

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case no: HC-MD-CIV-ACT-DEL-2017/03567

In the matter between:

MANGA NAWA-MUKENA

APPLICANT

and

MULTICHOICE NAMIBIA (PTY) LTD

FIRST RESPONDENT

NAMFLEX PENSION PRESERVATION FUND

SECOND RESPONDENT

NAMFLEX PROVIDENT PRESERVATION FUND

THIRD RESPONDENT

NAMFLEX RETIREMENT ANNUITY FUND

FOURTH RESPONDENT

Neutral citation: *Nawa-Mukena v Multichoice Namibia (Pty) Ltd* (HC-MD-CIV-ACT-DEL-2017/03567) [2020] NAHCMD 234 (18 June 2020)

Coram: RAKOW AJ

Heard: 05 June 2020

Delivered: 18 June 2020

Flynote: Application and motion – Appeal against court order – To stay proceedings pending another – Court to determine whether the judgment or order is appealable or not in terms of s 18(3) of the High Court Act, 16 of 1990 – Principles reiterated.

Summary: The applicant launched an application for leave to appeal against the judgement and cost order that refused to grant a stay of civil proceedings pending criminal proceedings initiated against her in the High Court. The first respondent opposed the application and raised a point *in limine* in that the order sought to be appealed not an appealable order as contemplated in s 18(3) of the High Court Act, 16 of 1990.

The court heard arguments in relation to the point *in limine* raised and made the following findings.

Held – the order of the court is indeed a final decision regarding the refusal of a stay of the civil proceedings pending the completion of criminal proceedings also pending against the defendant and two other persons whom she wish to call as witnesses in the civil proceedings.

Held – the specifics regarding the impact of the continuation of the civil matter was never placed in detail before the court, save to say that the right to a fair trial will be impacted as well as the right of the defendant and the two witnesses not to incriminate themselves. The application was based on possible prejudice that the applicant may suffer without specifically pointing these instances out.

Held further – The order refusing a stay in the main proceedings dispose of none of the relief claimed in the main proceedings and therefore does not meet this requirement for an appealable order

ORDER

a) The application for leave to appeal is therefore dismissed with costs, such costs to include on instructed and one instructing legal counsel.

JUDGMENT

RAKOW AJ:

Background

[1] The applicant brought an application for stay of proceedings on the following grounds:

‘Ordering and directing the pending civil action under case number HC-MD-CIV-ACT-DEL-2017/03567 be stayed until such time as the hearing of the applicant/ 1st defendant’s criminal trial under case number 16806/2017 set down for trial in the High Court (Main Division) is finalized.’

[2] The first respondent opposed to the application as intended by the applicant and the matter was set down for determination. The court made the following order on 21 January 2020:

‘a) Application for stay of proceedings under case number HC-MD-CIV-ACT-DEL-2017/03567 is refused.

b) Costs awarded to the Respondent (Plaintiff) against the Applicant (Defendant), to include Costs of one instructing and one instructed council.

c) Matter is postponed to 4/2/2020 for a status hearing. Parties to file a joint case status report on or before 31/1/2020.’

[3] On or about 18 February 2020 the applicant launched her application for leave to appeal against the judgement and cost order so delivered on 21/1/2020. These grounds were as follows:

‘1.That the learned Judge erred in the law and/or on the facts by finding that the threshold for exercising a discretion in an application for the stay of a civil trial in the circumstances where the facts and issues are similar to that of a criminal trial, should be “... exercised sparingly exercised on strong grounds, with great caution and in exceptional circumstances” whereas in law the court’s discretion in principle has to do with the issue as to whether there is a danger that the defendant may be prejudiced in the criminal trial if the civil trial is allowed to proceed.

2. Without derogating from the generality of the aforesaid principle in law and in amplification of same the learned Judge erred in the law and/or on the facts by virtue of the following:

2.1 that there is no impediment in this forum for applying the legal principle that where civil and criminal proceedings arise out of the same circumstances and are pending against the same person, it is the usual practice to stay the civil proceedings until the criminal proceedings have been disposed of;

2.2 that the rationale behind this practice has to do with the fact that the court need only be satisfied that there is a danger that a person in the position of the defendant might be prejudiced in the criminal proceedings if the civil proceedings are not stayed.

3. That the learned Judge erred in the law and/or on the facts by finding and applying the dictum in the case of *Mouton v Gaseb* where it was held that the speedy resolution of cases through the implementation of a judicial case management system has elevated the threshold for a successful stay of such civil proceedings whereas such a finding in several respects negates the established principle whether there is a danger that the defendant may be prejudiced in the criminal trial if the civil trial is allowed to proceed.

4. That the learned Judge erred in the law and/or on the facts by attaching undue weight to the issue of a speedy resolution of civil trials as enunciated in the judicial case management system whereas the learned judge gave insufficient weight to the potential prejudice the defendant stands to suffer in the criminal trial if the civil trial is allowed to proceed.

5. That the learned Judge erred in the law and/or on the facts by failing to consider the fact that the defendant's plea and witness statement as such do not constitute any evidence given under oath and hence could thus not be equated to the oral testimony which the defendant will be called upon to give at the trial.

6. That the learned Judge erred in the law and/or on the facts by failing to even consider and/or attach any weight to the fact that the rules of evidence should operate within the constitutional framework and as such failed to appreciate and find that the supremacy of the constitutional provisions should be adhered to in such circumstances.

7. That the learned Judge erred in the law and/or on the facts by failing to take into account the applicant's right to remain silent, the right to be presumed innocent until proven guilty as well as the right not to give self-incriminating evidence and the fact that should the civil trial commence before the criminal trial, then the defendant will be compromised in circumstances where the complainant (the plaintiff) in the criminal trial can use the evidence she gave in the civil trial against her and in doing so defeats the object and aim as well as protection guaranteed under the constitution.

8. That the learned Judge erred in the law and/or on the facts by failing to give any weight to the fact that the defendant would suffer clear prejudice in the event that she elects

not to give evidence at the civil trial in order to avail herself of her constitutional rights concerned, which election would inevitably lead to judgment given against her and her financial demise.

9. Likewise the learned Judge erred in the law and/or on the facts by failing to consider the fact that the same fate also befalls the defendant's witnesses, who are both co-accused together with her in the contemplated criminal trial.

10. The learned Judge erred in the law and/or on the facts by failing to give any weight to the legal principle that the foundational value of a fair trial within the realm of criminal procedure entails that the prosecution must establish the case against the accused (the defendant) without her involuntary participation.

11. Finally the learned Judge erred in the law and/or on the facts by failing to consider and find that that by granting the stay of the civil trial until the criminal trial has been finalized (or at least until such time as the applicant has given evidence in defence of the charges) would safeguard these constitutional rights and would dispense with the need to exercise judicial discretion whether to allow or disallow any such evidence given prior to the criminal trial.'

[4] The Plaintiffs in the main action/Respondents opposed the application for leave to appeal and raised a *point in limine* at the onset of their arguments.

Deciding the point in limine

[5] The point *in limine* raised by counsel for the Respondents in this application is in essence that the order made by the court is not an appealable order as contemplated in s 18(3) of the High Court Act, 16 of 1990. This section reads as follows:

'(3) No judgment or order where the judgment or order sought to be appealed from is an interlocutory order or an order as to costs only left by law to the discretion of the court shall be subject to appeal save with the leave of the court which has given the judgment or has made the order, or in the event of such leave to appeal being refused, leave to appeal being granted by the Supreme Court.'

[6] The problem does not arise with the fact that leave needs to be sought by the applicant, as that is the nature of the application before court, but in the fact that only a "judgement or order" which is an "interlocutory order or an order as to costs" is appealable. In that sense, the court is tasked to determine whether the order made

by the court to refuse a stay in the main proceedings pending the finalization of the criminal matter, is in fact an appealable order.

[7] In *Di Savino v Nedbank Namibia Ltd*¹ the following was said by the Supreme Court:

‘On appeal, the court held that the structure of s 18(3) of the High Court Act 16 of 1990 is that for a party to appeal against a judgment or order of the High Court, two requirements must be met. Firstly, the judgment or order must be appealable and secondly if the judgment or order is interlocutory, leave to appeal against such judgment or order must first be obtained from the High Court and if that court refuses to grant leave, leave should be obtained from the Supreme Court by way of a petition to the Chief Justice.’

It is clear that once it is determined that an order is interlocutory, and then leave to appeal is needed. The first requirement is however to decide whether an order or judgement is appealable.

[8] The process required in terms of s 18(3) is therefore to determine whether the judgment or order is appealable or not and once it is determined that the matter is appealable, the next requirement, namely whether the order was an interlocutory order or not, should be considered and decided. This is then also the procedure followed in *Government of the Republic of Namibia v Phillipus*.² In that matter it was stated that:

‘It follows that once an order is interlocutory, leave to appeal is required provided that the order itself is appealable.’

[9] O’Regan AJA in *Shetu Trading CC v Chair, Tender Board of Namibia and Others*³ said the following in this regard:

‘[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 & Germs (Pty) Ltd v Transvaal Provincial Administration 1987 (4) SA 569 (A)*:

¹ 2017 (3) NR 880 (SC).

² 2018 (2) NR 581 (SC).

³ 2012 (1) NR 162 (SC).

“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. . . .”

[10] O’ Regan AJA also referred in the above matter to the case of *Dickinson and Another v Fisher’s Executors 1914 AD 424* 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.’

[11] In deciding whether an order or judgement is appealable, in the *Di Savino v Nedbank Namibia Ltd*⁴ matter, Shivute CJ referred to the three attributes that must be present to identify an appealable judgement or order as follows:

‘The three attributes counsel for the appellant referred to are those set out in the decision of the South African Appellate Division in *Zweni v Minister of Law and Order 1993 (1) SA 523 (AD)* and as endorsed in many judgments of this court, namely that (i) the decision must be final in effect and not susceptible to alteration by the Court of first instance; (ii) it must be definitive of the rights of the parties, ie. it must grant definite and distinct relief; and (iii) it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.⁵

[12] The court before considering whether to grant leave to appeal, first needs to consider the three attributes as set out in *Di Savino* matter to determine whether the order given by the court in the initial application to stay proceedings, indeed meets the attributes defining an appealable order or judgement.

[13] The first question to decide is whether the decision is final in effect and not susceptible to alteration by the Court of first instance: In this matter, the order of the court is indeed a final decision regarding the refusal of a stay of the civil proceedings

⁴ Supra.

⁵ Also see *Minister of Finance and Another v Hollard Insurance Co of Namibia Ltd and Others 2019 (3) NR 605 (SC)*.

pending the completion of criminal proceedings also pending against the defendant and two other persons whom she wish to call as witnesses in the civil proceedings.

[14] The second question, that the order must be definitive of the rights of the parties, i.e. it must grant a definite and distinct relief. This was not the case with the current order, although, it was argued by the applicant that the rights of the applicant to a fair trial was indeed affected by the order, this *per se* cannot be said as the specifics regarding the impact of the continuation of the civil matter was never placed in detail before the court, save to say that the right to a fair trial will be impacted as well as the right of the defendant and the two witnesses not to incriminate themselves. The application was based on possible prejudice that the applicant may suffer without specifically pointing these instances out. The court therefore finds that this requirement was not met by the refusal of the application to stay proceedings.

[15] The third and last attribute of an appealable judgement or order is that such an order must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. The order refusing a stay in the main proceedings dispose of none of the relief claimed in the main proceedings and therefore does not meet this requirement for an appealable order.

[16] In light of the above, the court finds that the refusal to order a stay in the main proceedings is not an appealable order and therefore the court cannot grant the leave to appeal application. For the reason that it is in effect, the first hurdle that needs to be overcome in the process of deciding whether leave to appeal could be granted or not, the court did not consider as to whether or not there was a reasonable possibility that the Supreme Court may come to a different conclusion than this court.

[17] The applicant failed to make out a case for the relief sought and the application for leave to appeal is therefore dismissed with costs, such costs to include on instructed and one instructing legal counsel.

E RAKOW
Acting Judge

APPEARANCES:**APPLICANT:**

J A N STRYDOM

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FIRST RESPONDENT:

B De JAGER

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