

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING I.T.O. PRACTICE DIRECTIVE 61

HC-MD-CIV-MOT-POCA-2018/00140

In the matter between:

THE PROSECUTOR-GENERAL

RESPONDENT/APPLICANT

and

MARTIN NANDE SHILENGUDWA

1st APPLICANT/RESPONDENT

HILMA DALONDOKA SHILENGUDWA

2nd APPLICANT/RESPONDENT

BUSINESS AND INTELLECTUAL PROPERTY

AUTHORITY

3rd RESPONDENT

Neutral Citation: *The Prosecutor-General v Shilengudwa* (HC-MD-CIV-MOT-POCA-2018/00140) [2020] NAHCMD 68 (27 February 2020)

Corum: **Masuku J**

Heard on: **13 November 2019**

Delivered on: **27 February 2020**

REASONS FOR THE ORDER

MASUKU J:

[1] The applicants in this matter lodged an application for leave to appeal after they were dissatisfied with an order granted by this court on 24 July 2019 per Masuku J, and Claasen AJ, respectively.

[2] The applicants sought an order granting them leave to appeal on the grounds as set out in their notice of motion.

[3] The main issue to determine in this application is whether, the order granted by the court in both matters, is final in nature and effect and therefor amenable to being appealed to the Supreme Court with leave of this court.

[4] The applicants strongly contended that the order granted was final in nature and thus appealable, whereas the respondents argued to the contrary.

[5] The court was referred to various case law and reliance was primarily placed on a Supreme Court judgment and a *locus classicus* judgment in our jurisdiction in so far as the appealability of court orders or judgments is concerned.¹ The question the court had to answer was this: was the order it issued on 24 July 2019 and 25 July 2019 respectively, final in nature and effect and thus appealable?

[6] The question whether or not a judgment or order is appealable was answered by the Supreme Court in *Shetu Trading CC*. The Supreme Court, in its decision, relied on other judgments in this jurisdiction and beyond.²

¹ *Shetu Trading CC v Tender Board of Namibia* 2012 (1) NR 162 (SC).

² As was stated in the well-known cases of *Di Savino Antonio v Nedbank Namibia Limited*. SA 82 - 2014. 7 August 2017 (SC Judgment) and *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A).

[7] The elements that must be shown to exist, in order to render a judgment or order appealable, as found in the case referred to above are the following:

- a) It must be final in effect and not susceptible to alteration by the Court of first instance;
- b) It must be definitive of the rights of the parties; and
- c) It must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

Application of the attributes to the present matter:

[a] *It must be final in effect and not susceptible to alteration by the Court of first instance*

[8] The effect of the orders granted on 24 July 2019 and 25 July 2019 respectively in as far as they relates to the rule 61 application and the anticipation proceedings, were not final in nature or effect in that the main application, being the forfeiture application is yet to be considered by this court. The rule 61 application was merely interlocutory or preparatory in nature in that it questioned the basis upon which the applicant filed a different notice of motion as well as a founding affidavit pertaining to the forfeiture application citing that same was irregular and thus stood to be set aside. On the other hand, the anticipation proceedings sought to set aside the preservation order and considering that the forfeiture is still pending, the refusal thereby does not render the matter final in effect.

[9] It is trite that an order that does not finally dispose of the rights of the parties or does not dispose of a substantial part of the dispute between the parties is not appealable.³ It is also settled law that if the order of the High Court is merely procedural and the High Court did not determine the merits of the dispute, it is not appealable because of the rule against piecemeal appeals.⁴

³ *Di Savino v Nedbank Namibia Ltd* 2017(3) NR 880 (SC) at 891G-895; *Shetu Trading v Tender Board of Namibia* 2012 (1) NR 162 (SC) at 174D-176C.

⁴ *Knouwds NO (in his capacity as Provisional Liquidator of Avid Investment Corporation (Pty) Ltd) v Josea & another* 2010 (2) NR 754 (SC) at 759I-J, para 13.

(b) It must be definitive of the rights of the parties

[10] The court did not make any determination on the forfeiture application as it has yet to be determined.

[11] Furthermore, the mere fact that a decision or order issued may cause a party inconvenience or place it at a disadvantage in the litigation which nothing but an appeal can correct, is not taken into account in determining the question of the appealability of the order or judgment.⁵

(c) It must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings

[12] As has already been stated, the court did not pronounce itself on the forfeiture application, as same is to be fully and finally determined by this court in the proceedings that are already pending before this court. The Order granted on 24 July 2019 thus and did not have an effect of disposing of a substantial portion of the relief sought on the main proceedings launched and pending before court and was therefor not final in form or effect.

[13] In essence, the orders, as pertaining to the rule 61 and the anticipation proceedings, granted do not meet the requirements as set out in the *Shetu Trading* case as a result of which, the application for leave to appeal should be dismissed as I hereby do.

Order

1. The application for leave to appeal as far as the rule 61 and anticipation application is concerned is refused.

⁵ *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) par 9.

2. The applicants for leave are ordered to pay the costs of the application consequent upon the employment of one instructing and one instructed legal practitioner.
3. The matter is removed from the roll and is regarded as finalised.

T.S. Masuku
Judge

APPEARANCES:

1st and 2nd APPLICANTS/RESPONDENTS

J. Jacobs

Instructed by:

Van der Merwe Greeff-Andima

RESPONDENT/APPLICANT

M. Boonzaier

Instructed by:

Government Attorney