between the seller and the buyer shall be deemed in all respects as being performed and construed according to the laws of South Africa and the parties submit to the exclusive jurisdiction of the Western Cape High Court, Cape Town.” Underlined for emphasis

(b) Under the above circumstances, and given the fact that the parties agreed to the exclusive jurisdiction of the Western Cape High Court in Cape Town, the defendant pleads that this Honourable Court has no jurisdiction to entertain any proceedings at the behest of the plaintiff.’

[7] The respondent replicated to the special plea above. It denied that the High Court had no jurisdiction to entertain any proceedings at the behest of the respondent. It submitted that despite clause 19(k) of the agreement, the High Court has the competence to exercise jurisdiction:

- (a) Over any person who is either domiciled or resident within the borders of the Republic of Namibia.
- (b) Where the cause of action arose within the jurisdiction of the High Court.
- (c) Where the immovable property to be executed to satisfy the claim is located within the borders of Namibia.

[8] On 7 March 2022, the matter came before Masuku J for hearing. The appellant raised the issue of the special plea. Masuku J declined to hear the jurisdiction issue. The matter was referred back to the Managing Judge (Usiku J).

[9] On 30 March 2022 in a status hearing the parties in a 'joint status report' reported that the special plea be placed on the roll for the hearing of oral evidence and arguments on the plea, on a date suitable for the Managing Judge.

[10] On 21 July 2022, the special plea hearing came before Usiku J. When the matter was called counsel for the appellant said the following:

'Yes My Lord. My Lord this matter is set down for an adjudication of the special plea raised by the defendant and we know that the defendant has the onus to proof its special plea My Lord and therefore the defendant should start its case. My Lord the Defendant will not call any witnesses to the stand to testify and the defendant will therefore close its case and to only argue the matter on the papers before Court My Lord.'¹

[11] On 1 September 2022, the court below delivered its judgment on the special plea. The court noted that the special plea was argued before it on the papers without evidence led by appellant. That in the pleadings, the appellant acknowledged that he resides in Namibia, and the cause of action arose in Namibia but no evidence was led by the appellant on why that court should decline to exercise its jurisdiction.

¹ Page 189, vol 3 of the appeal record.

[12] That court reiterated the principle that (referencing *Foize Africa v Foize Beheer BV*²) a foreign jurisdiction clause in an agreement does not exclude the court's jurisdiction. That the court has discretion in deciding whether or not the exercise of that jurisdiction should be stayed pending the outcome of foreign jurisdiction clause.

[13] The court below further referred to *Swanu of Namibia v Katjivirue*³ where the court in that matter drew a distinction between an exception which is confined to the four corners of the pleadings and a special plea which does not appear *ex facie* the pleading, which has to be established by way of evidence.

[14] It opined that evidence should have been led and in the absence of facts placed before court on which the special plea was to be determined, it dismissed the special plea with costs. The matter was postponed to 28 September 2022 at 15h15 for a status hearing and allocation of trial dates. The parties were ordered to file a joint status report on or before 21 September 2022.

[15] This appeal lies against the dismissal of the special plea.

[16] The appeal raises three issues for determination.

- (a) The validity of the heads of argument prepared by Mr Theodorus Adam Barnard (Mr Barnard);

² *Foize Africa (Pty) Ltd v Foize Beheer BV & others* 2013 (3) SA 91 (SCA) at 99F-H.

³ *Swanu of Namibia v Katjivirue & others* (HC-MD-CIV-ACT-OTH-03315 of 2021) [2022] NAHCMD 98 (9 March 2022) paras 17-18 and 25.

(b) Whether the notice of appeal was a valid notice of appeal; and

(c) Whether the special plea was appealable and if it was, was leave to appeal required?

The heads of argument on appeal

[17] The appellant's heads of argument were prepared on 21 February 2025 by Mr Barnard who was counsel for the appellant but did not appear when the matter was called on 28 March 2025. Mr Marais SC appeared for the appellant. When the court probed him about the status of Mr Barnard relating to his court appearance in Namibia, his reply was that Mr Barnard has issues appearing in courts in this jurisdiction. In fact, in *Salt Essential Information Technology (Pty) Ltd v RDW Properties CC*,⁴ Parker AJ found that Mr Barnard was a permanent resident of Namibia and had to apply to be admitted as a legal practitioner in Namibia but there was no evidence that he was an admitted legal practitioner. Parker AJ reviewed and set aside a certificate dated 16 August 2023 issued by the Chief Justice to Mr Barnard in terms of s 85(2) of the Legal Practitioners Act 15 of 1995.

[18] In terms of s 3 of the Legal Practitioners Act 15 of 1995, no person shall be admitted and authorised to practice law in Namibia except in terms of the Legal Practitioners Act.

[19] Mr Barnard has no right of audience to practice law in Namibia.

⁴ *Salt Essential Information Technology (Pty) Ltd v RDW Properties CC* (HC-MD-CIV-ACT-CON-2021/02204) [2024] NAHCMD 375 (10 July 2024).

[20] In *Menzies Aviation (Namibia) (Pty) Ltd v Namibia Airports Company Limited* (HC-MD-CIV-MOT-GEN-2023/00386) [2025] NAHCMD 64 (21 February 2025), Prinsloo, J (as she then was) correctly interpreted practice of law as follows:

‘The “practice of law” is defined by Black’s Law Dictionary as –

“Not limited to appearing in court, or advising and assisting in the conduct of litigation, but embracing the preparation of pleadings, and other papers incident to actions and special proceedings, conveyancing, the preparation of legal instruments of all kinds, and the giving of all legal advice to clients . . . It embraces all advice to clients and all actions taken for them in matters connected with the law.”

[21] Given the circumstances of Mr Barnard and the authorities cited above, can it be said that appellant filed heads of argument? The answer is a resounding no. The appeal is deemed to have lapsed in terms of rule 17(2) of the rules of this Court.

Notice of Appeal

[22] I turn to consider the notice of appeal.

[23] There are no grounds of appeal relied on for the appeal. The first three paragraphs are explanations of how the matter initially came before Masuku J who declined to hear same as it was not a hearing on the merits of the case but on the special plea of jurisdiction and how Masuku J referred the matter back to the

Managing Judge. Paragraph 4 is also an explanation and appellant continues to say he was under the impression that the special plea would be heard first before the trial could proceed and then he concedes that his counsel informed the court that they were not going to lead evidence, and that they will argue the special plea on the papers. Paragraph 5 is a contention that such a procedure was incorrect and the learned judge should not have entertained the irregular hearing on the papers. Paragraph 6 is also a contention that the judge below was not bound to the irregular procedure. In para 7 appellant relies on *Foize Africa (Pty) Ltd v Foize Beheer BV & others* above for his contention in paras 5 and 6. In para 8 appellant concedes that the court below was correct to hold that evidence was required to establish the special plea and that there were no facts before court on which the special plea could be determined. In para 9 it is stated that despite the holding in para 8 the court below, erroneously concluded that, in the absence of facts supporting the special plea, the special plea stood to be dismissed. In para 10 appellant suggests that the court below should have ordered absolution from the instance and in para 11 it is submitted that the Supreme Court may reverse the dismissal of the special plea.

[24] When Mr Marais was confronted with the notice of appeal, he conceded that the notice could have been drafted better or he could have drafted the notice differently but argued that it was not so defective that it should be disregarded.

[25] The noting of an appeal constitutes the very foundation on which the case of the appellant must stand or fall.⁵ *Inter alia*, the notice of appeal serves to inform

⁵ *S v Kakololo* 2004 (NR) 7 (HC) at 8F.

the trial judge what the grounds are on which the appeal is being brought and whether they relate to issues of law or fact, or both.⁶

[26] In *Kakololo Maritz J* referred with approval to Watermeyer J in *Hashe v Minister of Justice & another* 1957 (1) SA 670 (C), when dealing with a notice in which no grounds were mentioned said (at 675) that 'it was not a valid notice of appeal, and as such it was no notice of appeal at all'. Such a notice is a nullity and does not have any force or effect.⁷

[27] Paragraphs [25] and [26] above were said in the context of a notice of appeal in criminal matters but they hold well in civil matters as well. The appellant's notice in our opinion is defective with the consequence that there was no appeal before us.

Appealability

[28] The issue whether the High Court had or had no jurisdiction to hear the respondent's claim against appellant is interlocutory or incidental to the main dispute. In *Di Savino v Nedbank Namibia Limited*⁸ the Chief Justice crystallised the meaning of s 18(3)⁹ of the High Court Act No 16 of 1990 to this:

'[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

⁶ Ibid at 8G.

⁷ Ibid at 9C-D.

⁸ *Di Savino v Nedbank Namibia Limited* 2017 (3) NR 880 (SC) para 51.

⁹ 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.

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.'

[29] The second requirement above speaks for itself, ie interlocutory orders which are appealable require leave to appeal.

[30] As for the jurisdictional issue in the current case, authorities have it that it is appealable but appellant should have sought leave from the court below, which he failed to do. It follows on this score as well, that the appeal was not properly before this Court or there was no appeal at all. It means that the matter should be struck off with costs.

[31] Even if we were to consider the merits, this is a case where appellant knowingly waived his right to lead evidence and communicated same to the respondent and eventually to the court. In reply to respondent's submissions counsel for appellant, *inter alia*, said: 'the plaintiff (sic) initially intended on leading evidence but they were advised otherwise at the end of the day my Lord'. 'Advised otherwise' could include privileged information which the court would not enquire into. In my opinion appellant should not be heard to shift the blame to the court.

[32] Consequently, the following order is made:

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

MAINGA JA

DAMASEB DCJ

PRINSLOO AJA

APPEARANCES:

APPELLANT:

J Marais

Instructed by Dr Weder Kauta Hoveka
Inc.

RESPONDENT:

T Muhongo

Instructed by ENSAfrica|Namibia Inc.