



REPORTABLE
CASE NO: P8/2018

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MINISTER OF FINANCE

First Applicant

NAMIBIA NATIONAL REINSURANCE

CORPORATION LIMITED

Second Applicant

and

**HOLLARD INSURANCE COMPANY OF NAMIBIA
LIMITED**

First Respondent

HOLLARD LIFE NAMIBIA LIMITED

Second Respondent

SANLAM NAMIBIA LIMITED

Third Respondent

SANTAM NAMIBIA LIMITED

Fourth Respondent

TRUSTCO INSURANCE LIMITED

Fifth Respondent

TRUSTCO LIFE LIMITED

Sixth Respondent

**OUTSURANCE INSURANCE COMPANY
OF NAMIBIA LIMITED**

Seventh Respondent

OLD MUTUAL LIFE ASSURANCE COMPANY

NAMIBIA LIMITED	Eighth Respondent
JACOBUS CELLIERS LAMPRECHT	Ninth Respondent
ANDRE VERMEULEN	Tenth Respondent
TERTIUS JOHN RICHARD STEARS	Eleventh Respondent
FRANCO GEOFFREY FERIS	Twelfth Respondent
QUINTON VAN ROOYEN	Thirteenth Respondent
ANNETTE BRANDT	Fourteenth Respondent
NANGULA KAULUMA	Fifteenth Respondent
KOSMAS HEINRICH EGUMBO	Sixteenth Respondent

Coram: DAMASEB DCJ, HOFF JA AND NKABINDE AJA

Heard: 26 March 2019

Delivered: 28 May 2019

Summary: This is an application post-facto for the recusal of a judge of the Supreme Court who refused a petition to the Chief Justice seeking leave to appeal against an order of the High Court which suspended the application and implementation of provisions of an Act of Parliament and subordinate legislation made under it.

The Minister of Finance, acting in terms of s 39(5) of the Namibia National Reinsurance Corporation Act 22 of 1998 on 29 December 2017, promulgated Government Notices No: 333, 334, 335, 336, 337 and 338 (the measures), which came into effect on 27 June 2018. The measures create a regime authorising the Minister to compel every registered insurer and reinsurer to cede a percentage of their business to NAMRe. The measures are justified on the basis that it will assist in building a sustainable reinsurance industry in Namibia and minimise the extent to which reinsurance premiums are exported out of Namibia. In terms of s 42(1) of the NAMRe Act, any registered insurer and reinsurer who fails to comply with the

measures is guilty of an offence and liable on conviction to a fine not exceeding N\$150 000 or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.

The current respondents brought an application in the court a *quo* challenging the constitutionality of certain provisions in the NAMRe Act and for the review of measures under that Act on grounds that the measures are contrary to Article 18 read with Articles 8, 16 and 21(1)(j) of the Namibian Constitution. Pending these proceedings, an application to compel the respondents to, in the interim, comply with the measures, and in the alternative to commit, for contempt, the corporate respondents' executives (9th to 16th respondents) in the event that any of the respondents do not comply with the court's order, ended in the court a *quo* staying the implementation and application of the impugned provisions pending the determination of the constitutional challenge.

Leave to appeal against this order was subsequently refused and the applicants petitioned the Chief Justice for leave to appeal. Frank AJA refused in chambers the request to be granted leave to appeal against the order of stay.

Post-facto the Supreme Court order the applicants brought the present proceedings in the Supreme Court in terms of Art 81 of the Constitution, seeking a *declarator* that, because of perceived bias on the petition judge's part, the refusal of the petition is a nullity and that the full court should consider the petition afresh.

This court reiterated that the test is whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the judge would not be impartial. The test is objective and the onus of establishing it rests upon the applicant.

Court on appeal held that the cumulative effect of the petition judge having been the lead counsel for the insurance industry in the 1999 constitutional challenge; his remunerated association with NNHL (which is the holding company of NedLife) and his previous directorship of Trustco Holdings (Trustco), would warrant a reasonable lay observer to, on the known facts, reasonably form the view that the petition judge

might not bring an impartial mind to bear in the petition and further that the petition judge ought not to have presided in the petition without disclosing such information and affording those desiring to do so to seek his recusal if so advised.

As regards the order of stay by the court *a quo*, court on appeal reiterating that a court is only competent to grant orders which were asked for by the litigants and may not usurp the powers delineated to the executive under the Constitution;

Application for recusal granted, refusal of petition set aside and leave to appeal granted against order of stay.

APPLICATION JUDGMENT

DAMASEB DCJ (HOFF JA and NKABINDE AJA concurring):

Introduction

[1] We are concerned with an opposed application for the *ex post facto* recusal of a judge of the Supreme Court. The judge refused a petition to the Chief Justice seeking leave to appeal against an order of the High Court which suspended the application and implementation of certain provisions of an Act of Parliament and subordinate legislation made under it.

[2] The applicants who seek the judge's recusal ask for a consequent order declaring the petition's refusal a nullity so that the full court can consider it afresh. The lead counsel for the applicants in these proceedings are Gauntlett SC QC and Mr Namandje while the lead counsel for the respondents are Mr Heathcote, Chaskalson SC and Töttemeyer.¹

¹ The respective parties they represented and their juniors appears more fully at the end of the judgment.

[3] The Namibia National Reinsurance Corporation Act 22 of 1998 (NAMRe Act) establishes the Namibia National Reinsurance Corporation Limited (NAMRe) as a juristic person² to carry on reinsurance business in or outside Namibia in accordance with sound insurance practices and methods.³

[4] NAMRe is vested, under the NAMRe Act, with the power to do or cause to be done all things necessary to achieve its objects and to effectively perform its functions in terms of that Act. One such function is to accept reinsurance business in respect of any class or classes of insurance business ceded or offered to NAMRe by registered insurers and reinsurers.⁴ Cession is obligatory in terms of s 39 of the NAMRe Act. That provision requires every registered insurer and reinsurer carrying on insurance business in Namibia to cede in reinsurance to NAMRe a percentage of the value of each policy issued or renewed in Namibia by it.

[5] The Minister of Finance⁵ (the Minister) is empowered by the NAMRe Act to, determine and specify, by notice in the *Gazette*, the class or classes of insurance business and the percentage of the value of each policy in respect of each class of insurance business to be ceded and to specify the date on which the requirements of that notice shall take effect.⁶

[6] The Minister, acting in terms of s 39(5) of the NAMRe Act, on 29 December 2017, promulgated Government Notices No: 333, 334, 335, 336, 337 and 338 (the

² Section 2.

³ Section 20(a).

⁴ Section 22(a)(i).

⁵ In terms of s 23(3), the State holds more than 50% of the shares in the NNRC through the Minister of Finance.

⁶ Section 39(2).

measures). The measures create a regime authorising the Minister to compel every registered insurer and reinsurer to cede a percentage of their business to NAMRe. The measures came into effect on 27 June 2018. The Minister justifies the measures on the basis that it will assist in building a sustainable reinsurance industry in Namibia and minimise the extent to which reinsurance premiums are exported out of Namibia.

[7] In terms of s 42(1) of the NAMRe Act, any registered insurer and reinsurer who fails to comply with the measures is guilty of an offence and liable on conviction to a fine not exceeding N\$150 000 or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.

Litigation background

[8] Both the statutory provisions and the measures were challenged by the present respondents in the Main Division of the High Court under case No: HC-MD-ACT-CIV-OTH-2017/04493 and HC-MD-CIV-MOT-REV-2018/00127. The challenge is in two parts: In the first-mentioned case a constitutional challenge of the NAMRe Act and an in the second-mentioned a review of the measures.

[9] The constitutional challenge seeks to have sections 39, 40 and 43 of the NAMRe Act declared unconstitutional and null and void. The review challenge seeks to have reviewed and set aside Regulations 5, 6, 7 and 9 published in Government Notice No 332 of 2017⁷ including all decisions by the Minister underpinning those Regulations. It also impugns GN No: 333; 334; 335; 336; 337; 338 of 2017 and all decisions by the Minister arising therefrom.

⁷ Issued under s 47 of the NAMRe Act.

[10] In the alternative, the respondents seek to have declared Regulations 5, 6, 7 and 9 and all decisions by the Minister underpinning the Regulations, to be contrary to Article 18 read with Articles 8, 16 and 21(1)(j) of the Namibian Constitution (the Constitution) and to further have declared GN No 333 of 2017 to 338 of 2017 and all decisions by the Minister underpinning the Notices to be contrary to Article 18 read with Articles 8, 16 and 21(1)(j) of the Constitution.

[11] The constitutional challenge and administrative law review are pending before the High Court.

[12] Having challenged the provisions of the NAMRe Act and the measures, the current respondents refused to comply with the law. The refusal prompted an urgent application by the Minister and NAMRe (the applicants) seeking, principally, a *declarator* that the MAMRe Act and the measures are of full force and effect and that, pending the constitutional challenge and the review challenge, the respondents must comply with immediate effect with the provisions of that Act and the measures. A further prayer seeks an order of committal for contempt of the corporate respondents' executives (9th to 16th respondents) in the event that any of the respondents do not comply with the court's order. I will henceforth refer to this application as the 'application to compel'.

[13] After the measures took effect and before the application to compel was launched, only six of the insurance companies affected by the measures agreed to comply therewith. NedLife Namibia Limited is one of the six.

[14] In the wake of the application to compel the respondents invoked the relief they seek in the pending constitutional challenge and the review by way of a collateral attack⁸ against the validity of the NAMRe Act and the measures. The collateral attack was also intended as a defence to the application to compel.

[15] Both the application to compel and the collateral challenge were heard in the High Court and judgment handed down on 20 September 2018, with an order in the following terms:

1. 'The application and implementation of the impugned provisions of the Namibia National Reinsurance Act No. 22 of 1998 (the 'Act') and Government Notices 333, 334, 335, 336, 337 and 338, promulgated by on 29 December 2017 in terms of the Act in Government Gazette 6496 and the Regulations promulgated on 29 December 2017 in terms of the Act, and published in terms of the Act and published in Government Gazette No. 6496 be and are hereby stayed, pending the determination of the following cases presently pending before this Court, namely, HC-MD-ACT-CIV-OTH-2017/04493 and HC-MD-CIV-MOT-REV-2018/00127.
2. The Applicants are ordered to pay the costs of the application consequent upon the employment of one instructing and two instructed counsel.'

[16] I will henceforth refer to this order as the 'order of stay'.

[17] The applicants applied to the High Court for leave to appeal against the order of stay on the grounds that: (a) the court had no power to grant a stay; (b) the order was made both *mero motu* and without joining parties patently affected by it;

⁸ On the principles for collateral challenge enunciated in, for example, *Black Range Mining v Minister of Mines and Energy* 2014 (2) NR 320 (SC).

(c) the order infringes the doctrine of separation of powers and (d) the collateral challenge granted by the court should have been rejected.

[18] On 29 September 2018, the High Court refused the application for leave to appeal the order of stay on the ground that it is not an appealable judgement or order within the meaning of s 18(3) of the High Court Act 16 of 1990.⁹ As the High Court explained its reasons for refusing leave:

‘The court did not make any determination on the validity or otherwise of the impugned provisions. What the Court did strictly speaking was to suspend the enforcement of the provisions pending the determination of the impugned provisions in that the Court did not pronounce itself on the validity or otherwise of the impugned provisions.’

[19] The applicants thereupon petitioned the Chief Justice for leave to appeal against the order of stay. The petition was considered in chambers and, on 29 January 2019, refused by Frank AJA (the petition judge).

[20] Alleging that they only became aware of the petition judge’s involvement in the petition after the fact, the applicants brought the present proceedings in terms of Art. 81 of the Constitution.¹⁰ The applicants contended that the petition judge ought to have recused himself. They sought a *declarator* that, because of perceived bias on the petition judge’s part, the refusal of the petition is a nullity and that the full court should consider the petition afresh.

⁹ Compare *Shetu Trading CC v Chair, Tender Board of Namibia and Others* 2012 (1) NR 162 (SC) at 174D-176C; *Di Savino v Nedbank Namibia Limited* 2017 (3) NR 880 (SC) at 891G-895G and *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 531I-533B.

¹⁰ Which states: ‘A decision of the Supreme Court shall be binding on all other Courts of Namibia and all persons in Namibia unless it is reversed by the Supreme Court itself, or is contradicted by an Act of Parliament lawfully enacted’. For an interpretation of the Article, see *S v Likanyi* 2017 (3) NR 771 (SC) at 781A-I.

[21] Since the applicants had already filed an application for the petition judge's recusal and for reconsideration of the petition, the court issued directions to the parties in the following terms:

'Oral argument will be heard on 26 March 2019 . . . on the question:

Whether Frank AJA's refusal of the petition in the above matter is a nullity due to an alleged association with parties to the litigation raising a reasonable apprehension of bias, based on the allegations made by the Minister of Finance in his application filed of record on 7 February 2019.

(a) If the full Court disagrees with the imputation of bias, the refusal of the petition stands.

(b) If the full Court sustains the allegations of bias, the Court will proceed to consider whether or not leave should be granted on the same papers that served before Frank AJA.

In view of (b), the parties are required to argue both the question of alleged bias and whether or not leave should be granted on the 26th of March 2019.

A party wishing to file any affidavit in opposition to the Minister's application filed of record must do so on or before 7 March 2019.

Heads of argument must be filed by the Minister on 11 March 2019 and by the other parties on 15 March 2019. Heads of argument must comply strictly with the relevant rules of Court.

In view of the personal nature of the allegations concerning Frank AJA, this direction and the Minister's application will be presented to Frank AJA to make whatever comment he finds necessary, for the attention of the Deputy Chief Justice. Such comment, if any, will be shared by the Registrar with the parties.'

Scope of the application

[22] The application now before this Court is in two parts: First, to have the refusal of the petition by the petition judge declared a nullity and, secondly, for the full court to consider afresh and grant leave to appeal against the order of stay.

The issues

[23] The two issues that call for decision are, whether the petition judge was conflicted thus rendering the refusal of the petition a nullity, and if he was, whether leave should be granted in respect of the order of stay.

[24] The test in an application for recusal of a judicial officer based on perceived bias is whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the judge would not be impartial. The test is objective and the onus of establishing it rests upon the applicant.¹¹

[25] The departure point is that a judicial officer is presumed to be impartial in adjudicating disputes and that presumption is not easily dislodged. A mere apprehension of bias is therefore not sufficient to rebut the presumption. (*S v SSH* 2017 (3) NR 871 (SC) at 878A-F; *SARFU* at 175; *S v Lameck* 2017 (3) NR 647 (SC) at 664, para 52).

Factual matrix: The recusal application

[26] The material facts necessary for the adjudication of the recusal application are largely common cause. They are set out in the Minister's supporting affidavit with which Ms Petronella Amalia Martin (the Chief Executive officer of NAMRe) makes

¹¹See *S v Munuma* 2013 (4) NR 1156 (SC) at 1162D-F and *President of the Republic of South Africa and other v South African Rugby Football Union and others* 1999 (4) SA 147 (CC) at 175B-C (*SARFU*).

common cause. As to their materiality, they are either admitted or not denied by the respondents in the answering affidavit. Crucially, the material facts are confirmed by the petition judge in his memo submitted to this court at its invitation. I will refer to the memo in full later in this judgment.

[27] At this stage of the proceedings before this court, the dispute between the applicants and the respondents is more about the legal conclusions that must be drawn from the facts that are common cause. I propose, therefore, to set out the material facts briefly and then set out the contentions advanced by the parties as to the legal consequences each suggests must follow from the known facts.

[28] It is common knowledge that the petition judge is an acting judge of the Supreme Court since 1 March 2017. He had, for a long time, been a senior member of the local Bar, enjoying the accolade of Senior Counsel. As an advocate, the petition judge acted as lead counsel for the insurance industry in its 1999 unsuccessful bid to challenge the constitutionality of the NAMRe Act in the matter of *Namibia Insurance Association v Government of the Republic of Namibia* 2001 NR 1 (HC). I will henceforth refer to that litigation as ‘the 1999 constitutional challenge’.

[29] In the 1999 constitutional challenge, the Full Bench held, contrary to the contention of the insurance industry, that the provisions of the NAMRe Act that were impugned are an appropriate use of State regulatory power and therefore do not infringe the right to equality in terms of Article 10 or the right to practise any profession or carry on any occupation, trade or business in terms of Article 21(1)(f) of the Constitution.

[30] Of the present respondents, only the fourth (Santam) was a party (as applicant) in the 1999 constitutional challenge.

[31] As will soon become apparent, the respondents do not support the conclusion of the Full Bench. It must follow that if the constitutional challenge now pending in the High Court at the instance of the respondents is upheld, the Full Bench's conclusion in 1999 would be found to have been incorrect in law and the petition judge's argument (as counsel for the insurance industry) in the 1999 constitutional challenge vindicated.

[32] The companies that challenge the constitutionality of the NAMRe Act and the measures in the pending challenge in the High Court include the following respondents in the petition: Trustco Insurance Ltd (5th respondent) and Trustco Life Ltd (6th respondent). The Trusco companies do all their insurance business in Namibia and do not export insurance premiums beyond national boundaries. In the application to compel, is cited, amongst others, Mr Quinton van Rooyen (Mr van Rooyen) as 13th respondent in the application to compel as well as in the petition.

[33] The petition judge has either held or still holds directorships of insurance companies. From 2006 to 2009, he was a director of Trustco Holdings of which Mr van Rooyen is the managing director and driving force. The petition judge therefore worked closely with Mr van Rooyen during that period and was remunerated for his services to Trustco Holdings. From 2005 up to the present time, the petition judge is the remunerated chairman of NedNamibia Holdings Limited (NNHL) which owns all

the shares in NedNamibia Life Assurance Limited (NedLife), an applicant in the constitutional challenge pending in the High Court challenging the constitutionality of the NAMRe Act and the measures but is not party to the application to compel and therefore also not a party in the petition.

[34] In the pending constitutional challenge and the administrative law review, the respondents invoke, amongst others, Articles 10 and 21 of the Constitution which were relied on in the 1999 constitutional challenge.

[35] In terms of the practice of the Supreme Court, once a petition is received by the Chief Justice, it is assigned to one or more judges whose involvement is not disclosed to the parties until after the petition is considered and the outcome announced to them. Reasons for the order are also not published. That is what transpired in regard to the petition which is the subject of the recusal application.

The Minister's contentions

[36] Based on the known facts set out above, the applicants seek the recusal of the petition judge on three principal grounds.

[37] Firstly, the petition judge having acted as lead counsel for the insurance industry in the 1999 constitutional challenge had, in his former capacity, either advised a party in the petition or acquired personal knowledge relevant to the petition. The Minister maintains that this created a conflict of interest which should have become immediately apparent to the petition judge upon becoming seized with the petition.

[38] According to the Minister, the NAMRe Act was challenged by the insurance industry on the same bases that it is challenged in the proceedings *a quo* and that the petition judge (then as lead counsel for the insurance industry) was the architect of the legal strategy on which the challenge was based. The Minister points out that the constitutional challenge in the court *a quo* proceeds from the premise that the judgment of the Full Bench in the 1999 constitutional challenge is wrong.

[39] The Minister asserts that on those facts, the petition judge would be reasonably perceived not to act impartially.

[40] The second ground is premised on the petition judge's remunerated association with NNHL (which is the holding company of NedLife) since February 2005. To recap, NedLife, although not cited as a party in the petition, is an applicant in the pending constitutional challenge and the review.

[41] The Minister states that NedLife is referred to in the supporting affidavits in the petition as one of the insurers which agreed to comply with the measures on an interim basis and which is also directly affected by the order of stay in that it stands to benefit from the refusal of the petition as it will no longer be under an obligation to comply with the agreement reached to comply with the measures, pending the finalisation of the constitutional challenge and the review.

[42] According to the Minister, the fact that the petition judge, as chairman of NNHL, receives remuneration imposes a fiduciary duty on him towards NedLife

which is a subsidiary of NNHL and that made it untenable for him to preside in the petition.

[43] The third ground concerns the petition judge's previous directorship of Trustco Holdings (Trustco) for the period 2006-2009. Trustco owns the fifth (Trusco Insurance Limited) and sixth (Trusco Life Limited) respondents in the petition of whom the 13th respondent (Mr Quinton van Rooyen) is the driving force. All these companies are part of the constitutional challenge and review proceedings pending in the court *a quo*. According to the Minister, the lapse of 10 years is not enough to remove the concern of reasonable apprehension of bias and that the judge's working relationship with Mr van Rooyen during that time does not guarantee, consciously or unconsciously, impartial conduct on his part.

[44] The Minister alleges that the cumulative effect of the above facts disqualified the petition judge from determining the petition. The Minister maintains that once the petition was assigned to him, the petition judge should have disclosed and consulted with the parties on his various associations with the respondents. He failed to do so. The Minister further contended that had he known that the petition judge was seized with the petition, he would have noted an objection and sought the judge's recusal.

[45] The Minister asserts that the petition judge's failure to recuse himself rendered the order he made in the petition a nullity. He therefore asks the Supreme Court to exercise its inherent jurisdiction in terms of Article 78(4),¹² - and to reverse the petition judge's refusal of the petition in terms of Article 81 of the Constitution and to consider the petition afresh.

¹² Which vests the Supreme Court with 'inherent jurisdiction' of a superior court of record.

The respondents' contentions

[46] The respondents take the view that the applicants failed to make out a case for the recusal of the petition judge. They deny that the Minister established either a case of actual bias or a reasonable apprehension of bias. According to the respondents, the Minister's allegations in support of recusal do not undermine the presumption of judicial impartiality and the judge's duty to hear the petition.

[47] As regards the petition judge's association with the insurance industry's 1999 constitutional challenge, the respondents dispute that there is a basis in law for recusal because of that, more so because in that litigation only Santam was a party and the rest of the present respondents in the petition were not.

[48] The respondents assert further that the applicants have not made out a case that the petition judge, as counsel in the 1999 constitutional challenge, acquired any personal knowledge relevant to the issues in the petition. According to them, the petition judge cannot be said to have been biased merely because he represented one of the parties now before court some 20 years ago.

[49] The respondents contend that prior association will only form the basis of a reasonable apprehension of bias if the subject matter of the litigation in question arises from such association or activities but that no such suggestion is made by the applicants who, in any event, were aware that the petition judge was seized with the matter but opportunistically chose not to object before the petition was determined.

[50] As regards the petition judge's past association with Trustco, the respondents' stance is that it is irrelevant as the judge had resigned that position 10 years before he presided in the petition. That past relationship could therefore not give rise to any reasonable apprehension that the judge may be biased in favour of Trustco.

[51] Although admitting that the petition judge is the incumbent chairperson of NNHL and has been since 2005, the respondents dispute that NNHL in any way exercised control over the day to day operations of NedLife. Their view is that NedLife is controlled by an entirely independent board of directors on which the petition judge does not serve and he could therefore not have been conflicted. The respondents dismiss the relevance of the emoluments the petition judge receives from NNHL as it is from a company that is not party to the pending constitutional challenge and the review or in the petition.

[52] The respondents maintain that it was the choosing of the Minister to exclude NedLife and other interested parties from the application to compel and consequently in the petition – an election that resulted in NedLife not being an interested party in the petition. Based thereon, the respondents are of the view that there is no basis in fact to sustain a reasonable apprehension of bias arising from the petition judge's perceived association with NedLife. It is asserted that the fact that the Minister did not allege how the outcome of the petition would impact the financial position of the judge is proof that no relation exists between him and NedLife and no reasonable apprehension of bias could therefore arise.

Petition judge's reply to the Minister's allegations

[53] The petition judge was invited to respond to the allegations made by the Minister in the recusal application. The learned judge does not dispute the primary facts relied on by the applicants concerning his involvement in the 1999 constitutional challenge; that he is chairman of the NNHL which is the holding company of NedLife and that he had been a director of Trustco.

[54] As regards the first, the petition judge states that the constitutionality of the NAMRe Act was not an issue in the petition as that had to be accepted as common cause between the parties in deciding the petition and the issue therefore did not fall for determination.

[55] As concerns his association with NNHL, the petition judge states that NedLife is controlled by its own board of directors on which he does not sit, is not a party in the Minister's application to compel and was therefore not affected by the outcome of the petition.

[56] As regards the association with Trustco, the petition judge states that his relationship with that company terminated during 2009 and that the facts giving rise to the petition or the proceedings *a quo* never formed part of any discussion in Trustco during his tenure on its board.

Was the petition judge conflicted?

[57] Although the applicants cite three distinct grounds on which they seek to have the outcome of the petition invalidated, that result will follow if only one of those

grounds is upheld. The question is whether any of the associations of the petition judge (past or present) rise to the level of disqualifying bias.

Discussion

[58] A duty of recusal arises where it appears that the judicial officer has an interest in the case or where there is some other reasonable ground for believing that there will be a likelihood that the judge will not adjudicate impartially.¹³

[59] In *R v Bow Street Magistrate; Ex parte Pinochet Ugarte (No 2)* [1999] 1 All ER 577, Lord Browne-Wilkinson explained the underpinnings of the law on recusal as follows:

‘The fundamental principle is that a man may not be a judge in his own cause. This principle as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest outcome, but in some other way his conduct or behavior may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man. . . must not be judge in his own cause, since the judge will not normally be himself benefitting, but providing a benefit for another by failing to be impartial.’ (My underlining)

[60] The House of Lords held that the sacred rule that a man may not be a judge in his own cause should not be confined to a case in which the judge is a party, but

¹³ *S v Stewe* (SA 2-2018) [2019] NASC (15 March 2019), para 12 and 13.

applies also to a case in which he has an interest, whether financial, proprietary or non-financial or proprietary.¹⁴ Therefore, it was held, that although a judge's interest in a party to a case with which he was seized was non-pecuniary in nature, the rationale applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties.¹⁵

[61] In *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers' Union* the South African Supreme Court of Appeal held that:¹⁶

'[I]t is a hallowed maxim that if the judicial officer has any interest in the outcome of the matter before him (save an interest so clearly trivial in nature as to be disregarded under the *de minimis* principle) he is disqualified, no matter how small the interest by be The law does not seek, in such a case, to measure the amount of his interest. I venture to suggest that the matter stands no differently with regard to the apprehension of bias by a lay litigant.

. . .

. . . a Court cannot . . . be called upon to measure in a nice balance the precise extent of the apparent risk, if suspicion is reasonably apprehended, then that is an end to the matter.'

[62] It must be apparent from the authorities cited above that the law on recusal serves three objectives. The first is that the court system must not be paralysed by frivolous claims for recusal - hence the presumption of impartiality and the duty to hear matters. The second is that those who sit in judgment over others must not promote their own or others' interests or causes. The third is that everything possible must be done to not leave a nagging feeling in the public's mind that one party to a dispute did not get a fair hearing because of who the judge is or was.

¹⁴ *Ex parte Pinochet Ugarte* (No 2), at 587E-F.

¹⁵ *Ibid*, at 588E-J.

¹⁶ 1992 (3) SA 673 (A) at 690A-B.

[63] All three objectives serve to promote confidence in the administration of justice. No one objective is less important than the other although there are different ways in which they can be given effect to – either through open ventilation or through administrative arrangements for which the head of jurisdiction is responsible.¹⁷

[64] The last objective presents a peculiar problem in that the facts giving rise to its application are not easy to prove and is based on perception and value judgment and in some way the thought processes of an affected judicial officer. It therefore highlights the importance of the judicial officer making full disclosure and to err on the side of caution if in doubt as explained in para [85] below.

[65] The issue is whether the petition judge's admitted associations and relationships (past and present) are of the nature that a reasonable person, in possession of all the facts and aware of the surrounding circumstances, would reasonably form the view that the petition judge might (not would) be biased in the determination of the petition.

The submissions

Applicants

[66] The applicants' submissions mirror the views expressed in the supporting affidavit and reply which are in material respects justified by reference to decided cases. I find it unnecessary therefore - not least because of the conclusion to which I come - to repeat them in great detail. In any event, I make sufficient reference to them in the judgment as I analyse specific aspects of the case.

¹⁷ See para [87] below for how this is relevant.

Respondents

[67] The respondents' support for the preservation of the petition judge's order refusing the applicants' petition is founded on the following bases. The first is that the applicants were aware of the identity of the petition judge before the determination of the petition and ought to have raised the objection then and that seeking recusal after the fact is, therefore, opportunistic and should be rejected. Those allegations were denied by the Minister. Nothing further need be said about this argument because the issue became moot during oral argument when the court declined the respondents' offer (if the court were amenable) for Mr Heathcote (representing some of the respondents) to testify at the oral hearing to present evidence to support the allegation.¹⁸

[68] The further argument is that the applicants failed to satisfy the double reasonableness test by establishing the facts necessary for this court to come to the conclusion that the petition judge should have recused himself and that the judge had the duty to hear the matter. It is contended in that regard that the petition judge's associations relied on in support of the recusal application are either non-existent, too remote or distant in the past as to be of any consequence.¹⁹

[69] The other argument is that the issue that fell for determination in the petition was radically different from and unrelated to that which linked the petition judge to Santam in the 1999 constitutional challenge.

¹⁸ This was only a tender and not an application to lead evidence, which was resisted by the applicants and had the potential to unduly sidetrack the court from a consideration of the real dispute between the parties.

¹⁹ Compare: *Locabali (UK) Ltd v Baysfield Properties* (and similar cases) [2000] 1 All ER 65 (CA).

The law to facts

Petition judge's association with the 1999 constitutional challenge

[70] In the 1999 constitutional challenge the petition judge acted as lead counsel for the insurance companies that lost the bid to have the NAMRe Act declared unconstitutional. That was some 20 years ago. It is implied, at least partly, in the objection on which that is based that the learned judge had some identity of interest with the parties on whose behalf he acted. That much is apparent from the suggestion that he was the 'architect' of the legal case instituted by the insurance companies. That argument goes against the fundamental principle of our law and practice that the advocate represents the client's interest however objectionable (as long as it is not illegal) he might consider the client's case.

[71] I do not accept the implied premise that because the petition judge acted as counsel in that matter, he was beholden to the views held by those he then represented and that he could not as counsel for that reason have acted for the interests of a party which in subsequent litigation held a view contrary to that held by the parties he previously represented. But the objection goes much more than that and invokes a principle enunciated in a landmark judgment from South Africa's apex court which has been cited with approval by our courts. That case is *Bernert v Absa Bank Ltd.*²⁰

[72] *Bernert* makes clear that a reasonable apprehension of bias can arise either because the judge advised in the previous capacity or because he acquired personal

²⁰ 2011 (3) SA 92 (CC).

knowledge about the matter which could potentially be deployed to the detriment of one party and to the benefit of the opponent. As Ncgobo CJ put it:

‘Prior association with an institution cannot form the basis of a reasonable apprehension of bias, ‘unless the subject-matter of the litigation in question arises from such associations or activities. . . . Where a judicial officer, in his or her former capacity, either advised or acquired personal knowledge relevant to a case before the court, it would not be proper for that judicial officer to sit in that case.’²¹ (Emphasis supplied.)

[73] And as the House of Lords correctly stated in *Ex Parte Pinochet Ugarte (2)*²²:

‘[I]f, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge’s decision will lead to the promotion of a cause in which the judge is involved together with one of the parties.’

[74] The crucial factor in the present case is that the dispute the petition judge participated in as counsel in the 1999 constitutional challenge remains a live issue between at least one party (Santam) he represented in 1999 and the same parties against whom he then acted in essentially the same form.²³

[75] At the core of the dispute in its current manifestation is whether the insurance industry should be bound by the NAMRe Act’s provisions which require them to cede business to NAMRe. Remove that and there is really no live issue between the protagonists. The application to compel and the collateral challenge

²¹ 2011 (3) SA 92 (CC) at para 78

²² See 588E- F.

²³ Showing that the respondents in the 1999 litigation in *Namibia Insurance Association v Government of Namibia* 2001 NR 1 at 4C-D are the Government of Namibia, NAMRe and the Minister of Finance.

which ultimately resulted in the petition are an outgrowth from the central issue of the constitutionality of the NAMRe Act.

[76] The petition judge advised and represented Santam and other insurance companies in the 1999 constitutional challenge and argued in favour of the unconstitutionality of the NAMRe Act. Although that issue was decided in a binding judgment of the High Court, it remains a live controversy today because Santam and others in the insurance industry continue to believe that the NAMRe Act is unconstitutional. That the belief is earnestly held became apparent from a submission made during oral argument on behalf of one of the respondents' counsel. In an undisguised critique of the 1999 Full Bench decision on the NAMRe Act, Mr Heathcote argued that the unconstitutionality of the NAMRe Act must be approached, not on the basis of the reasons given by the Full Bench in 1999, but on the principles authoritatively enunciated by this court as the apex court in *Medical Association of Namibia & another v Minister of Health and Social Services & others*.²⁴

[77] I reference this to demonstrate that the legal arguments relied on in 1999 by the petition judge in his former capacity as counsel for the insurance industry remain as potent today as they were in 1999. The reluctance by the insurance industry to accept the constitutional *vires* of the NAMRe Act is entrenched and passionately held. Mr van Rooyen stated (on affidavit in the application to compel) that he would rather go to jail than comply with the Act and the measures. The objection to the NAMRe Act is therefore something approximating the pursuit of a cause. That is the

²⁴ 2017 (2) NR 544 (SC).

distinguishing feature about this case which brings it within the prohibition set out by Ngcobo CJ in *Bernert*.

[78] Faced with these facts, a reasonable lay observer will perceive that the petition judge adjudicated a dispute which relates to whether the insurance industry has a case that an issue he advised them on in the past was incorrectly decided in law: in other words that the legal argument he advanced in the past is correct - as opposed to the conclusion reached by the Full Bench before which he appeared in 1999.

[79] On that basis alone, the petition judge should not have determined the petition, alternatively should have consulted the parties on whether or not there would be any objection to his involvement, and to entertain any such objection in a transparent manner.²⁵

NedLife

[80] The petition judge's existing relationship with NedLife raises a different, if unique, problem. It is an interested party as regards whether or not the NAMRe Act is constitutional but has agreed to comply with the measures albeit in protest - not because it has abandoned the stance that the Act is unconstitutional. In any event, NedLife stands to profit from any decision which has the effect of reversing the full force and effect of the NAMRe Act.

[81] In my view, NedLife has a more than passing interest in the outcome of the petition. How could it not? If the petition succeeds, the order of stay will be revisited.

²⁵ *Bernert*, at 111E-F.

If the order of stay is reversed, there is a live issue whether or not the industry must comply with the NAMRe Act and the measures. If it is ordered that they must not comply, the agreement which NedLife concluded with the applicants in protest cannot have any valid basis in law and can be ignored. The fact that Nedlife had agreed to comply in the interim is, therefore, of no moment. The reality is that at the time of the consideration of the petition, it remained a possibility for the Supreme Court to grant leave to appeal against the order of stay.

[82] I accept that NedLife is not a party to the proceedings that led to the petition. Yet, it makes common cause with others on an issue for which the petition judge was lead counsel. It therefore continues to harbour a belief in the unconstitutionality of the NAMRe Act and the measures. The suggestion by the respondents that the petition judge's association with NedLife is irrelevant because, although a subsidiary of NNHL, it has its own board of directors and not subject to the dictates of the board of NNHL and that the petition judge is not directly remunerated by NedLife in any event, goes against the admonition in *BTR* that:

'Provided the suspicion of partiality is one which might reasonably be entertained by a lay litigant a reviewing Court cannot . . . be called upon to measure in a nice balance the precise extent of the apparent risk, if suspicion is reasonably apprehended, then that is an end to the matter.'²⁶

[83] True, the board of NedLife is not subject to direction by that of NNHL. That does not mean that the two entities have no shared financial interest or interdependence. It cannot be correct that the financial performance of NedLife is of no moment to NNHL. Proceeding from that premise, the financial soundness or

²⁶ At 694J-695A.

otherwise of NedLife is a matter which is of interest and of benefit (or detriment) to the shareholders of NNHL to whom the latter's directors owe a fiduciary duty.

[84] Therefore, even if the petition judge derives no direct financial benefit from NedLife and it was not shown how he stood to benefit personally from the outcome of the petition, at the very least there was a duty of disclosure. I turn to that issue next.

Obligation of disclosure: the marginal cases

[85] When there exists hint of a conflict a judge may feel, applying the double reasonableness test, that there is no obligation to recuse herself or himself and that she or he is in duty bound to sit. Yet she or he might still find herself or himself in the position where her or his involvement in the case - because of a marginal disposition towards one of the parties may, after the verdict, be misconstrued as bias. It is in this kind of case (what one may call the marginal case) where the judge is required to make disclosure to the parties.

[86] There are two reasons for this. The first is to afford the party potentially adversely affected to object to the judge sitting. The judge would be entitled (as would the opponent) to say: 'Sorry, there is no reason for recusal'. The objector would then (if so advised) bring a formal application for recusal which will be adjudicated transparently. It is at this stage where, on counsel's advice based on the applicable test, most objections are abandoned.

[87] The second reason is that it affords the head of jurisdiction to whose attention such a matter must immediately be brought, to look at the matter afresh and, if need be, reassign it to someone else - in the interest of saving time. To those not privy to the inner-workings of the court, this happens in practice more often than is assumed.

[88] The rationale of this practice is set out in *Bernert*. The learned Chief Justice reasoned that where the judge's interest in the matter before him is not trivial in nature, it may give rise to a suspicion of partiality. The court pointed out that disclosure of any such interest must be made to the parties, even in cases where there is no realistic possibility that the outcome of a case would affect a judicial officer's interest or shareholding. Ncgobo CJ wrote (at p 111A-C):

'The question which a judicial officer should subjectively ask himself or herself, therefore, is whether, having regard to his or her share ownership or other interest in one of the litigants in proceedings, he or she can bring the necessary judicial dispassion (objectivity) to the issues in the case. If the answer to this question is in the negative, the judicial officer must, of his or her own accord, recuse himself or herself. If, on the other hand, the answer to this question is in the affirmative, the second question to ask is whether there is any basis for a reasonable apprehension of bias on the part of the parties, whether on the basis of an interest in the outcome of the case, interest in one of the litigants (by shareholding, family relations or otherwise) or attachment to the case. If the answer to this question is in the affirmative, the judicial officer must disclose his or her interest in the case, no matter how small or trivial that interest may be. And, in the event of any doubt, a judicial officer should err in favour of disclosure.' (My underling for emphasis)

[89] Ncgobo CJ emphasised that litigants should not be left with the impression that the judicial officer is hiding his or her interest in the case from them. This is likely

to be the case where there was no prior disclosure, and the parties subsequently discover that the judicial officer had an interest. This may raise questions about the impartiality of the judicial officer, in circumstances where this would not have been the case if there had been prior disclosure.

[90] The Chief Justice went on to explain that although failure to disclose an interest, in itself, does not lead to a reasonable apprehension of bias the advantage of this practice is that it gives the parties the opportunity to object to the judicial officer sitting, or to bring to the attention of the judicial officer some aspect of the case that has a bearing on the shareholding or interest, that the judicial officer might have overlooked. Moreover, it may be relevant because it may (as in the case before us) cast some evidentiary light on the ultimate question of reasonable apprehension of bias.

[91] In my view, Article 12 (1) of the Constitution must be understood to include a right to object to a judge and *that* is only possible if the litigant has the full facts which could give rise to it. It is this latter right that imposes a duty on a judge seized with a petition to disclose facts peculiarly within her or his knowledge, principally because the identity of the judge would be unknown to the parties.

[92] The standard we must apply in these circumstances is not whether the applicants were treated unfairly but whether it was reasonable for them, armed with the correct facts, to form the reasonable suspicion that they were not. They had to discharge that onus and establish that they are entitled to the relief they seek in the notice of motion.

[93] For all of the above reasons, I am satisfied that the applicants made out the case:

- (a) That the reasonable lay observer would on the known facts have reasonably formed the view that the petition judge might not bring an impartial mind to bear in the petition; and that
- (b) The petition judge ought not to have presided in the petition without seeking the views of the parties arising from his past associations and affording those desiring to do so to seek his recusal if so advised.

[94] It becomes unnecessary for me to consider the remaining grounds for recusal advanced by the applicants.

Consequence of non-recusal

[95] Once it is established that a judge ought to have but did not recuse himself, the failure vitiates.²⁷ I did not understand the respondents to suggest otherwise.

[96] This court has made clear that in an appropriate case it will reverse its own earlier decision in an exceptional case and specifically referenced the situation where a member of the court ought to have but did not recuse themselves.²⁸

²⁷ *S v Munuma* 2013 (4) NR 1156 (SC), para 44; *S v Likanyi* 2017 (3) NR 771 (SC) at 783A-D; *S v Stewe* (SA 2-2018) [2019] NASC (15 March 2019), para 13, *S v Molaudzi* 2015 (2) SACR 341 (CC); *R Bow Street Magistrate; Ex Parte Pinochet Ugarte* (No 2) [1999] 1 All ER 577 (HL) at 588E-J;

²⁸ *S v Likanyi* 2017 (3) NR 771 (SC) at 788C-G.

[97] The petition judge's refusal of the petition is of no force and effect and we are at large to consider afresh the applicants' application for leave to appeal the order of stay.

Should leave to appeal be granted?

[98] The parties proceeded from the premise that the application to compel, which was met with the collateral challenge of the respondents, was an interlocutory proceeding and that leave of the High Court was required for an appeal to the Supreme Court. The High Court refused the applicants' leave to appeal to this court on the ground, as it found, that the order of stay was interim in nature, did not finally determine the rights of the parties and, therefore, not appealable. The Court relied on the triad of factors articulated in the South African Appellate Division judgment in *Zweni v Minister of Law and Order*.²⁹ The respondents support that conclusion.

[99] In terms of s 18(3) of the High Court Act 16 of 1990, for a party to appeal against a judgment or order of the High Court, two requirements must be met. The first is that the judgment or order must be appealable and secondly if the judgment or order is interlocutory, leave to appeal against it must first be granted by the High Court and if refused, leave should be obtained from the Supreme Court by way of petition to the Chief Justice.³⁰

[100] Therefore, what falls to be determined, since we have now become seized with the petition for leave to appeal, is whether the applicants made out the case, first, that the order of stay is appealable and, second, whether it enjoys prospects of

²⁹ 1993 (1) SA 523 (A) (*Zweni*).

³⁰ *Di Savino v Nedbank Namibia Limited* 2017 (3) NR 880 (SC) at 892A-C (*Di Savino*).

success. Those two questions are inextricably linked in light of the nature of the order granted by the High Court.

[101] The applicants seek leave to appeal to this Court against the order of stay on the following bases: First, that the court a *quo* erred in its approach to the test for leave to appeal because it failed to have regard to the principle that an order is appealable as of right because of the presence of other considerations which, as in the present case, do not fit the mould of *Zweni*. The applicants maintained that the High Court's order was final in effect even if it was framed as interim. Second, that the court's order was not sought by any of the parties and, thirdly that an order staying the implementation of legislation is a judicial overreach as it does violence to the constitutionally recognised principle of separation of powers. The competence of the order of suspension is therefore at the forefront of the application for leave to appeal.

[102] In view of the grounds on which leave to appeal is sought, it is necessary to first set out what was before the High Court.

[103] The High Court was seized with an application to compel the respondents to comply with the NAMRe Act and the measures, coupled with an application to commit the principals of the respondents to prison for contempt in the event of a failure to comply; and in addition the collateral challenge of the respondents that the NAMRe Act and the measures were unconstitutional.

[104] It became common cause in this court that the staying of the NAMRe Act and the measures were not part of the relief sought by any of the parties *a quo*. The respondents' position rather is that the worst the court *a quo* could have done was to declare the NAMRe Act and the measures unconstitutional but chose the lesser evil of staying their enforcement until the constitutional challenge and the review are finally determined. The applicants maintain that is not a good enough justification for the preservation of an incompetent order.

[105] During oral argument, the court expressed a concern about the propriety of the order as regards the separation of powers. It was for that reason that a member of the court asked the parties whether it would be proper to remit the matter to the High Court if it were found that the court *a quo* made an order it was not asked to make and opted not to deal with the relief prayed for in the pleadings.

[106] According to the respondents, the Supreme Court must reject the petition out of hand because the order of stay sought to be challenged by way of appeal is a non-appealable interim order which does not finally determine the rights of the parties as enunciated in, for example, *Shetu Trading CC v Chair, Tender Board of Namibia and Others*³¹ relying on *Zweni*.³² The rationale of the non-appealability of interim orders is to avoid piecemeal appeals which is unnecessarily expensive and that it is desirable that such issues be resolved by the same court and at one and the same time.³³

³¹ 2012 (1) NR 162 (SC) at 174D-176C.

³² 531I-533B.

³³ *Shetu* para 20.

[107] The issue whether the order of stay is appealable or not need not occupy us long because, if an order of a court is incompetent it is *a fortiori* appealable even if it is only interim and does not finally determine the rights of the parties. Allowing an incompetent order to stand offends the rule of law and legality. The debate about appealability concerns competent orders granted by the High Court. If the High Court grants an order which is not competent in law that debate does not arise.

[108] It was recognised by the Constitutional Court of South Africa that an incorrect application of the law offends the principle of legality.³⁴ An incorrect application of the law on a matter as fundamental as the validity of a court order goes to the heart of legality and the rule of law. Besides, had the court *a quo* considered if there were other considerations on the facts which did not fit the mould of *Zweni*³⁵, it would probably have found that, although framed as an interim order, the order of stay was final in effect.³⁶ As it happens, that order still stands and, for the duration of its operation, an Act of Parliament (including measures promulgated under it) are rendered unenforceable.

[109] Having found that the order of stay is appealable, I proceed to consider if the applicants enjoy prospects of success. The test for granting leave to appeal is whether there is a reasonable possibility, (not a probability) that the Supreme Court may come to a different conclusion.³⁷ The question in the present case therefore is whether there are reasonable prospects that the Supreme Court might come to the conclusion that the order of stay is incompetent.

³⁴ *CUSA v Tao Ying Metal Industries & others* 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para 68.

³⁵ See High Court judgment at para 12.

³⁶ See *Knouwds v Hosea* 2010 (2) NR 754 at para 12.

³⁷ *S v Ningisa and Others* 2013 (2) NR 504 (SC) at para 5- 6.

[110] If the order of stay was granted without being asked for or amounts to trespassing on the competence of the elected branch, it cannot be allowed to stand and the applicants would have made out the case for it being reconsidered on appeal.

Order not asked for?

[111] It was common cause in the present proceedings that the order of stay was not asked for in the pleadings by the respondents and was not an issue in the proceedings *a quo*. The applicable principle in such a situation has been stated and restated by this court in a long line of cases.³⁸ It was recently restated in a judgment of this court in *Namibia Airports Company Ltd v Fire Tech Systems CC and Others*.³⁹ Hoff JA made clear at para [29] that ‘a court is only competent to grant orders which were asked for by the litigants’. The Supreme Court might therefore set aside the order of stay on appeal.

Does the order potentially violate separation of powers?

[112] In the heads of argument, counsel for the applicants challenged the respondents to cite any authority from either the Southern African region or elsewhere where a court of law had assumed jurisdiction to stay a legislative measure. We have not been referred to any such authority by counsel for the respondents.

³⁸ *Kauesa v Minister of Home Affairs & Others* 1995 NR 175 (SC) at 183E-G; *Kasheela v Katima Mulilo Town Council* (SA 15-2017) [2018] NASC (16 November 2018); *JT v AE* 2013 (1) NR 1 (SC) at 8A-B, para 19; *Namib Plains Farming and Tourism v Valencia Uranium* 2011 (2) NR 469 (SC) at 483C-D; *Teek v President of the Republic of Namibia* 2015 (1) NR 58 (SC) para 30.

³⁹ Case No SA 49-2016 (12 April 2019) at paras 28-33.

[113] As counsel for the applicants suggested, such comparative jurisprudence as there is points in the opposite direction. We were referred to judgments where the courts declined to assume such jurisdiction and where the apex courts reversed orders of first instance courts purporting to assume such jurisdiction.⁴⁰ In those cases cited, the issue was whether the High Court had the power to suspend the operation of an Act of Parliament, pending a constitutional challenge to declare legislation invalid.

[114] The constitutional court set aside the order of the court *a quo* noting that the effect of such order defeats the will of parliament, hampering its ability to exercise the legislative authority conferred on it by the constitution.⁴¹

[115] Counsel also made reference to Article 63(1) of the Constitution clothing the legislature with legislative powers and Article 25(1)(a) which gives the courts power to declare an Act of parliament unconstitutional and, if necessary, to suspend its operation and afford parliament the opportunity to rectify a legal defect. Applicants' counsel argued that such a power does not include a power to stay a valid law.

[116] Neither the learned judge *a quo* nor the respondents have cited any constitutional basis for the order granted by the High Court. To say that the High Court granted a lesser order than what was sought is not an answer to the complaint that the court granted an order which was not competent because of the doctrine of

⁴⁰Counsel relied on two decisions of the Constitutional Court in *UDM v President of the Republic of South Africa* 2003 (1) SA 488 (CC) and *Ministry of Home Affairs v Eisenberg & Associates* 2003 (5) SA 281 (CC).

⁴¹ *UDM*, at 491B-C.

separation of powers. Can it be right to argue that because life imprisonment is a more severe penalty than corporal punishment, the latter would pass muster if a court imposed corporal punishment⁴² instead of life imprisonment which the prosecution asked for.

[117] I have surveyed both Canadian⁴³ and Indian⁴⁴ jurisprudence to see if courts in those jurisdictions assume a jurisdiction to suspend the operation of legislation but was unable to find support for the order of stay. Separation of powers is just as justiciable as the rights enshrined in the Bill of Rights. It binds the courts just as it does the other organs of the State. In other words, just as the Executive and the Legislature may not usurp the power of the courts, the Judiciary may not usurp the powers delineated under the Constitution to the other separate but equal branches.

[118] The drift of authority is that courts enjoy the power under the constitution (just as it is the case in Namibia)⁴⁵ to declare legislation invalid if it offends the constitution. That power includes a power to make a declaration of invalidity but to suspend its taking effect and to afford the legislature the opportunity to correct a defect in the law identified by the court. That is a power expressly granted under the constitution. Absent such a finding, it is doubtful that a Namibian court enjoys a power to order that legislation not have the force of law for an indefinite period of time as happened in the present case. The issue can of course only be finally determined on appeal.

⁴² Which is an unconstitutional form of punishment: *Ex Parte Attorney-General: In Re Corporal Punishment by Organs of State*: 1991 NR 178 (SC).

⁴³ *R v Ferguson* [2008] 1 S.C.R. 96 at para 35; *Nova Scotia (Workers Compensation Board) v Martin* [2003] 2 S.C.R. 504 at para 28.

⁴⁴ *Gopalan* (1950) S.C.R. 88,120, (50) A.S.C.27; *Fram N. Balsara v Bombay* (1951) S.C.R. 682, (51) A.S.C. 318.

⁴⁵ *Government of the Republic of Namibia v Cultura* 2000 1993 NR 328 (SC) at 335E; 1994 (1) SA 407 (NmSC)

[119] There are therefore more than reasonable prospects that on either ground of incompetence advanced by the applicants, the Supreme Court might revisit the order of stay.

Trustco's position vis-a-vis leave to appeal

[120] Mr Chaskalson SC submitted on behalf of Trustco that his client was in a different position to the other respondents in that its reinsurance business is placed entirely within the borders of Namibia and that if ultimately the applicants achieve their objectives through the measures, the opposite result will occur. For that reason, counsel submitted, even if the applicants succeed to obtain leave to appeal, they should not sue against Trustco.

[121] I cannot conceive of a situation where leave to appeal the order of stay is granted as against some of the parties and not others, when the issue in the appeal, if it ultimately comes to this court, is the competence of that order. If the order is found to be not competent in law, it will have that result against the entire world. Therefore, what Mr Chaskalson asks for is not legally possible.

Applications to strike

[122] Both the applicants and the respondents had brought applications to strike certain matter from the respective affidavits, and in one respect from the heads of argument of the other side. The common cause facts were sufficient to determine the

outcome of this application without resort to the material either side sought to expunge from the others' papers. Accordingly, I find no productive purpose in resolving the disputes that have arisen from the applications to strike as they do not – with the greatest respect to the parties – affect what the real disputes are between them.

Costs

[123] Having achieved success, the applicants are entitled to their costs. It is plain from the direction given by the Court in this matter that the heads of argument had to comply strictly with the rules of court.⁴⁶ In terms of rule 17(7)(k) heads of argument must not exceed 40 pages, unless a judge on request directs otherwise. Without obtaining the leave of the Supreme Court, the applicants filed heads of argument in excess of fifty pages. That non-compliance is to be discouraged by an appropriate costs order. Legal practitioners are cautioned to heed the peremptory terms of the rule which is intended to prevent judges being burdened with prolix heads.

Order

[124] I would therefore propose the following order:

- (a) The application for the recusal of Frank AJA is granted and his refusal of the petition hereby set aside as being of no force and effect.

- (b) The first and second applicants are granted leave to appeal to the Supreme Court against the order of stay granted by the High Court.

⁴⁶ *Vide* para [19] above.

(c) The applicants are awarded the costs of the application for recusal and leave to appeal against the respondents - jointly and severally the one paying the other to be absolved, subject thereto that in respect only of the heads of argument the applicants' taxed costs shall be to the extent of 85% of the costs allowed for the heads of argument.

DAMASEB DCJ

HOFF JA

NKABINDE AJA

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Instructed by Van der Merwe-Greef Andima Inc
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