

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING
APPLICATION FOR LEAVE TO APPEAL

Case no: CC 03/2020

In the matter between:

THE STATE

and

TULIHALENI NDESHIHAFELA ANNA NGHIHALWA	ACCUSED 1
JOHANNA MBELOOKUNYE JONA	ACCUSED 2
TUHAFENI NAPANDELWE TWEYA NGIHALWA	ACCUSED 3
PAULINE GANES	ACCUSED 4

Neutral citation: *S v Nghihalwa & 3 Others* (CC 03/2020) [2022] NAHCMD 276 (02 June 2022)

Coram: UNENGU AJ

Heard: 31 May 2022

Delivered: 2 June 2022

Flynote: Criminal Procedure – Application for leave to appeal – Application lacks averments of prospects of success on appeal and reasons why applicant thinks the

Supreme Court will come to a different conclusion – Notice does not state proper and specific grounds – No averments of reasonable prospects of success on appeal – Application does not comply with crucial legal requirements laid down by case law and rule 115(2) of the High Court Rules – Points in *limine* upheld and application struck from the roll.

Summary: The applicant is seeking leave to appeal the ruling dismissing her application for the recusal of the presiding judge from the matter she is charged with together with three other accused persons for fraud and money laundering. The other accused persons did not join her in the application. The State raised points in *limine* pointing out that the application lacks specific and clear grounds upon which the applicant relies in the application.

Held; that applicant failed to state proper and specific grounds in the Notice.

Held further; that the applicant also failed to state in the Notice whether or not her application enjoys reasonable prospects of success on appeal for the Supreme Court to come to a different conclusion than reached by this court.

Held further; that the application lacks crucial legal requirements laid down in case law and does not comply with rule 115(2) of the High Court Rules.

Held furthermore, that the points in *limine* raised by Mr Moyo are of considerable force and effect – Points upheld and the application for leave to appeal struck from the roll.

ORDER

The application for leave to appeal is hereby struck from the roll.

RULING

(Application for Leave to Appeal)

UNENGU, AJ

[1] In this application, the applicant through her legal representative, Mr Siyomunji, is seeking leave to appeal to the Supreme Court against the ruling of this court dismissing her application for recusal of the presiding judge (myself) from a criminal matter she and other three accused persons are charged with multiple counts of fraud and money laundering. The State's case in the matter is at an advanced stage because many State witnesses have already testified with only the investigating officer still to testify who is also about to finish his evidence in-chief and to be cross-examined by counsel for the applicant and her co-accused.

[2] Although the applicant was charged together with the other three accused, it appeared from the main application which I dismissed on 4 March 2022 that accused 2, 3 and 4 did not join her in the application. This is confirmed by the applicant in the Notice for Leave to Appeal filed on 16 March 2022. The grounds advanced in the said Notice are almost similar to those advanced in the main application for my recusal but failed to state the grounds and the reasonable prospects of success of the appeal in the Supreme Court if leave is granted. The aspect of success and reasons why the applicant thinks she will succeed on appeal, are very important attributes for the court to consider in an application like the one in *casu*. Not only reasonable prospects of success in the Supreme Court is a requirement, but it is also a requirement to aver in the application for leave that the court misdirected itself on facts and law in the judgment of the application for recusal. In this application though, such averments are absent. The *onus* to convince the court about the existence of the legal requirements is upon the applicant. Failure to prove reasonable prospects of success, will result in the court refusing to grant the application for leave to appeal.

[3] In this application, the applicant neglected to assert that there existed reasonable prospects of success on appeal, the test the courts strictly apply. Cheda, J in the matter of *Lameck v State*¹ when dealing with a similar application, quoted a passage from the judgment of *S v Smith*² where the following was 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 a trial court. In order to succeed, therefore, the appellant must

¹ *Lameck v State* (CC 15/2015) [2014] NAHCMD 85 (10 April 2015).

² *S v Smith* 2012 (1) SACR 567 at 570 B—C.

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.”

[4] Similarly, in the matter between *Tobias Haupindi and Magistrate Helvi Shilemba and Others*³, the Supreme Court stressed, in respect of the approach of applications for recusal that, whereas a judicial officer should recuse himself/herself where the facts warrant the recusal, it is also his/her duty not to do so where the facts do not warrant a recusal. Further, it is stated that disgruntled litigants should not be permitted to successfully complain of bias simply because the judicial officer has ruled against him or her. Nor should litigants be encouraged to believe that, by seeking disqualification of a judicial officer who is likely to rule against them, they will have their case in their favour. As a judicial officer, I have a duty to sit in all cases, including this application, which I am not disqualified from sitting.

[5] In the application, both Mr Moyo counsel for the State and Mr Siyomunji for the applicant, submitted written heads of argument for consideration by the court. However, Mr Siyomunji was absent from the hearing to supplement his written heads with oral submissions. He only sent a communication to court through Mr Moyo and the applicant that he will not be present at the hearing. His absence from the hearing deprived the court from hearing his views regarding the status of the ruling in an application for recusal. I wanted to hear from both counsel whether or not the ruling was interlocutory, therefore, not appealable. In that regard, Mr Moyo referred the court to the judgment in the matter of *Lameck v The State*⁴, as authority and submitted that application for leave to appeal against the refusal of a judicial officer to recuse himself or herself from a case he/she is presiding over is not interlocutory. According to Mr Moyo, such an application is regulated by rule 115(2) of the High Court Rules which provides that when leave to appeal from a judgment or order of the court and if not been requested at the time of the judgment or order, application for such leave must be made with grounds for the leave to appeal within 15 days after the date of the order appealed against. I accept his views as no contrary views were submitted by the applicant.

³ *Tobias Haupindi and Magistrate Helvi Shilemba and Others* Case NO: 7 /2016; delivered on 14 July 2017; at para 33.

⁴ *Supra*.

[6] In his written heads of argument Mr Moyo also raised points in *limine* asking the court to strike the application from the roll due to failure of the applicant to follow the prescriptions of the law and that the notice seeking leave to appeal against the ruling in the application which sought my recusal from the matter as the presiding judge, is a nullity without force and effect. I agree with him and is of the view that the points in *limine* raised are correct and of considerable force and effect. The application falls short of legal requirements laid down in case laws cited above and the provisions of rule 115(2) in that the application does not contain proper grounds for leave to appeal and averments that it enjoys reasonable prospects of success on appeal for the Supreme Court to come to a different conclusion than reached at by this court.

[7] In that regard, I come to the conclusion that there is nothing before court to adjudicate on and as such, the points in *limine* raised are upheld.

[8] In the result, I make the following order:

The application for leave to appeal is hereby struck from the roll.

E P UNENGU
Acting Judge

APPEARANCES:**STATE:**

E Moyo

Office of the Prosecutor-General, Windhoek

ACCUSED:

M Siyomunji

Of Siyomunji Law chambers, Windhoek