

REPUBLIC OF NAMIBIA



NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 19/2013

In the matter between:

Leave to Appeal the Third Recusal Application of:

MARCUS THOMAS
APPLICANT

In Re:

THE STATE

and

MARCUS THOMAS
ACCUSED NO 1

KEVIN DONNEL TOWNSEND

ACCUSED NO 2

Neutral citation: *S v Thomas* (CC 19/2013) [2020] NAHCMD 244
(23 June 2020)

Coram: LIEBENBERG J

Heard: 15 June 2020

Delivered: 23 June 2020

Flynote: Criminal Procedure – Leave to Appeal – Whether the applicant has shown on a balance of probabilities that, based on the grounds of appeal raised, there are reasonable prospects of success on appeal – Appeal lies against dismissal of recusal application – Grounds of appeal constituting reasons for presiding judge to recuse himself and criticism of court’s analysis of the merits in application for recusal – Approach does not satisfy well established test on leave to appeal – Failing to state reasonable prospects of success on appeal – An adverse finding to an application decided in trial proceedings on the merits, not constituting a ground for recusal – Applicant dismissed.

ORDER

The application for leave to appeal is dismissed.

JUDGMENT

(Application for Leave to Appeal)

LIEBENBERG, J

[1] Subsequent to the court’s ruling delivered on 19 May 2020, dismissing an application for the third recusal of the presiding judge lodged by the applicant (first accused in the main trial), the applicant filed a notice of application for leave to appeal. The parties have agreed, which agreement is filed on record and dated 27 May 2020 that this matter be decided on the papers and in chambers.

[2] In the notice of application for leave to appeal the applicant has enumerated 11 grounds of appeal *ex facie*, the notice. However, on perusal thereof, the grounds set out do not measure up to required and established principles relating to grounds of appeal. Other than overlapping with one another, they fail to be clear and specific. This notwithstanding, and as will become apparent during this judgment, the applicant has adopted the wrong approach in his application for leave to appeal.

[3] Grounds 1 and 2 specifically are not clear and specific as it does not set out why the author arrives at such decision. The first ground simply avers that the honourable judge, 'erred in law and/or fact in finding that applicant's application were frivolous, without merit and based on unreasonable grounds'. The second ground states that 'the Judge erred by finding that a reasonable, objective and informed person will not, on the facts of the application for recusal, reasonably apprehend that the judge has or will not bring an impartial mind'. These two grounds are phrased in general terms and merely amount to a conclusion drawn by the drafter. Grounds 3 – 11 fundamentally overlap with one another and simply gives reasons why the presiding judge must recuse himself and amounts to criticism against the factual findings of the court in the recusal application.

[4] Collectively, the grounds raised amount to a rehearsal of the recusal application. The applicant contends that the court erred on the law and/or the facts in the manner in which the proceedings of 29 October 2019 were conducted and the court's subsequent ruling appended hereto. The criticism in brief, *inter alia* states that the court gave an incomplete historical account of the matter; the court exclusively relied on the version of the accused's erstwhile lawyer, Mr Ipumbu, which the applicant alleges was prejudicial to him and that the court having stated the conduct¹ of the accused amounts to fraud, constituted an irregularity.

¹ Drafting a letter on behalf of Mr Ipumbu without his consent.

[5] From a proper reading thereof, it would appear that the applicant has taken the platform of this application for leave to appeal to further air his disapproval of the court's ruling dated 29 October and the court's approach thereto. In other words, though the court has adequately dealt with its reasons for not granting the recusal application, the application expresses persistent disagreement, which manifests itself in the current application before court. To avoid unnecessary duplication of issues already dealt with in the recusal judgment, this court will not be tempted to be drawn in to regurgitating issues already raised and dealt with in the recusal application, but will determine whether the applicant has satisfied the legal requirements in law, in an application of this nature.

[6] The well-established test is whether the applicant has shown on a balance of probabilities that, based on the grounds of appeal raised, there are reasonable prospects of success on appeal. It is not sufficient to show that another court *might* come to a different conclusion, justifying the granting of leave to appeal.² To this end, the Supreme Court as per Mainga JA has occasioned in *S v Ningisa*³ to refer to the abovementioned test with reference to *S v Ackerman en 'n Ander*⁴ and *R v Boya*⁵, as follows,

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

[7] As similarly referred to in the former two recusal applicants lodged by applicant, the test of reasonable apprehension of bias, as authoritatively

² *S v Ceasar* 1977 (2) SA 348 (AD) at 350E; *S v Nowaseb* 2007 (2) NR 640 (HC).

³ *S v Ningisa* 2013 (2) NR 504 SC at para 6.

⁴ *S v Ackerman en 'n Ander* 1973 (1) SA 765 at 766H quoting from *R v Boya* 1952 (3) SA 574 (C) at 577B-C.

⁵ *R v Boya* 1952 (3) SA 574 (C) at 577B-C.

stated in *S v Munuma & others*,⁶ where Strydom AJA stated that the correct test is the 'reasonable apprehension' test:

'the test for the recusal of a judge is "whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case."' ⁷

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

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

⁶ *S v Munuma & others* 2013 (4) NR 1156 (SC).

⁷ Para 18 and 19 *S v S SH* 2017 (3) NR 871 SC (See also *Christian v Metropolitan Life Namibia Retirement Annuity Fund & others* 2008 (2) NR 753 (SC) at 769 and *Lameck v The State* (SA 15/2015) [2017] NASC (19 June 2017), paras 50 - 54).

⁸ *Ibid* para 29.

[10] For the aforesaid reasons I am respectful of the view that the applicant has failed to show on a balance of probabilities that there are reasonable prospects of success on appeal.

[11] In the result, the application for leave to appeal is dismissed.

JC LIEBENBERG
JUDGE

APPEARANCES

APPLICANT: B Cupido
Titus Ipumbu Legal Practitioners,
Windhoek.

FIRST RESPONDENT: M Siyomunji
Siyomunji Law Chambers,
Windhoek.

SECOND RESPONDENT: A Verhoef
Of the Office of the Prosecutor-General,
Windhoek.