REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA,
MAIN DIVISION, WINDHOEK
RULING

Case Number: HC-MD-CIV-MOT-GEN-2021/00144

In the matter between:

RECONNAISSANCE ENERGY NAMIBIA (PTY) LTD	**APPLICANT**

and

ANDREAS SINONGE	**1ST RESPONDENT**
NATIONAL PETROLEUM CORPORATION OF NAMIBIA (PROPRIETARY LIMITED)	**2ND RESPONDENT**
SHAMBYU TRADITIONAL AUTHORITY	**3RD RESPONDENT**
MINISTER OF MINES AND ENERGY	**4TH RESPONDENT**
MINISTER OF AGRICULTURE, WATER AND LAND REFORM	**5TH RESPONDENT**
MINISTER OF ENVIRONMENT, FORESTRY AND TOURISM	**6TH RESPONDENT**

Neutral Citation: *Reconnaissance Energy Namibia (PTY) LTD v Sinonge and Others* (HC-MD-CIV-MOT-GEN-2021/00144) [2022] NAHCMD 356 (19 July 2022)

Coram: RAKOW, J
Heard: **01 July 2022**
Delivered: **19 July 2022**

Flynote: Two applications for leave to appeal – Interlocutory orders – Court to determine the appealability of the said orders – If judgement or order does not have a final bearing on the rights of the parties, then it is not appealable at all.

Summary: The court is called upon to decide on two leave to appeal applications. An appeal against the order of 23 November 2021 and the leave to appeal application against dismissing the recusal application. Both appeals deals with an interlocutory order, thus the court has to decide on the appealability of the said orders.

Dismissing an application for recusal is generally accepted as an appealable order. Although an order dismissing an application for recusal does not necessarily meet the test as set out in Di Savino on the hallmarks of appealability, the Supreme Court stated in *Henle t/a Namib Game Services v Wildlife Assignment International Pty Ltd.*

Held that, the applicant to show that the order appealed against is appealable.

Held further that, in determining the appealability, one needs to see whether the order appealed against meets the three attributes as described in the *Government of the Republic of Namibia v Fillipus*.

Held futher that, in terms of the first appeal, the Supreme Court would have no jurisdiction if what an applicant seeks is for it to merely pronounce upon the correctness of the reasoning of the High Court and not upon a decision granting definite and distinct relief.

Held further that, applicant in the current matter failed to make out a case that the court misdirected itself on the legal principles applicable in recusal applications and as such, the application for leave to appeal against the dismissal of the recusal application should not succeed.

ORDER

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1. The application for leave to appeal against the order of 23 November 2021 giving leave to the applicant in the main action to file its answering affidavit, is dismissed with costs of disbursements.

2. The application for leave to appeal against the dismissal of the application for recusal is dismissed with costs of disbursements.

JUDGMENT

RAKOW, J:

Introduction

[1] The original application by the applicant (the respondent in the current application) was brought during May 2021 seeking to be restored in possession of his traditional land. The applicant is a member of the Shambyu Traditional Community, which is recognized as a Traditional Authority under the Traditional Authorities Act 25 of 2000 and he resorts under the customary law jurisdiction of the third respondent in the main action and reside at Mbambi Villige in the Kavango East region of Namibia. It is his claim that, he is the holder of a customary right of communal land tenure over a certain portion of communal land in terms of section 28 of the Communal Land Reform Act 5 of 2002.

[2] The applicant in this matter, who is the first respondent in the main application, is Reconnaissance Energy Namibia (Pty) Ltd, a private company with limited liability duly registered and incorporated in accordance with the company laws of Namibia. The first respondent in the main application also holds 90% interest in the petroleum exploration rights under the Petroleum Exploration License (PEL) no 73 covering the latitude and longitude degree square Blocks 1719, 1720, 2721, 2819, 1820 and 1821 in the Kavango Region of Namibia which include the area in and around Mbambi Village. The remainder of the respondents indicated that they do not intend to participate in these proceedings.

[3] There was also various condonation applications asking for the court to condone various late performances of the applicants of the said applications.

The history of the matter

[4] The applicant in the main matter, Mr. Sinonge, brought an application in which he seeks relief against the first and third respondents (in the main application) inter alia to restore the status *quo ante omnia*, that they are ordered to forthwith restore vacant possession of the area of land to the applicant, as well as restore to him his crop fields and the topsoil of the said crop fields and that the respondents are to pay the costs of disbursements for this application.

[5] The application became opposed and was initially case managed by Justice Geier before being transferred to myself. In a status report dated 6 September 2021, the parties indicated that the applicant intends to bring a strike-out application. On 7 September 2021, Justice Geier gave directions to the parties regarding the process to be followed with regards to the bringing of a strike-out application and then filing of heads of argument. The matter was postponed to 27 October 2021 with an indication that it will then be postponed to 8 December 2021 for the purpose of fixing a hearing date for the strike-out application.

[6] On 27 October 2021, the matter was postponed by Justice Geier to my roll on 2 November 2021 because it was re-assigned. On 2 November 2021, the court was informed by the applicant that they no longer intend to bring a strike-out application and that they wanted to file their replying affidavit, but that the first respondent is of the opinion that they should seek condonation for the late filing of their replying affidavit. The court then heard both parties on the issue and expressed the opinion that the applicant is not barred and can proceed to file its reply, but that the court will allow the first respondent to convince the court otherwise and the matter was set down for hearing on 23 November 2021.

[7] The court heard both parties and gave an order that the applicant can proceed to file its reply on or before 9 December 2021. The matter was postponed for the fixing of hearing dates to 7 December 2021. On 7 December 2021 the court was informed that although the first respondent filed a leave to appeal application, it also intends in bringing

a recusal application. The court then ordered that the recusal application be dealt with first and fixed dates for the filing of the said application.

[8] The recusal application was dismissed on 18 March 2022 with the reasons released on 28 March 2022. The applicant then filed a notice of appeal against the dismissal of the recusal application also. There are therefore two leave to appeal applications before court, the one dealing with the order on 23 November 2021 allowing the original applicant to file its replying affidavit and the second one, being the dismissal of the recusal application. For ease of reference, the court will deal with the leave to appeal the application filed first, being the appeal against the order of 23 November 2021 and then with the leave to appeal application for an appeal filed against dismissing the application for recusal.

The first leave to appeal application

[9] The applicant raised various grounds of appeal in relation to the first appeal. For completion sake I intend to refer to each of these grounds as follows:

AD FIRST GROUND

The honourable court erred in law and on the facts and or did not exercise the court's discretion judicially when the court granted leave to the applicant to file his replying affidavit when the applicant did not make a substantive application seeking leave from the court as required by rule 54(1), or 55(1) or 56(1).

AD SECOND GROUND

The honourable court erred in law and or on the facts and or did not exercise the court's discretion judicially when the court granted leave to the applicant to file his replying affidavit when the court had initially found that the days within which the applicant ought to have filed his replying affidavit were stayed or suspended by the intended application to strike out, alternatively, when the court initially found that logic dictates that the application to strike out suspended or stayed the running of the days within which the applicant ought to have filed his replying affidavit.

AD THIRD GROUND

The honourable court erred in law and or on the facts and or did not exercise the courts discretion judicially in the manner in which the court resolved the real issue that was in dispute between the applicant and the 1st respondent.

AD FOURTH GROUND

The honourable court misdirected itself in fact and in law in the manner in which it relied on the order that was granted by the previous managing judge on the 11th of August 2021 and in the manner in which it applied the provisions of rule 32 of the rules of this court as a basis warranting the grant of the order that the court gave on the 23rd of November 2021 granting leave to the applicant to file his replying affidavit.

AD FIFTH GROUND

The honourable court misdirected itself in law in the manner in which it applied its general judicial power prescribed in the rules to manage cases and its specific judicial powers under rule 32 to give directions in interlocutory matters prescribed in rule 32 of the rules of this court.

AD SIXTH GROUND

The honourable court misdirected itself when it varied the order that it granted on the 23rd of November 2021, with another order that was granted on 24th of November which included an order for costs.

<u>The second leave to appeal application</u>

[10] The applicant raised quite detailed grounds for appeal against the dismissal of the recusal application. The court will attempt to reduce them somewhat without taking the gist of these grounds away.

AD FIRST GROUND:

1. The honourable court erred in law and on the facts and or did not exercise its judicial power in accordance with the constitutional obligations conferred on it by article 12(1)(a) and 78(2) of the Namibian Constitution in not finding that, a

reasonable, objective and informed person, would on the following utterances and views made by the court on the 2nd of November 2021, reasonably apprehend that, the learned Judge had prejudged the issue of whether or not the applicant was barred to file his replying affidavit.

2. Given the aforesaid views of the court on the dispute as to whether or not the applicant was automatically barred to file his replying affidavit at that point in time, which views were expressed by the court in the aforesaid manner and in the aforesaid context before the matter was argued on the 23rd of November 2021, is it unreasonable for the 1st respondent to hold a reasonable apprehension that, on the 2nd of November 2021, the court had prejudged the issue as to whether or not the applicant was automatically barred to file his replying affidavit.

3. We respectfully submit that, any reasonable litigant would have a reasonable apprehension that the court had prejudged the issue before it was even argued on the 23rd of November 2021.

4. We will further submit that, if regard is had to the nature of the words used by the court in expressing its views, the ordinary grammatical meaning of the words used, the context within which they were used, to whom those views were addressed to, the subject matter that the court was addressing and the manner in which the aforesaid views of the court were made, any reasonable litigant will hold a reasonable apprehension that the court had prejudged the issue of whether or not the applicant was automatically barred to file his replying affidavit before that matter was argued on the 23rd of November 2021.

5. On the aforesaid basis, we will contend and submit that, the court erred in not finding that, on the aforesaid correct facts pleaded by the 1st respondent, it is reasonable for the 1st respondent to hold a view that, the court pre-judged the issue of whether or not the applicant was automatically barred to file his replying affidavit.

6. On the aforesaid basis alone, we will submit that, it is most likely that the Supreme Court will find that this honourable court erred in this regard. On this basis, we

submit that, this court ought to grant leave to the 1st respondent to appeal its order to the Supreme Court.

7. In the light of the above position, we respectfully submit that, there are good prospects that the Supreme Court will in its assessment of the aforesaid correct facts find that it is reasonable for the 1st respondent to hold a reasonable apprehension that the court pre-judged the aforesaid issue if leave to appeal to the Supreme Court is granted. On the aforesaid basis, we respectfully submit that leave to appeal to the Supreme Court be granted by this honourable court.

AD SECOND GROUND:

1. In its determination of the recusal application and in its judgment, the honourable court did not consider or correctly consider and deal with the 1st respondents grounds for recusal as set out in its founding papers.

2. In its judgment, the court does not deal with the aforesaid grounds in the manner in which they were asserted by the 1st respondent in its founding papers.

3. We respectfully submit that, in its judgment, the court appears to have conflated the grounds for recusal when in actual fact each ground had its own substance and basis in the founding affidavit. This is evident from paragraph 25 -37 of the court's judgment.

4. We will point out that, even though at paragraph 12 of the judgment the court acknowledges and recognizes the rights conferred on litigants in article 12(1) of the Constitution, the court did not consider and deal with the aforesaid grounds for recusal in accordance with the terms of article 12(1) of the constitution. The 1st respondent had clearly pointed out in its founding affidavit how the approach and manner adopted by the court violates the terms of article 12(1)(a) of the Constitution.

5. We respectfully submit that article 12(1)(a) guarantees a right on a litigant to be heard in a manner that is fair and impartial and the 1st respondent established that in respect of the first ground for recusal, the court did not hear the 1st respondent in a fair and impartial manner. The 1st respondent in its founding affidavit had referred to the provisions of the rules that it relied to submit to the court that the applicant was automatically barred and leave to file his replying affidavit was subject to a substantive application.

6. We will submit that, in terms of article 78(2) of the constitution, the court is subject and bound by the law and the rules that the 1st respondent referred to is the law that was applicable in the submission of the 1st respondent.

7. In its judgment the court does not deal with these rules that the 1st respondent referred to and on this basis, it is reasonable for the 1st respondent to reasonably apprehend that it was not heard and its right under article 12(1)(a) of the Constitution was violated.

8. On the aforesaid basis, we will contend and submit that, the court did not deal with or it did not correctly deal with the 1st respondent's grounds for recusal as asserted by the 1st respondent in its founding papers. On the aforesaid basis alone, we will submit that, it is most likely that the Supreme Court will find that this honourable court erred in this regard. On this basis, we submit that, this court ought to grant leave to the 1st respondent to appeal its order to the Supreme Court.

9. In the light of the above position, we respectfully submit that, there are good prospects that the Supreme Court will in its assessment of the aforesaid grounds for recusal find that it is reasonable for the 1st respondent to hold a reasonable apprehension that it was not heard and its article 12(1)(a) rights were violated. On the aforesaid basis, we respectfully submit that leave to appeal to the Supreme Court be granted by this honourable court.

AD THIRD GROUND:

1. The learned Judge erred on the facts and in law in the manner in which it applied the relevant test for recusal.

2. At paragraph 25 the court describes its view as a prima facie view. We point out that at the time the court expressed its views it did not state or qualify that its views were prima facie views. We will further submit that given the words used and the manner how the views were expressed by the court there is no expressed or implied basis in those expressions that indicates that those were prima facie views.

3. At paragraph 31 of the judgement, the court stated that it expressed a view on the next step that was to be taken in the matter. We submit that in its founding papers the 1st respondent set out the views made by the court on the 2nd of November 2021 and among the views made by the court is a view that states that the court was of the view that the days within which the applicant ought to have filed his replying affidavit were stayed or suspended. We submit that this view is not a view about the next step to be taken, instead it's a view that the court made on the dispute between the 1st respondent and the applicant.

4. At paragraph 32, the court stated that the 1st respondent did not indicate how the utterances are grounds for a reasonable apprehension. We will submit that the 1st respondent did indicate in respect of both grounds how the utterances constitutes a reasonable apprehension on the 1st respondent. The 1st respondent set out its basis from paragraphs 41-152 in respect of the first ground and from paragraphs 153 -187 in respect of the 2nd ground.

5. At paragraph 33, the court stated that a mere apprehension that a judicial office might be biased is not sufficient and the court further found that the 1st respondent did not discharge the onus placed on it without indicating how the grounds set out by the 1st respondent failed to discharge that onus.

6. We will contend that the court erred in this regard in that the grounds averred by the 1st respondent in respect of both grounds did rebut the presumption against impartiality and the court should have found that the grounds asserted by the 1st respondent in respect of both grounds did in fact and in law discharge the onus placed on the 1st respondent. Those references, the court did not apply the legal

principles set out in those authorities to the grounds for recusal raised by the 1st respondent in its founding papers.

7. We will contend that the court adopted a more exacting test in determining the recusal application and in determining the onus placed on the 1st respondent. We will contend that the court ought to have adopted a less exacting test and by not adopting a less exacting test the court erred on the facts and in law.

8. The learned Judge misdirected himself when he found that the applicants have not satisfied the requirements for recusal, because the learned judge did not consider all the grounds for recusal relied upon by the 1st respondent.

9. On the aforesaid basis, we will contend and submit that, the court did not apply the test to the grounds pleaded by the 1st respondent and on this basis the court did not deal with the test for recusal correctly. On the aforesaid basis, we will submit that, it is most likely that the Supreme Court will find that this honourable court erred in this regard. On this basis, we submit that, this court ought to grant leave to the 1st respondent to appeal its order to the Supreme Court.

10. In the light of the above position, we respectfully submit that, there are good prospects that the Supreme Court will in its assessment of the aforesaid grounds for recusal find that the 1st respondent discharged its onus. On the aforesaid basis, we respectfully submit that leave to appeal to the Supreme Court be granted by this honourable court.

AD FOURTH GROUND:

1. The court erred in its finding and reasons at paragraph 34 of the judgement.

2. It is the manner in which the court dealt with the issue that is the basis of the apprehension and not necessarily the raising of the issue.

3. We will point out that the principle emanating from the *Kauesa* judgement is not applicable in this matter. The basis of the 1st respondent's apprehension is not that

the court cannot raise an issue. The basis for the apprehension is stated at paragraphs 41-152 and from paragraphs 153-187 of the founding affidavit.

AD FIFTH GROUND:

1. 1. The court erred in its finding and reasons at paragraph 35 of the judgement.

2. We will submit that the court's finding and reasons at paragraph 35 indicates that the court did not correctly consider the grounds for recusal asserted by the 1st respondent at paragraphs 41-152 and from paragraphs 153-187 of the founding affidavit.

3. We submit that from paragraph 41-152 the 1st respondent clearly states its rights in terms of article 12(1)(a) were violated as set out in the first ground and if the those rights were violated it has a reasonable apprehension that the court will adopt a similar approach in the main hearing.

AD SIXTH GROUND:

1. The court erred in its finding and reasons at paragraph 36 of the judgement.

2. We will respectfully submit that in its founding papers from paragraphs 41-152 and from 153-187, the 1st respondent clearly indicated its apprehension that arose on the 2nd of November 2021 and its apprehension that arose on the 23rd of November 2021.

3. We will submit that the 1st respondent from paragraphs 41-152 in respect of the first ground for recusal did demonstrate the basis of the apprehension and from paragraph 153-187 it did demonstrate the basis for its apprehension in respect of the second ground.

4. On this basis, we will submit that, the court erred in fact and in law in respect of the finding at paragraph 36 of its judgement.

AD SEVENTH GROUND:

1. We will submit that in determining the application for recusal, the learned judge erred in the following respects:

2. In determining impartiality the learned judge did not follow the guidelines set out at clause 2(a)(b)(i-iv)(c) and (c) of the Rules of Ethical Judicial Conduct in Namibia.

    2.1. The learned judge did not adhere and follow the principle of judicial precedent by not following the approach and applying the legal principles adopted by the Supreme Court in the *Lameck* matter on the issue of recusal.

    2.2. By not finding that before the 2nd of November 2021 the position of the applicant with regard to filing its replying affidavit was that he will seek leave from the court to be granted leave to do so and his position was not that the days of filing the replying affidavit were suspended.

    2.3. By not finding that the applicant only started asserting the position that the days within which he ought to have filed his replying affidavit were suspended on the basis of the alleged interlocutory application after the court had expressed its view on the staying of the days on the 2nd of November 2021.

    2.4. By not finding that the expression of the court's view on the staying of the days on the 2nd November 2021, whilst the dispute on barring was still a live issue to be decided by the court unduly favoured the applicant as the applicant then started asserting the narrative expressed by the court.

    2.5. The learned Judge further erred and misdirected himself in not realizing that the applicants' complaint relates to an irregularity in a form of a fundamental issue which has effect of preventing the applicants to enjoy a fair, impartial, objective and full hearing if the learned Judge continues with the hearing of this matter.

<u>Second leave to appeal application opposed</u>

[11] The respondent to the leave to appeal application indicated that they wish to oppose the said application and responded as follows:

AD FIRST GROUND

1.1. That the Honourable court erred in law and on the facts and or did not exercise its judicial power in accordance with the constitutional obligations conferred on it by article 12(1)(a) and 78(2) of the Namibian Constitution in not finding that a reasonable, objective and informed person, would on the (following) utterances and views made by the court on the 2nd of November 2021, reasonably apprehend that, the learned judge had pre-judged the issue of whether or not the applicant was barred to file his replying affidavit.

1.2. The Honourable court was correct in deciding that it could not have prejudged the dispute between the parties on 2 November 2021 because the dispute only came before the court on 2 November 2021;

1.3. On 2 November 2021, the court expressed a prima facie view on the dispute between the parties, i.e. that the Applicant was not barred from filing his replying affidavit because of the abandoned interlocutory. It is an acceptable position that a judge can express a view based on submissions made by the parties, from the papers before court, from their training and experience. What judges are required to be is impartial, that is, to approach the matter with a mind open to persuasion by the evidence and submissions of counsel and therefore to allow parties to convince the court or not on the prima facie view before a ruling is made.

1.4. The Honourable court invited the parties to address it on its prima facie view before a decision can be made on the dispute. The honourable court was impartial in this regard and did not prejudge the dispute as no judgment or order was made on the dispute on 2 November 2021 before arguments were made by the parties on 23 November 2021. The order/ judgment was only made on 23 November 2021 after the parties have fully ventilated the dispute in court.

1.5. Therefore, no reasonable person, in the circumstances of this case would have a reasonable apprehension that the Honourable Court had prejudged the dispute on 2 November 2022 on whether the Applicant was automatically barred to file his

replying affidavit before the matter was argued on 23 November 2021. It is further not reasonable for the 1st respondent to hold such an apprehension.

1.6. The true and correct facts are that the judgment/order on the dispute was only granted on 23 November 2021 after arguments were advanced by both parties and after the 1st respondent failed to convince and or persuade this Honourable Court that its prima farcie view is wrong. The Honourable Court was impartial as required by Article 12(1)(a) and Article 78 of the Namibian Constitution in determining the dispute between the parties.

1.7. There is no reasonable possibility that the Supreme Court will come to a different conclusion that the Honourable Court erred, on the correct facts and the law, in holding that it did not pre-judge the dispute or in holding that, as a result of the expressed view, there are no grounds on which a reasonable person would reasonably apprehend bias on the part of the presiding officer.

1.8. As a result, leave to appeal should not be granted on this ground as the 1st respondent has no prospects of succeeding on appeal on this ground.

AD SECOND GROUND –

That in the determination of the recusal application, the honorable court did not consider or correctly consider and deal with the 1st respondent's grounds for recusal as set out in the founding papers.

2.1. The 1st respondent relies on this ground in that the Honourable court did not deal with the grounds as reiterated in paragraph 8 of the notice in the manner in which they were asserted in the founding papers. In addition, the 1st respondent indicates that the Honourable Court has conflated the grounds for recusal in the judgment when in actual fact each ground had its own substance and basis in the founding affidavit.

2.2 The Honourable Court dealt with the various grounds of recusal as summarised in the various paragraphs of the judgment:

2.2.1 Ad grounds set out in paragraph 8.1-8.3 – The court summarised these grounds and dealt with them in the judgement. In paragraph 32 and 33 of the

judgment, the Court ruled that the 1st respondent did not indicate how the utterances made by the court are grounds of a reasonable apprehension of bias and that the 1st respondent did not discharge the onus placed on it in proving actual bias. The court further held in paragraph 35 that the 1st respondent failed to show how the utterances and conduct of the court could lead to a reasonable conclusion that the court will not be impartial in administering justice in the dispute between the parties.

2.2.2 Ad grounds set out in paragraph 8.4 - 8.6 and 8.8 - 8.9 – The 1st respondent highlights common cause facts under these paragraphs which were relied on to substantiate the grounds of recusal in the founding affidavit. These are not separate grounds but common cause facts which were also summarised in the judgment as the relied on by the 1st respondent.

2.2.3 Ad grounds set out in paragraph 8.7 - The court dealt with these allegations in paragraph 32 of the judgment by holding that:

‘[32] . . . the court adopted an approach that, in its opinion, would lead to the resolution of the dispute. The Applicant does not indicate whether the approach taken by the court was a misdirection or a misapplication of the law.’

2.2.4 Ad grounds set out in paragraph 8.10 -The 1st respondent relies on common cause facts that were also summarised by the court in paragraph 25 of the judgement and correctly dealt with in paragraph 34 of the judgment.

2.2.5 Ad grounds set out in paragraph 8.11- the court dealt with these allegations in paragraph 31 of the judgment by stating the following:

‘[31] It is further true that the court did express an opinion regarding the next step to be taken in the matter, but at the same time invited the applicant (first respondent) to advance proper structured arguments on heads of argument to convince the court of its opinion. The court could further not have pre-judged the dispute between the parties on 2 November 2021 as the court only became aware of the specific dispute then. In the process of resolving the issue that arose, the court asked certain questions and raised an opinion but was open to persuasion upon hearing the parties and therefore formally postponed the matter for full arguments to be heard.’

2.2.6 Ad grounds set out in paragraph 8.12 - The court dealt with these allegations in paragraph 32 of the judgment by holding that:

‘[32] . . . the court adopted an approach that, in its opinion, would lead to the resolution of the dispute. The Applicant does not indicate whether the approach taken by the court was a misdirection or a misapplication of the law.’

2.2.7 Ad grounds set out in paragraph 8.13 to 8.16 – These allegations were dealt with by this Honourable Court in the following paragraphs:

‘[26] The applicant’s bone of contention seems to be the fact that the court *mero motu* identified a different issue that was resolved without directly resolving the issue that was identified between the parties. Procedurally, the managing judge may raise new issues in terms of rule 18(2) of the High Court Rules, which reads as follows:

‘In giving effect to the overriding objective, the court may, except where the rules expressly provide otherwise –

(h) Identify the real issues in dispute in the case at an early stage

(i) decide promptly which issues need full investigation. . .

(j) decide the order in which issues are to be resolved’.

The court further stated at paragraph [32] as follows:

‘[32] . . . the court adopted an approach that, in its opinion, would lead to the resolution of the dispute. The Applicant does not indicate whether the approach taken by the court was a misdirection or a misapplication of the law.’

Lastly, the court ruled in paragraph [34] as follows:

‘[34] The argument that the court may only decide on issues as identified by the parties to the dispute is also unsustainable. In dealing with the issue at hand on 2 November 2021, the issue as identified by the court mero motu eventually did resolve the real dispute between the parties: by deciding that the days for the filling of the replying affidavit were suspended answers the question that the respondent was not barred. It is further also true that the two issues that were before court on the 2 and 23 November 2021 were both disposed of and dealt with by the court in the order of 23 November 2021.’

2.2.8 Ad grounds set out in paragraph 8.17- The court dealt with this position in paragraph [34] of the judgment:

'[34] The argument that the court may only decide on issues as identified by the parties to the dispute is also unsustainable. In dealing with the issue at hand on 2 November 2021, the issue as identified by the court *mero motu* eventually did resolve the real dispute between the parties: 'by deciding that the days for the filling of the replying affidavit were suspended answers the question that the respondent was not barred. It is further also true that the two issues that were before court on the 2 and 23 November 2021 were both disposed of and dealt with by the court in the order of 23 November 2021.'

In setting out the test in paragraph [30] of the judgement, the Honourable Court concluded at paragraph [35] that:

'[35] The court is also of the opinion that the link between the perception of bias in this procedural order and the outcome of the main dispute was not sufficiently established and that the applicant failed to show how the utterances and conduct of the court could lead to a reasonable conclusion that the court will not be impartial in administering justice in the dispute between the parties.'

2.2.9 Ad grounds set out in paragraph 8.17-These are common cause facts on which the court assessed the application and were not and could not be advanced as a separate ground of recusal by the 1st respondent.

2.3 The court therefore dealt with all the grounds that the 1st respondent relied on and correctly made the decision that the facts of this matter are not such that the presiding officer ought to have recused herself.

2.4 There is therefore no possibility that the Supreme Court would find that this Honourable Court did not deal with the identified grounds of recusal in its judgment in accordance with Article 12(1)(a) of the Constitution. There is further no prospect of success on appeal and leave to appeal should not be granted.

2.5 In dealing with the recusal application, the Honourable Court had also correctly adopted the position of the Supreme Court in paragraph [28] and [29] that:

'[28] I further would like to refer to the matter of *SOS Kinderdorf International v Effie Lentin Architects* which was followed in the Supreme Court in *Rally for Democracy and Progress*

and Others v Electoral Commission of Namibia and Others, in which the court pointed out that the court also has to regulate its own procedures. The Supreme Court said the following:

'The Rules of Court constitute the procedural machinery of the court and they are intended to expedite the business of the courts. Consequently, they will be interpreted and applied in a spirit which will facilitate the work of the courts and enable litigants to resolve their differences in as speedy and inexpensive a manner as possible. And art 78(4) which, as part of the Superior Courts' inherent jurisdiction, vested them with the power to regulate their own procedures and to make court rules for that purpose.

[29] The rules of court are made to facilitate the work of the court and not the court to facilitate the working of the rules of court. The provisions of the court rules are a set of tools that allow the court to do its work and to see that court orders are adhered to and the general objective of the rules achieved. The manner in which the court applies these rules then must be with the intentto resolve differences in a speedy and inexpensive manner and will in some instances require the court to rule on issues and objections ancillary to the main relief in a manner not necessitating the exchange of papers and documents, but in a speedy manner.'

2.6 There is no possibility that the Supreme Court will find that the Honourable Court erred in finding that it has inherent powers to regulate its own procedures through the mechanisms of the rules of court as opposed to being bound by the rules of court. There is further no possibility that the Supreme Court would find that such an approach creates a reasonable apprehension that the court would not bring an impartial mind to the determination of the real dispute between the parties. As the Court correctly stated in paragraph [35]:

'[35] The court is also of the opinion that the link between the perception of bias in this procedural order and the outcome of the main dispute was not sufficiently established and that the applicant failed to show how the utterances and conduct of the court could lead to a reasonable conclusion that the court will not be impartial in administering justice in the dispute between the parties.'

2.7 There are therefore no prospects of success on appeal on this ground and the Application for leave to appeal should not be granted.

AD THIRD GROUND - That the learned judge erred on the facts and in law in the manner in which it applied the relevant test for recusal.

3.1 The Honourable court correctly identified the accepted test on recusal in paragraph [30] of the judgment and has correctly applied the test to the facts of this matter.

3.2 This ground should not be considered as a basis on which leave to appeal should be granted. The Honourable court expressed a view on the issue at hand and it is common cause that both parties were invited to make submissions and to convince the court on whether or not its views were correct. The view of the court was therefore prima facie as it was subjected to persuasion.

3.3 The Honourable Court was correct in holding that the 1st respondent failed to indicate how the utterances or the court's view uttered on the 2 November 2021 constituted grounds on which a reasonable apprehension of bias may be made. The court further was correct in holding that the 1st respondent failed to indicate that the approach adopted by the court was a misdirection or a misapplication of the law. This is the reason why the Court correctly ruled that the 1st respondent did not discharge the onus placed on it as its allegations were mere apprehension of bias as opposed to the required cogent or real basis on which a reasonable apprehension of bias can be made.

3.4 There is therefore no possibility that the Supreme Court would find that mere apprehension of bias is sufficient to dislodge the presumption of impartiality. The recusal test used by the Supreme Court is whether there is a reasonable apprehension of bias, in the mind of a reasonable litigant in possession of all the correct and relevant facts that a judicial officer might not bring an impartial and unprejudiced mind to bear on the resolution of the dispute before the court. The courts do not recognise a more exacting or less exacting test in determining recusal applications.

3.5 In the consideration of all the grounds relied on by the 1st respondent and in correctly applying the acceptable test in recusal application, the Honourable court did not error on the facts or on the law in ruling that the 1st respondent failed to discharge the onus placed on them. There is therefore no possibility that the Supreme Court would come to a different conclusion. The 1st respondent does also not enjoy any prospects of success on appeal on this ground.

AD FOURTH, FIFTH AND SIXTH GROUNDS-

That the court erred in it's findings and reasons at paragraphs [34], [35] and [36] of the judgment.

4.1 The reasoning by the court in paragraphs [34], [35] and [36] are legally sound and based on the law as set and accepted by the Supreme Court. Hence the court's reasoning that:

'[35] . . .the link between the perception of bias in this procedural order and the outcome of the main dispute was not sufficiently established and that the applicant failed to show how the utterances and conduct of the court could lead to a reasonable conclusion that the court will not be impartial in administering justice in the dispute between the parties.'

And further that:

'[36] . . . the recusal of the presiding officer will not be in the interest of the administration of justice.'

4.2 There is therefore no possibility that the Supreme Court would come to a different conclusion.

AD SEVENTH GROUND

5.1 The 1st respondent relies on a failure by the Honourable court to comply with Guidelines as set out in the Rules of Ethical Judicial Conduct in Namibia, to follow precedence in the Lameck matter or to make certain factual findings as a ground on which leave to appeal to the Supreme Court should be granted.

5.2 Factual findings or discretionary findings will only lie as grounds of appeal where there was a misdirection or misapplication of the law by the court. The 1st respondent failed to indicate how the approach adopted by the Honourable court in resolving the dispute between the parties was a misdirection or misapplication of the law. Most importantly, the 1st respondent failed to show how the approach and utterances by the Court could be grounds on which a reasonable apprehension of bias could be made.

5.3 The Supreme Court would not come to a different conclusion on the facts and circumstances of this case and leave to appeal should therefore not be granted.

APPEALLABILTY OF THE ORDER

6.1 It is common cause that the judgment dismissing the recusal application is appealable. The refusal of the recusal application is an interlocutory order as it does not dispose of any portion of the relief sought or any of the issues relevant to the disputes between the parties, but simply questions the competency of the judge a quo to proceed with the matter. It is not dispositive of any of the issues relevant to the disputes between othe parties which had to be adjudicated. This is why there is a need to seek leave to appeal from this Hongourable court.

6.2 The fact that the order is appealable, with leave, is not a ground on which leave should be granted. The test for granting leave to appeal is whether there is a reasonable possibility, as opposed to a probability, that the Supreme Court may come to a different conclusion.

6.3 The Honourable Court did not erred on the facts or on the law in determining the recusal application and there is no possibility that the Supreme Court would come to a different conclusion.

General approach – leave to appeal applications

[12] When deciding on any application for leave to appeal, the first hurdle an applicant needs to overcome, is to show that the order appealed against is indeed an appealable order. This reasoning follows the judgement of the Supreme Court in *Di Savino v Nedbank Namibia Limited*[1] which set it out as follows:

> '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.'

[13] This is in line with the interpretation given to Section 18(3) of the High Court Act, 1990 which reads:

[1] *Di Savino v Nedbank Namibia Limited* (SA 82/2014) [2017] NASC 32 (07 August 2017).

'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.'

It is clear that both these leave to appeal applications deals with an interlocutory order and as such the court needs first to decide on the appealability of the said orders. Once it has been established that a judgement or order is appealable, leave would be required for all interlocutory orders in order for the applicant to appeal the said order.

[14] O'Regan AJA in *Shetu Trading CC v Chair, Tender Board of Namibia and Others*[2] said the following in this regard.

'[39] Not every decision made by the court in the course of judicial proceedings constitutes a 'judgment or order' within the meaning of s 18(1). As Corbett JA (as he then was) explained in *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 (4) SA 569 (A):

"But not every decision made by the court in the course of judicial proceedings constitutes a judgment or order. Some may amount merely to what is termed a "ruling", against which there is no appeal. . . ."

[15] O'Regan AJA also referred in the above matter to the case of *Dickinson and Another v Fisher's Executors 1914 AD 424* where Innes ACJ had reasoned:

'But every decision or ruling of the Court during the progress of a suit does not amount to an order. That term implies there must be a distinct application by one of the parties for definite relief. The relief prayed for may be small or it may be of great importance but the Court must be duly asked to grant some definitive and distinct relief before its decision upon the matter can properly be called an order'

[16] In determining the appealability question, one needs to see whether the order appealed against meets the three attributes as described in the *Government of the Republic of Namibia v Fillipus*.[3] These are whether the decision is final in effect, whether

[2] *Shetu Trading CC v Chair, Tender Board of Namibia and Others* 2012 (1) NR 162 (SC),
[3] *Government of the Republic of Namibia v Fillipus* 2018(2) NR 581 (SC) at 584D-F, paragraph [10].

it is definitive of the rights of the parties and whether it grants definite and distinct relief or the effect of disposing of at least a substantial portion of the relief claimed in the must have main proceedings. It is further trite that if the judgement or order does not have a final bearing on the rights of the parties, then it is not appealable at all.

[17] An order with a final effect has been defined to be an order that could not subsequently be changed by the court that made the decision[4] or an order which has the effect to have the issue in question been finally decided by the court a quo when the relief was refused. Most importantly, the court highlights that the focus on the effect of the order should not be on the nature of the defence or procedural advantage sought, but also on the effect of the procedure engaged during the cause of a matter on the overall conduct of the case.[5]

[18] The three attributes counsel for the respondent referred to, are also those set out in the decision of the *South African Appellate Division in Zweni v Minister of Law and Order*[6] 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, i.e. 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

The sequence of s 18(3) is such, therefore 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.

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[4] *Di Savino* at 893G-H, citing the principle from the decision of *Wirtz v Orford* and another 2005 NR 175 (SC).
[5] Fillipus at 587(H-I, paragraph [21]
[6] *South African Appellate Division in Zweni v Minister of Law and Order* 1993 (1) SA 523 (AD)

[19] In terms of the first leave to appeal application, the court finds that the Supreme Court would have no jurisdiction if what an applicant seeks is for it to merely pronounce upon the correctness of the reasoning of the High Court and not upon a decision granting definite and distinct relief[7]. This is applicable in the instance of the first leave to appeal application because the Applicant complains of the manner and approach adopted by the Honourable Court in granting the orders of 23 and 24 November 2021. After everything it is important to remember that an appeal lies against a decision and not the reasoning of a court.[8] Therefore, if the conclusion reached by the court is correct, albeit for different reasons, the appeal would fail.

[20] This Honourable Court is bound by the words of Smuts AJ in the matter of *Government of the Republic of Namibia v Fillipus*[9] at paragraph [23] and [24] wherein the courtstated that:

'[23] As was also emphasized by O'Regan in Shetu, not all interlocutory orders would be appealable with leave. Even if leave is granted by the High Court, this would not dispose of the issue. The question of appealability remains an issue for the appellate court to determine, if it is itself in issue. The interlocutory order would also need to have the hallmarks of appealability to constitute a judgment or order to be appealable.

[24] It follows that once an order is interlocutory, leave to appeal is required provided that the order itself is appealable.'

[21] The court therefore concludes that the first leave to appeal application against the order of 21 November 2021 should not be granted as the order appealed against does not meet the three attributes as described above and as such is not an appealable order. However, this is not the same for the second leave to appeal application. The order dismissing an application for recusal is generally accepted as an appealable order.

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[7] *Dickinson* 1914 AD 424 at 427; *De Beers Marine Namibia (Pty) Ltd v Loubser* 2017 (1) NR 20 (SC)

[8] *Constantia Insurance Co Ltd v Nohamba* 1986 (3) SA 27 (A) at 42-43; *Western Johannesburg Rent Board and Another v Ursula Mansions* (Pty) Ltd 1948 SA 353 (A) where the headnote reads: 'the court, having mero motu raised the point that the notice of appeal was not against the court's order but against that part of the reasons for judgment in which the court a quo had held that the applicants had acted arbitrarily, struck the appeal off the roll with costs'; *Administrator, Cape, and Another v Ntshwaqela and Others* 1990 (1) SA 705 (A) at 715D.

[9] Supra

[22] Although an order dismissing an application for recusal does not necessarily meet the test as set out in Di Savino on the hallmarks of appealability, the Supreme Court stated in *Henle t/a Namib Game Services v Wildlife Assignment International Pty Ltd*[10]

'The respondent in the Moch case submitted that the order was not appealable as it did not meet the criteria stipulated in the Zweni case. It is in this context that Hefer JA mentioned it was 'not merely the form of the order' that had to be considered but, 'also, and predominantly, its effect'. It is when considering the potential effect of the judge continuing with the matter where he should have recused himself that a decision is made that a refusal to recuse constitutes an appealable decision.'

[23] An order refusing a recusal application is therefore an appealable order but it is not an automatic result that leave will be granted. The applicant still needs to meet the test applicable for leave to appeal to be granted. The well-established test as set out in *S v Thomas*[11] is explained by Liebenberg J as follows:

'Whether the applicant has shown on a balance of probabilities that, based on the grounds of appeal raised, there are reasonable prospects of success on appeal. It is not sufficient to show that another court might come to a different conclusion, justifying the granting of leave to appeal. To this end, the Supreme Court as per Mainga JA has occasioned in *S v Ningisa*[12] to refer to the abovementioned test with reference to *S v Ackerman en 'n Ander* [13] and *R v Boya*[14] , as follows,

'A reasonable prospect of success means that the judge who has to deal with an application for leave to appeal must be satisfied that, on the findings or conclusions of law involved, the Court of Appeal may well take a different view from that arrived at by the jury or by himself and arrive at a different conclusion.'

[24] The Application for leave to appeal and the Heads of Argument of the applicant in the 2nd leave to appeal application tends to reiterates the Founding affidavit that was filed in the Application for recusal and basically amounts to criticisms against the approach of the court in the initial hearing on the issue as to whether an application for upliftment of

[10] Henle t/a Namib Game Services v Wildlife Assignment International Pty Ltd (SA 41&67-2017) [2018]NASC (27 March 2018), paragraph [24]
[11] Test set out in *S v Thomas* (CC 19/2013) [2020] NAHCMD 244 (23 June 2020), paragraph 6.
[12] *S v Ningisa* 2013 (2) NR 504 SC at para 6.
[13] *S v Ackerman en 'n Ander* 1973 (1) SA 765 at 766H quoting from *R v Boya* 1952 (3) SA 574 (C) at 577B-C.
[14] *R v Boya* 1952 (3) SA 574 (C) at 577B-C

bar was necessary as well as the factual findings of the court in the recusal application and the factual findings of the court in the recusal application.

[25] The application of the reasonable prospect of success criteria in specifically leave to appeal applications against a refusal to recuse was dealt with in *S v Thomas*[15] where Liebenberg said the following:

'[8] The appellant based his contention of bias against the presiding judge on the manner in which this court dealt with an application for postponement. I deem it necessary to state the role judges play and the protections afforded to them in exercising their duties. Judges are professionals who, as triers of fact, are guided by principles relating to the admissibility and analysis of evidence. They make decisions on the facts and evidence placed before them, and not on the caprices of those who appear before court. A litigant who is dissatisfied by a ruling made by a court, is at liberty to exhaust his right to appeal the matter at its end. However his/her displeasure does not inspire a ground for recusal.

[9] Having stated the tests above and applying it to the facts of the present application, it becomes clear that the applicant falls short in satisfying the said test. The applicant has not shown a misdirection on the legal principles applied in the recusal application, nor a misdirection on the facts, other than criticism and conclusions drawn by the applicant on his analysis of the facts. The approach adopted by the applicant in its application does not pass muster with the established requirements of an application of this nature. Instead of providing cogent reasons why the applicant possesses prospects of success on appeal, the application amounts to a mere extension of his recusal application and a rehearsal thereof, which this court declines to entertain.'

[26] The applicant in the current matter failed to make out a case that the court misdirected itself on the legal principles applicable in recusal applications and as such, the application for leave to appeal against the dismissal of the recusal application should not succeed.

The court therefore makes the following order:

[15] Supra at [8] and [9]

1. The application for leave to appeal against the order of 23 November 2021 giving leave to the applicant in the main action to file its answering affidavit, is dismissed with costs of disbursements.

2. The application for leave to appeal against the dismissal of the application for recusal is dismissed with costs of disbursements.

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E Rakow

Judge

APPEARANCES:

Applicants:	Adv. Khama (with Mr Shimakeleni) Instructed by: Shakwa Nyambe & Company Incoroporated Windhoek
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2nd Respondent:	L. Kavendjii Instructed by: Kangueehi & Kavendjii Inc. Windhoek
3rd Respondent:	F. Kadhila Instructed by: Office of the Government Attorney Windhoek