REPORTABLE

REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 11/2010

In the matter between:

TECKLA NANDJILA LAMECK	**1ST APPLICANT**
YAN FAN	**2ND APPLICANT**
JEROBEAM KONGO MOKAXWA	**3RD APPLICANT**

And

THE STATE	**RESPONDENT**

Neutral citation: *Lameck v State* (CC 15/2015) [2014] NAHCMD 85 (10 April 2015)

Coram: CHEDA J

Heard: **30 January 2015**

Delivered: **10 April 2015**

Flynote: Leave to appeal – should not be granted on the basis of a mere possibility of the success on appeal but only where there are prospects of success on appeal.

Leave must not be granted where absolutely no chance of a successful appeal exists or where the court is certain beyond reasonable doubt that the appeal will fail.

Summary: Applicants applied for my recusal which application was dismissed. Applicants then applied for leave to appeal to the Supreme Court. Applicants must prove that there exists reasonable prospects of success on appeal, not a mere possibility or that the case is arguable. A further consideration in my view is the national importance and public interest of the matter. Leave to appeal is granted

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ORDER

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1. The application for leave to appeal be and is hereby granted.

JUDGMENT

CHEDA J:

[1] Applicants filed an application for leave to appeal to the Supreme Court. The application is based on my judgment of the 14 November 2014 wherein I dismissed their application for my recusal. Applicants are in the middle of a criminal trial and had applied for my recusal on the basis of my perceived bias, against them, hence their fears that they may not receive a fair trial.

[2] In the application for recusal, I dismissed it on the basis that applicants were not reasonable in their assertion that I was biased against them and they did not prove that there existed reasonable apprehension of bias on my part in the circumstances. Applicants were dissatisfied with my judgment. It is their dissatisfaction that culminated into the present application.

[3] Applicants' counsel, Mr. Healthcote argued that there was misdirection on my part as I failed to recuse myself when applicants wanted me to do so, as they perceived that I was going to be biased against them.

[4] The issue before the court is basically leave to appeal to the Supreme Court. A party that is aggrieved by the finding of a lower court, this court being one, vis-à-vis the Supreme Court, falls within the category of having its decision appealed against, subject of course to the fulfilment of the legal requirements laid down in various authorities, as will appear hereinunder.

[5] The well-established test is that of "the existence of reasonable prospects of success on appeal". This test has stood the test of time and was ably stated in S v Smith 2012 (1) SACR 567 at 570 B-C where Plasket AJA stated:

> "what the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding."

The onus to convince the court lies with the applicant.

[6] Leave to appeal cannot be granted by mere asking, more is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless, see *S v Kruger 2014 (1) SACR 647*. In other words, there must be a sound and rational basis for the conclusion that there are prospects of success on appeal. See also *R v Ngubane & Others 1945 AD 185.*

[7] The courts have adopted a strict application of this principle and will refuse an application for leave in those cases where absolutely no chance of a successful appeal exists, or where the court is certain beyond reasonable doubt that the appeal will fail. However, there is no need for certainty on the part of the court that a higher court will hold a different view. All applicant needs to do is establish the existence of

a possibility that the appeal may succeed (my emphasis), see *S v Ackerman en 'n ander 1973 (1) SA 765 A (767 G-H).* The above authorities show that the reasonable prospects of success apply to both questions of fact and law, see R v Kuzwayo 1949 (3) SA 761 (A) at 765.

[8] In light of the above stated, I am of the opinion that, for applicant to succeed he should satisfy the court that, if leave be granted, he has a reasonable prospect of success on appeal.

[9] In *casu* appellants' argument is that I misdirected myself in dealing with the issue of warrants and not summons at a particular stage. While I hold a different view which is supported by respondents through Mr Nyambe assisted by Mr Eixab, applicants are entrenched in their view of my bias in continuing with the trial. Although the matter has not been finalised, it seems appellants are of the strong view that the contentious issue should be determined first to avoid prejudice on their part in the event that they are correct in their perceptions. It is their further argument, that, in the event that the Supreme Court finds in their favour at a later stage, they would have suffered an irreparable damage or injury.

[10] While the issue before the court is that of leave to appeal I am constrained to bear in mind the consequences of granting or refusing the said leave. In doing so, an examination of the facts and the net effect of any decision has on this matter is unavoidable. In my view this matter without reverting to the alleged facts has the ingredients of national importance and all the hallmarks of public interest and as such cannot and should not be taken lightly. Above all it clearly invites an examination of the requirements of the dictates of justice.

[11] While the granting of leave to appeal is grounded on the existence of the prospects of success of the appeal, other factors such as the importance of the matter to the parties and the dictates of justice should in my view influence the court's determination of the said appeal. The determination of leave to appeal poses problems to a presiding officer as he encounters the unavoidable conclusion that the

judgment which he firmly believes in, he is now being called upon to revaluate it himself by granting leave to appeal. However, he should not allow his own views to cloud his better judgment. However, though he must at all times thrive to adopt an objective view bearing in mind the fallibility of a human mind. I must also add that in a criminal trial such as this and indeed in all criminal trials heed should be had of the presumption of innocence of an accused person throughout the trial until proven guilty by a competent court. This is the golden rule which is a cornerstone of our judicial system.

[12] Applicants have taken issue with both matters of fact and the applicable law. This, of course, is vigorously opposed by respondent who in that stance is supportive of my judgment.

[13] The guiding principle is that, the judge should reflect dispassionately upon his/her decision and decide whether a higher court can reasonably come to a different conclusion, see *S v Mabena & Another 2007 (1) SACR 482 at 494 paragraph 22.* In that case Nugent JA remarked:

> "It is the right of every litigant against whom an appealable order has been made to seek leave to appeal against the order. Such an application should not be approached as if it is an impertinent challenge to the Judge concerned to justify his or her decision. A court from which leave to appeal is sought is called upon merely to reflect dispassionately upon its decision, after hearing argument, and decide whether there is a reasonable prospect that a higher court may disagree."

[14] I am fortified by these remarks and totally align myself with them. I wish to however, add that in my view there is no mathematical formula in arriving at an undisputed conclusion in a legal matter, as a lot largely depends on an individual's interpretation of the law to a set of facts at hand. The approach therefore is that of pragmatism and objectivity coupled with the need to dispense justice without fear, favour, affection or ill will particularly where public interest, issues of national

importance and above all where appellants' constitutional rights are at stake. It is, therefore, an onerous task which should not be taken lightly. A judge in my situation is in the circumstances being called upon to objectively look at the matter and say that his own judgment is so indubitably correct that the judges of the Supreme Court will concur with him, see *R v Baloi 1949 (1) SA 523.* This stance, in my mind, will not be realistic as we are all entitled to our own personal assessments and interpretations of situations at any given time.

[15] The question of reasonable prospects of success of the appeal is in my view debatable, but, unavoidably calls for determination. It is now settled law that the test is that of reasonableness of the prospects of success as shown by the authorities, see also *S v Sikhosana 1980 (4) SA 559 (A).* I am, therefore, constrained to remain within the confines of the above principle. The application of this principle calls for me to disabuse my mind and reflect in a dispassionate manner my considered decision and then decide whether there exists a reasonable prospect of success on appeal resulting in the appeal court disagreeing with me.

[16] In that consideration, therefore, I am bound to bear in mind that to my knowledge, there is no one who has a monopoly of knowledge in any field and for that reason one's knowledge and interpretation of the applicable law is subject to different views by others charged with the same interpretative duties. I have carefully and objectively taken into account all the submissions by counsel throughout these proceedings, I could not, but, fail to say "what if I am wrong", in my interpretation of the law regarding the issue of summons and warrants. This to me is a question of law which then qualifies for determination by the Supreme Court. In the event, that an error which should be subjected to further and careful scrutiny as per our legal system, that process should be allowed to proceed to its logical conclusion. It is not for me to obdurately shut the judicial door against the innocently presumed applicants. Justice will not be served by such attitude.

[17] In light of the above I conclude as follows:

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1. The application for leave to appeal be and is hereby granted.

M Cheda

Judge

APPEARANCES

APPLICANTS	:	R Heathcote (with him G Hinda and G Narib) Sisa Namandje & Co. Inc, Windhoek
RESPONDENT:		S Nyambe (with him J Eixab) Office of the Prosecutor-General, Windhoek