



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

EX- TEMPORE JUDGMENT

In the matter between:

Case no: HC-MD-CIV-MOT-GEN-2017/00220

**HOLLARD INSURANCE COMPANY
OF NAMIBIA LIMITED**

FIRST APPLICANT

HOLLARD LIFE NAMIBIA LIMITED

SECOND APPLICANT

SANLAM NAMIBIA LIMITED

THIRD APPLICANT

SANTAM NAMIBIA LIMITED

FOURTH APPLICANT

QUANTA INSURANCE LIMITED

FIFTH APPLICANT

TRUSTCO INSURANCE LIMITED

SIXTH APPLICANT

TRUSTCO LIFE LIMITED

SEVENTH APPLICANT

KIND PRICE INSURANCE COMPANY

OF NAMIBIA LIMITED

EIGHTH APPLICANT

CORPORATE GUARANTEE AND INSURANCE

COMPANY OF NAMIBIA LIMITED

NINETH APPLICANT

OUTSURANCE INSURANCE COMPANY

OF NAMIBIA LIMITED

TENTH APPLICANT

NEDNAMIBIA LIFE ASSURANCE

COMPANY LIMITED

ELLEVENTH APPLICANT

BONBEN ASSURANCE NAMIBIA

LIMITED T/A BONLIFE

TWELVETH APPLICANT

OLD MUTUAL LIFE ASSURANCE COMPANY

NAMIBIA LIMITED

THIRTEENTH APPLICANT

and

**MINISTER OF FINANCE
NAMIBIA NATIONAL REINSURANCE
CORPORATION**

**FIRST RESPONDENT
SECOND RESPONDENT**

Neutral citation: *Hollard Insurance Company of Namibia Limited v Minister of Finance* (HC-MD-CIV-MOT-GEN-2017/00220) [2019] NAHCMD 136 (02 April 2019)

Coram: GEIER J
Heard: 02 April 2019
Delivered: 02 April 2019
Released on: 06 May 2019

Flynote: Appeal — In what cases — the Court had dismissed an application to refer certain issues to the hearing of oral evidence — In the application to obtain leave to appeal against that order the point was raised that the court's orders were not appealable – Court holding that the refusal to refer certain specified issues to the hearing of oral evidence merely amounted to a ruling on an evidential issue, a matter in respect of which, no appeal should lie in terms of Section 18 (3) as read with 18 (1) of the High Court Act 1990 — Application for leave to appeal accordingly dismissed.

Summary: The facts appear from the judgment.

ORDER

1. The application for leave to appeal is dismissed with costs.

2. Such costs to include the costs of three instructed- and one instructing counsel.
3. The case is postponed to 08 May 2019 at 08h30 for a status hearing.
4. The parties are to file a status report indicating their proposals on the way forward.

JUDGMENT

GEIER J:

[1] This application for leave to appeal raises the issue of the appealability or not of my refusal to refer this case to the hearing of oral evidence on specified issues.

[2] In this regard it is firstly instructive to consider the language of section 18 of the High Court Act 1990 and to note how the applicable provisions were interpreted by O'Regan AJA in *Shetu Trading CC v Chair, Tender Board of Namibia and Others* 2012 (1) NR 162 (SC), which the learned Judge of Appeal did as follows:

[36] The next question that arises is whether the fact that the High Court granted leave to appeal against the order renders the order appealable. This question brings us back to the second dictum in *Aussenkehr* contained in the last sentence of the paragraph of the judgment cited in para 26 above, where the court mentioned that a decision on urgency might be regarded as an 'interlocutory order' within the meaning of s 18(3) and, therefore, appealable with leave.

[37] In order to consider this issue, it is necessary to look at the language of s 18 of the High Court Act more carefully. Section 18(1) provides that an appeal from a 'judgment or order' of the High Court lies to the Supreme Court. Section 18(3) then provides that a 'judgment or order' where the order is interlocutory or concerned with an order of costs alone is not appealable without leave. Given that s 18(3) repeats the words 'judgment or order' which are used in s 18(1) as well, it seems plain that s 18(3) does not expand the scope of 'judgments

or orders' against which an appeal will lie; it merely provides that in the cases of certain 'judgments or orders', an appeal will only lie with leave.

[38] If the High Court grants leave to appeal against a decision that does not constitute a 'judgment or order' within the meaning of s 18(1), the Supreme Court is not bound to decide the appeal. The court must always first consider whether the decision is appealable. If the decision against which leave to appeal has been granted does not fall within the class of 'judgments or orders' contemplated by s 18(1), then it is not appealable at all.'

[3] The learned judge then went on to say at [39]:

'[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 & A Germs v Transvaal Provincial Administration*:

"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. . . ."

[4] O'Regan AJA also referred to the case of *Dickinson and Another v Fishers Executors*¹ 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'.²

[5] These attributes are seemingly met in this instance militating towards the *prima facie* view that the court's orders should be appealable with leave. I will return to this aspect.

[6] The cited Supreme Court decisions however make it clear that there will be many occasions where a ruling made by the High Court will not constitute a judgment or order that is appealable within the meaning of Section 18(1) – and – that

¹ 1914 AD 424.

² *Dickinson v Fisher's Executors* at 427.

such a ruling will not even be converted into an appealable judgment or order, just because leave to appeal has been granted. The distinction between an interlocutory order, that is appealable with leave, in terms of Section 18(3), and a ruling, which is not appealable because, although interlocutory, it lacks the quality of being a judgment or order, will often be difficult to prove for the reasons that the question of appealability, itself, is challenging, as observed above.

[7] Also and as the example in *Shetu Trading* shows: it is not the form or the wording of the order utilised by a court which determines its appealability, where, in the circumstances of *Shetu Trading*, an application had been dismissed with costs by Judge Ndauendapo in the court a quo, an order normally amounting to an order that would be appealable as of right but, once its true nature was considered by the Supreme Court, in accordance with what was good practice, it was found that Judge Ndauendapo's finding, in the court a quo, should really have resulted in the striking of the application due to the considerations relating to urgency, which order did thus not determine any of the rights of the parties and which order, thus, lacked in finality and was thus found not to be appealable, even with leave.³

[8] In addition all the decisions in South Africa and here, in this jurisdiction, which had to grapple with this issue, have made it clear that the question of appealability, is '*intrinsically so difficult*' that even the accepted and authoritative principles, as formulated in *Zweni v Minister of Law & Order* 1993 (1) SA 523 (A) ([1992] ZASCA 197), may not prove to be decisive of this issue and in regard to which it has been held that these factors are '*not cast and stone*', but are really only '*illustrative*' and '*not immutable*' and that the principles listed in *Zweni* therefore only constitute '*useful guidelines*' and '*not rigid principles*' to be applied invariably.⁴

[9] The applicable guidelines as formulated by Harms JA in *Zweni* at pages 531(i) to 533(p), were cited with approval- and the considerations applied by the courts over time- were then analysed in *Shetu Trading* as follows :

³ Compare *Shetu Trading CC v Chair, Tender Board of Namibia and Others* at [42].

⁴ *Shetu Trading CC v Chair, Tender Board of Namibia and Others* at [22].

[18] This court has considered the appealability of judgments or orders of the High Court on several occasions.⁵ In *Vaatz v Klotsch and Others*⁶ this court referred with approval to the meaning of 'judgment or order' in the equivalent provision in the South African High Court Rules given by *Erasmus in Superior Court Practice*. Relying on the jurisprudence of the South African Supreme Court of Appeal, Erasmus concluded that an appealable 'judgment or order' has three attributes: it must be final in effect and not susceptible to alteration by the court of first instance; it must be definitive of the rights of the parties; and it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.⁷

[19] This summary is drawn directly from the judgment of *Zweni v Minister of Law and Order*.⁸ In that case, the South African Appellate Division referred to the distinction between 'judgments and orders' that are appealable and 'rulings' that are not.⁹ According to the court in *Zweni*, the first characteristic of a ruling, as opposed to a judgment or order, is that it lacks finality. As Harms AJA, formulated the test: unless a decision is res judicata between the parties and the court of first instance is thus not entitled to reconsider it, it is a ruling.¹⁰ He continued —

*'In the light of these tests and in view of the fact that a ruling is the antithesis of a judgment or order, it appears to me that, generally speaking a non-appealable decision (ruling) is a decision which is not final (because the court of first instance is entitled to alter it), nor definitive of the rights of the parties nor has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. . . .'*¹¹

[20] There are important reasons for preventing appeals on rulings. In *Knouwds NO v Josea and Another*,¹² this court cited with approval the following remarks of the South African Supreme Court of Appeal in *Guardian National Insurance Co Ltd v Searle NO*,¹³

⁵ See, for example, *Vaatz and Another v Klotsch and Others*, unreported judgment of this court, SA 26/2001, dated 11 October 2002; *Aussenkehr Farms (Pty) Ltd and Another v Minister of Mines and Energy and Another* 2005 NR 21 (SC); *Wirtz v Orford and Another* 2005 NR 175 (SC); *Handl v Handl* 2008 (2) NR 489 (SC); *Minister of Mines and Energy and Another v Black Range Mining (Pty) Ltd* 2011 (1) NR 31 (SC); *Knouwds NO (in his capacity as provisional liquidator of Avid Investment Corporation (Pty) Ltd) v Josea and Another* 2010 (2) NR 754 (SC); *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd and Others* 2011 (2) NR 469 (SC).

⁶ *Id.*

⁷ See *Erasmus Superior Court Practice* (Juta) A1 – 43.

⁸ 1993 (1) SA 523 (A) at 531I – 533B.

⁹ This is a distinction with a long pedigree in South African jurisprudence. See *Dickinson and Another v Fisher's Executors* 1914 AD 424 at 427 – 428.

¹⁰ *Id.* at 535G.

¹¹ *Id.* at 536B.

¹² SA 5/2008, as yet unreported judgment of this court dated 14 September 2010, in para 13.

¹³ 1999 (3) SA 296 (SCA).

*'There are still sound grounds for a basic approach which avoids the piecemeal appellate disposal of the issues in litigation. It is unnecessarily expensive and generally it is desirable for obvious reasons, that such issues be resolved by the same court and at one and the same time.'*¹⁴

[21] As the court in *Guardian National Insurance* went on to note, one of the risks of permitting appeals on orders that are not final in effect, is that it could result in two appeals on the same issue which would be 'squarely in conflict' with the need to avoid piecemeal appeals.¹⁵

[10] In commenting on the evolution of the jurisprudence on these issues in South Africa and in Namibia the learned Chief Justice in *Di Savino v Nedbank Namibia Ltd* 2017 (3) NR 880 (SC) - quoting from the *Pretoria Garrison* case - stated:

[47] Counsel for the appellant is entirely correct in his submissions as to the then existing legal position regarding the meaning of 'interlocutory orders' prior to 1982. It is, however, clear that the position did not only change in South Africa now requiring leave to appeal in all civil proceedings, but it is also true to say that the Namibian legislation is now different from that of South Africa. The Namibian jurisprudence on the interpretation of s 18 of the High Court Act has evolved. This it did by distinguishing between 'judgments or orders' and 'interlocutory orders' which require leave to appeal. In this respect, our courts have moved on beyond where the South African courts were prior to the 1982 amendment to that country's Supreme Court Act. It is probably correct to conclude that a distinctively Namibian procedural law has evolved. Our courts have hitherto stayed clear of the spirited debate that had characterised the South African position prior to the 1982 amendment. Even though the broad concept of 'interlocutory orders' has retained its relevance in the context of appealability, it is not necessary to revert to the centuries old debate on the meaning of the word 'interlocutory'. The jurisprudential nuances emanating from the South African approach on the point are difficult to apply in practice. Moreover, as Schreiner JA observed in the *Pretoria Garrison* case at 868:

'No doubt various considerations have predominated in the minds of those responsible at different times for drawing the line at one place or another. The rules of procedure have differed considerably from age to age and country to country, and it is hardly to be hoped that any single principle should be deducible as governing appeals from procedural orders everywhere and always.'

[11] He went to conclude:

¹⁴ *Id* at 301B.

¹⁵ *Id* at 302B.

[51] It would appear to me therefore that the spirit of s 18(3) is that before a party can pursue an appeal against a judgment or order of the High Court, two requirements must be met. Firstly, the judgment or order must be appealable. Secondly, if the judgment or order is interlocutory, leave to appeal against such judgment or order must first be obtained even if the nature of the order or judgment satisfies the first requirement. The test whether a judgment or order satisfies the first requirement is as set out in many judgments of our courts as noted above and it is not necessary to repeat it here.'

[12] Given the various judicial pronouncements set out above it would appear that a useful point of departure - for the determination of this question in this case - would be the consideration of what occurred in this case. The refusal to refer this matter to the hearing of oral evidence stems from the interlocutory application brought on 27 April 2018, which was opposed, and which, after an exchange of affidavits, was set down for hearing, which resulted in an ex-tempore judgment delivered by this court on 15 November 2018, and where, in terms of the resultant orders, the application was dismissed with costs, such costs to include the costs of three instructed- and one instructing counsel.

[13] These orders, in respect of which the applicants now seek leave to appeal, seemingly have all the attributes of interlocutory orders, capable of being appealed against, with leave, in terms of Section 18 (3) of the High Court Act, as I have stated above.

[14] It should be mentioned however that none of the parties argued their case on this basis. Correctly so in my view, as the example of the order, under consideration in *Di Savino*,¹⁶ demonstrates.

[15] The next useful point of departure will be the consideration of this court's orders against the test enunciated in *Zweni* from which the following aspects emerge immediately:

- 1.) The order made by this court is not *res judicata*;
- 2.) The court would be entitled to reconsider it;
- 3.) The order is not definitive of the rights of the parties;

¹⁶ Compare *Di Savino v Nedbank Namibia Ltd* at [12] to [18].

- 4) The order does not have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings;
- 5) The doors of the court were not closed to the applicant;
- 6) The main application remains pending, to be heard on the merits, which remain to be decided.

[16] It is clear that all these aspects are already strong indicators that what the court is dealing with amounts, in substance, to a ruling and not an order or judgment falling within the ambit of Section 18 (1).

[17] In spite of these indicators Mr Heathcote SC, who appeared with Mr Maasdorp, argued that the order, refusing the referral to oral evidence, has enough for it to be appealable. This argument was to the effect that the court's finding on mootness had introduced the element of finality in effect. He underscored this submission by reminding the court that an application for referral should be brought *in limine*, as the granting of such an order had the effect of shifting the determination of the main application, on the *Plascon- Evans* principle, to the determination of such application on the basis of the civil test, namely that on a balance of probabilities, where also other aspects, such as credibility, would come now into play. A refusal of such application would thus result in a situation where such issues would not be revisited. He made these submissions also with reference to the appealability of recusal orders, which now require leave, although a finding or a refusal to recuse does not result in a disposal of a material part of that case. He reiterated that the effect, of the refusal, of the court, to refer the matter, was such, that such finding would not be reconsidered by the court and where the effect will be that the main application would still be decided with reference to the *Plascon- Evans* test.

[18] Mr Gauntlett SC, QC, who appeared with Messrs Kelly and Hengari, on the other hand, referred to various examples of rulings, all of which could have an impact on litigation, such as, for example, where a postponement had been refused, which could result in a situation where the evidence of certain witnesses would not be heard, or a refusal of an application to take evidence on commission *de bene esse* which could have a similar effect. He argued that the applicant should not be allowed to 'yo-yo' up and down the courts. With reference to what Innes ACJ had stated in *Dickinson* he submitted that if the court's decision, ultimately, proves to be

adverse, to the party dissatisfied with the ruling upon a point of evidence, that party could, in support of his appeal against such decision, rely on the erroneous nature of the ruling, if it was erroneous.

[19] With reference to the example based on a refusal of an application to take evidence on commission, he submitted that such an application could be renewed on changed facts. Similarly the application, which had resulted in the refusal of the court, to accede to the applicant's referral application, could be renewed, on changed facts. This also proved the interlocutory nature of the rulings made by the court, which also made no final finding on the main relief.

[20] He emphasised that his argument on appealability rested on two legs, the first of which was based on the nature of the ruling, which makes it indistinguishable from the examples having a bearing on this matter, as reflected in the handed up extract from *Erasmus Superior Court Practice* – [Service 41,2013]¹⁷, and, secondly,

¹⁷ Where the learned authors had listed a number of relevant decisions and where it was stated: 'Leave to appeal was **refused** in the following cases on the ground that the orders in question were simple interlocutory orders or rulings which are unappealable under the section:

1 An order in terms of rule 6(5)(g) that deponents to affidavits appear personally and be cross-examined as witnesses at the hearing (*Pfizer v South African Druggists Ltd* 1987 (1) SA 259 (T). See also *Wallach v Lew Geffen Estates CC* 1993 (3) SA 258 (A) and *MAN Truck & Bus (SA) (Pty) Ltd v Dorbyl Ltd t/a Dorbyl Transport Products and Busaf* 2004 (5) SA 226 (SCA) at 238F-239C);

2 An order putting into effect an earlier order pending an appeal against that order (*South African Druggists Ltd v Beecham Group plc* 1987 (4) SA 876 (T));

3 The dismissal of an exception raised in terms of rule 33(4) (*Elida Gibbs (Pty) Ltd v Colgate Palmolive (Pty) Ltd* (2) SA 360 (W); *Maize Board v Tiger Oats Ltd* 2002 (5) SA 365 (SCA) at 373I-374A);

4 An order granted in a special case presented to court ito rule 33(4) (*Maize Board v Tiger Oats Ltd* 2002 (5) SA 365 (SCA) at 374A-B);

5 An order in terms of rule 6(12) that a matter should be heard as a matter of urgency (*Lubambo v Presbyterian Church of Africa* 1994 (3) SA 241 (SE));

6 An order directing a party to supply further particulars (*Sistag Maschinenfabrik Sidler Stadler AG v Insamcor (Pty) Ltd* 1989 (1) SA 406 (T));

7 An order granting a plaintiff leave to amend his particulars of claim (*Webber Wentzel v Batstone* 1994 (4) SA 334 (T));

8 A referral to evidence of factual disputes in review proceedings (*Government Mining Engineer v National Union of Mineworkers* 1990 (4) SA 692 (W));

9 The upholding of an exception on the ground that particulars of claim were vague and embarrassing (*Trope v South African Reserve Bank* 1993 (3) SA 264 (A));

10 The refusal of a postponement on the grounds of the illness of the defendant (*Priday t/a Pride Paving v Rubin* 1992 (3) SA 542 (C)); and

11 A ruling on the privilege attaching to a police docket (*Zweni v Minister of Law and Order* (1) 1991 (4) SA 166 (W); *Zweni v Minister of Law and Order* (2) 1991 (4) SA 183 (W); *Zweni v Minister of Law and Order of the Republic of South Africa* 1993 (1) SA 523 (A)).

12 ...

13 ...

14 The granting of an interdict *pendente lite* (*African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) 47C-D; *Cronshaw v Coin Security Group (Pty) Ltd* 1996 (3) SA 686 (A); see also *Van Niekerk v Van Niekerk* 2008 (1) SA 76 (SCA) at 78G-I; *JR 209 Investments (Pty) Ltd v Pine Villa Country Estate (Pty) Ltd*; *Pine Villa Country Estate (Pty) Ltd v JR 209 Investments (Pty) Ltd* 2009 (4) SA 302 (SCA) at 312A-D).'

that it would only become apparent later, whether the ruling made was prejudicial, which aspect should be determined at the end where it will become apparent whether or not the ruling vitiates the result or not.

[21] He argued that the finding on mootness was not final and that the applicant will be entitled to deal with this issue again. He made this point with reference to the example to interim relief where a court will be allowed to reconsider such issues at the subsequent stage. Ultimately what the court did in this instance was to make a ruling on an evidential issue.

[22] In reply Mr Heathcote contended that the court's refusal had a final effect which aspect would propel it into the realms of appealability. He made the point that an interlocutory application can never be moot in the main application unless the main application is moot.

[23] Finally he tried to distinguish the examples in which the courts had refused to grant leave to appeal – as listed in *Erasmus Superior Court Practice*, and as referred to by Mr Gauntlett – as well as his reliance on *MAN Truck & Bus (SA) (Pty) Ltd v Dorbyl Ltd t/a Dorbyl Transport Products & Busaf* 2004 (5) SA 226 (SCA) ([2004] 2

All SA 113; [2004] ZASCA 8) at paragraph [21]¹⁸ – as they did not deal with the appealability of an order refusing to refer a matter to the hearing of oral evidence.

Resolution

[24] In determining whether or not this court's order, refusing a referral for oral evidence to be led on specified issues, is an order which is not appealable with leave I take into account firstly again that such order seemingly satisfies the *Zweni* indicators or factors listed in [9] above.

[25] Secondly, I believe that Mr Gauntlett was correct in submitting that the application could be renewed. before this court, on changed facts. In this regard I also uphold his argument that even the point of mootness remains open for reconsideration in the main application, similarly to a reconsideration which follows upon the granting of interim relief on a return day.

[26] As far as Mr Heathcote's most persuasive argument is concerned, namely that an interlocutory application can never be moot in the main application, unless the main application is moot and that this point was not even properly raised, I state

¹⁸ '[21] It was submitted on behalf of the appellant that there was not a sufficient dispute of fact to warrant the Full Court referring the matter for the hearing of oral evidence. The short answer to this submission is that this direction is not appealable. It is not a 'judgment or order' within the meaning of those words in s 20(1) of the Supreme Court Act 59 of 1959. This Court held in *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532J - 533B:

'A "judgment or order" is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings (*Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 (4) SA 569 (A) at 586I - 587B; *Marsay v H Dilley* 1992 (3) SA 944 (A) at 962C - F). The second is the same as the oft-stated requirement that a decision, in order to qualify as a judgment or order, must grant definite and distinct relief (*Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another* 1992 (4) SA 202 (A) at 214D - G).'

The direction of the Full Court that evidence be led, has none of these attributes. The position is, for practical purposes, identical to that dealt with in *Union Government (Minister of the Interior) and Registrar of Asiatics v Naidoo* 1916 AD 50. In that matter, a single Judge of the Transvaal Provincial Division directed an application made upon motion to stand over for the production of oral evidence. Both parties consented in writing to an appeal being had direct to the Appellate Division. The Court held that special leave to appeal was necessary, but, as no order had been made upon the motion, an application for such leave was premature and should be refused. Innes CJ said at 52:

'There has been an application for relief, but no decision upon it. The prayer of the petition falls under nine separate heads, and in regard to none of them has any order been made. The application has merely been postponed for further evidence. When the enquiry is resumed the Judge may decide in favour of the present applicants on the facts; or he may possibly, though very improbably, revise his view of the law upon further argument. But if he does neither; if he finds against the applicants on the law and the facts, and grants the relief prayed for, it will then be competent for them to appeal and to raise every point upon which they now wish to rely. The fact is that the present application is for leave to appeal not against the order of the learned Judge - for he has made none - but against his reasons. It is entirely premature, and must at this stage be refused.'

that I do not uphold that submission in circumstances where this court was called upon to exercise a discretion in a matter, which discretion must- and was also exercised against the background and context of this particular case and which had to be viewed also in the context of the other litigation in which the parties are engaged and where the point – in any event – was also properly raised on the papers in the interlocutory application.

[27] Although Mr Heathcote's argument, as to the finality of the effect, of the refusal to refer the matter to the hearing of oral evidence, also merits serious consideration, I believe that Innes ACJ, as he then was, has correctly dealt with the manner, which is to the effect that the refusal of this court, should be dealt with at the end of the day, and in the context of an appeal, where the final determination of the effect of this refusal should be made and whether or not such ruling was erroneous in nature and whether or not it will vitiate the ultimate decision of the court *a quo* or not.

[28] This approach would at the same time - and to borrow a phrase - also '*prevent the parties from yo-yoing up and down the courts*' and which approach would also prevent, at the same time, the piecemeal- appellate adjudication of issues in the litigation, pending before the lower court, which would also achieve a cost- and time saving effect, which course would also avoid the potential possibility of two appeals, on the same issue.

[29] After all, what the court in this instance did, through its orders, was to, merely, rule on an evidential issue, a matter in respect of which, in my view, no appeal should lie in terms of Section 18 (3) as read with 18 (1). I rule accordingly.

Further comment

[30] Mr Gauntlett has urged the court, in addition to the ruling made above, at the same time, to also express itself on whether or not the court, in any event, would have granted leave to appeal. Accordingly and although I will not do justice to all Mr Heathcote's arguments, I hereby merely wish to indicate that I would also have refused the application for leave to appeal in any event on the basis that the court's discretion, in regard to the application for a referral, was exercised correctly and

judicially. I hold this view particularly if reviewed against the background facts which would indicate that another court would not come to the conclusion that the matter was not moot, in the circumstances where this aspect arose squarely from the papers exchanged, which aspect was subsequently argued and decided and whereupon the finding of mootness was made after a consideration which showed that the discretion in question was judicially exercised upon a consideration of the findings made in regard to mootness, on the basis of which, in turn, the resultant finding relating to convenience of the sought referral was based, which in turn resulted in the refusal of the application.

The costs issues

[31] As far as leave to appeal was sought in respect of the costs order that the court had made, Mr Heathcote submitted that the court did not exercise its discretion properly when it awarded costs in respect of three instructed- and one instructing counsel. He submitted that the referral issue was not a difficult one to decide and which matter thus did not require the attention of three instructed- and one instructing counsel.

[32] Mr Gauntlet submitted here that the court had exercised its discretion correctly on the basis of what the court had said in paragraph [43] of its judgment¹⁹ which paragraph constituted a good 'snapshot' reflecting on what basis such discretion had been exercised.

[33] Although I believe that Mr Heathcote's reliance on *South African Poultry Association & Others v Ministry of Trade & Industry & Others* 2015 (1) NR 260 (HC) shows that it is indeed possible for another court to form a different opinion on this aspect of costs, I believe also that, for the reasons then given, in paragraph [43], that the discretion pertaining to costs was nevertheless properly exercised, leaving no room for interference on appeal.

¹⁹ *Hollard Insurance Company of Namibia Limited v Minister of Finance* (HC-MD-CIV MOT-GEN-2017/00220) [2018] NAHCMD 411 (15 November 2018) reported on the High Court website under Civil Judgments <http://www.ejustice.moj.na>

[34] When it comes to the resultant costs, flowing from this application, Mr Gauntlett has requested the court to make a similar order, on the basis of the reasons stated in the said paragraph [43] of the judgment in respect of which leave to appeal was sought. I believe that the same considerations continue to apply.

[35] Accordingly - and in the result - I make the following orders:

1. The application for leave to appeal is dismissed with costs.
2. Such costs to include the costs of three instructed- and one instructing counsel.
3. The case is postponed to 08 May 2019 at 08h30 for a status hearing.
4. The parties are to file a status report indicating their proposals on the way forward.

H GEIER
Judge

APPEARANCES

APPLICANTS:

R Heathcote SC (with him R Maasdorp
Instructed by Francois Erasmus & Partners,
Van der Merwe-Greeff Andima Inc., Theunissen,
Louw & Partners & Engling, Stritter & Partners,
Windhoek

RESPONDENTS:

JJ Gauntlett SC QC, with him (L C Kelly
& U A Hengari)
Instructed by Government Attorney, Windhoek