



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2022/00530
(INT-HC-LEA2023/00473)

In the matter between:

BANK OF NAMIBIA

APPLICANT

and

TRUSTCO BANK NAMIBIA LTD

1st RESPONDENT

TRUSTCO GROUP HOLDINGS LTD

2nd RESPONDENT

COLLEXIA (PTY) LTD

3rd RESPONDENT

PAYMENTS ASSOCIATION OF NAMIBIA

4th RESPONDENT

MINISTER OF FINANCE

5th RESPONDENT

Neutral citation: *Bank of Namibia v Trustco Bank Namibia Ltd* (HC-MD-CIV-MOT-GEN-2022/00530) [2024] NAHCMD 42 (9 February 2024)

Coram: RAKOW J

Heard: 24 November 2023

Delivered: 9 February 2024

Flynote: Civil Procedure – Leave to appeal – Whether an application for recusal is appealable – The Court finds that two of the three appealable requirements of recusal are met and that the Supreme Court may come to a different conclusion and thus grants leave to appeal.

Summary: This is an application for leave to appeal for the refusal by the managing judge to recuse herself from the main matter.

It was argued that the managing judge determined the application for recusal on a prior adverse finding against the plaintiff. It was further argued that, she is unlikely to be impartial in the main application due to an order that is being challenged in the Supreme Court that was made by her and contradicted by another judge in separate proceedings.

It was further argued that the Supreme Court is likely to find that the managing judge ought to have recused herself.

Held that, the matter is appealable as it meets two of the three requirements laid out in the *Zweni* matter.

Held that, the Supreme Court may come to a different conclusion. The Court grants the application for leave to appeal.

ORDER

1. The application for leave to appeal is hereby granted.
 2. Costs of the application shall be cost in the appeal.
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JUDGMENT

RAKOW J:

Introduction

[1] The parties in the main matter are the Bank of Namibia, who is bringing an application for the first respondent to be placed under a provisional order of winding-up in the hands of the Master of the High Court of Namibia. The main application is opposed by Trustco Bank Namibia Ltd who is the first respondent and Trustco Group Holdings Ltd who is the second respondent.

[2] The parties exchanged papers and the matter proceeded until such a time when the court was requested by the applicant to recuse itself from the matter. The court advised the parties to bring a formal application that will allow for all parties to ventilate the issues properly, which application was then brought by the applicant.

[3] The application for recusal was refused and the plaintiff then brought the current application for leave to appeal the decision. None of the other parties opposed this application.

Arguments on behalf of the plaintiff

[4] It was argued that by perusal of the ruling of the managing judge it is demonstrative that she did not engage the pleaded basis upon which the plaintiff sought her recusal. She determined the application on a wrong premise i.e that the plaintiff sought her recusal as a consequence of her prior adverse finding against the plaintiff. The plaintiff further argued that their case is simply that it objectively and reasonably apprehends that the managing judge is unlikely to bring an impartial mind to bear in her adjudication and determination of the main application because of an order, which is now the subject of determination of an appeal to the Supreme Court and which has been contradicted by another judge of this Court in separate proceedings, that she made in separate and prior proceedings, arises for decision in the main application.

[5] It was further submitted that the Supreme Court applying the trite principles governing applications for the recusal of judicial officers to the pleaded basis upon which the plaintiff sought the recusal of the managing judge, is likely to find that she ought to have recused herself.

Legal Considerations and Conclusions

[7] The court first needs to decide whether the current order is indeed an appealable order as contemplated in s 18(3) of the High Court Act 16 of 1990. This section reads as follows:

'(3) 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.'

[8] In deciding whether an order or judgment is appealable, in the *Di Savino v Nedbank Namibia Ltd*¹ matter, Shivute CJ referred to the three attributes that must be present to identify an appealable judgment or order as follows:

'The three attributes counsel for the appellant referred to are those set out in the decision of the South African Appellate Division in *Zweni v Minister of Law and Order 1993 (1) SA 523 (AD)* and as endorsed in many judgments of this court, namely that (i) the decision must be final in effect and not susceptible to alteration by the Court of first instance; (ii) it must be definitive of the rights of the parties, ie. it must grant definite and distinct relief, and (iii) it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.'

[9] Applying the above to the current matter before the court, the court finds that the dismissing of the recusal application in this instance indeed meets two of the three attributes as set out in the *Zweni* matter and in light of the interest of justice, that definitely plays a big role when considering recusal applications, I find that this matter is appealable.

[10] On test to be applied on whether leave to appeal should be granted, the following was stated by this court in *African Selection Trust SA v Namsov Fishing Enterprises (Pty) Ltd*:²

'In terms of the applicable test, the court will now have to determine whether or not there is a reasonable possibility that the Supreme Court may come to a different conclusion.'

[11] What Mainga JA said in *S v Ningisa and Others*³ which was a criminal appeal matter find application in civil matters also. He said:

¹ *Di Savino v Nedbank Namibia Ltd* 2017 (3) NR 880 (SC).

² *African Selection Trust SA v Namsov Fishing Enterprises (Pty) Ltd* (HC-MD-CIV-ACT-CON-2016/03860) [2017] NAHCMD 363 (17 November 2017).

³ *S v Ningisa and Others* (SA 3 of 2009) [2012] NASC 10 (13 August 2012).

'In determining whether or not to grant a convicted person leave to appeal, the dominant criterion is whether or not the applicant will have a reasonable prospect of success on appeal (*Rex v Baloi* 1949 (1) SA 523 (AD)). From the very nature of things, it is always somewhat invidious for a Judge to have to determine whether a judgment which he/she has himself/herself given maybe considered by a higher court to be wrong, but that is a duty imposed by the legislature upon Judges in both civil and criminal matters. As regards the latter, difficult though it may be for a trial Judge to disabuse his/her mind of the fact that he/she has himself/herself found the State case to be proved beyond reasonable doubt, he/she must, both in relation to questions of fact and of law, direct himself/herself specifically to the enquiry of "whether there is a reasonable prospect that the Judges of Appeal will take a different view...."

Conclusion

[12] After hearing and considering the arguments, this court is of the opinion that the Supreme Court may come to a different conclusion as to what this court came to, and for that reason, the application for leave to appeal must be succeed.

[13] The court therefore makes the following order:

1. The application for leave to appeal is hereby granted.
2. Cost of the application shall be cost in the appeal.

E RAKOW
Judge

APPEARANCES

APPLICANTS: T Motau SC (with him T Muhongo and L Shikale)
Instructed by Shikale & Associates, Windhoek

1st & 2nd

RESPONDENTS: J Schickerling SC (with him L Lambaard)
Instructed by PD Theron & Associates, Windhoek