REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Practice Directive 61

<table>
<tr><td rowspan="3">

Case Title:
Esja Holdings (Pty) Ltd — 1st Applicant
Mermaria Seafood Namibia (Pty) Ltd — 2nd Applicant
Saga Seafood (Pty) Ltd — 3rd Applicant
Heinaste Investment Namibia (Pty) Ltd — 4th Applicant
Saga Investment (Pty) Ltd — 5th Applicant
Esja Investment (Pty) Ltd — 6th Applicant

and

The Prosecutor-General — 1st Respondent
Ricardo Jorge Gustavo — 2nd Respondent

Tamson Tangeni Hatuikulipi — 3rd Respondent

James Nependa Hatuikulipi — 4th Respondent

Sackeus Edwards Twelityaamena
Shanghala — 5th Respondent

Bernard Martin Esau — 6th Respondent
Pius Natangwe Mwatelulo — 7th Respondent
Namgomar Pesca (Namibia) (Pty) Ltd — 8th Respondent
Erongo Clearing and Forwarding CC — 9th Respondent
JTH Trading CC — 10th Respondent
Greyguard Investment CC — 11th Respondent

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Case No:
HC-MD-CIV-MOT-
POCA-2020/00429

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Division of Court:
Main Division

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Heard on:
31 August 2022

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Otuafika Logistics CC — 12th Respondent Otuafika Investment CC — 13th Respondent Fitty Entertainment CC — 14th Respondent Trustees of Cambarada Trust — 15th Respondent Olea Investment Number Nine CC — 16th Respondent Trustees of Omholo Trust — 17th Respondent Ndapandula Johanna Hatuikulipi — 18th Respondent Swamma Esau — 19th Respondent Al Investment No Five CC — 20th Respondent Oholo Trading CC — 21st Respondent Gwaaniilonga Investment (Pty) Ltd — 22nd Respondent	
Heard before: Honourable Justice Sibeya, Judge	**Delivered:** 22 September 2022

Neutral citation: *Prosecutor-General v Gustavo & Others* (HC-MD-CIV-MOT-POCA-2020/00429) [2022] NAHCMD 497 (22 September 2022)

Order:

1. The first to the sixth applicants' application for leave to appeal to the Supreme Court against the order and ruling of this court for the dismissal of the application to refer the matter to oral evidence and for the applicants to be granted leave to cross-examine the Prosecutor-General, is dismissed

2. The first to the sixth applicants' are ordered to pay the Prosecutor-General's costs for opposing the application for leave to appeal, jointly and severally, the one paying the other to be absolved, subject to rule 32 (11).

3. The matter is postponed to 30 and 31 January 2023 at 09:00 for the hearing of the application for a restraint order and the rule *nisi* return date hearing.

Reasons for order:

SIBEYA, J:

Introduction

[1] This court is seized with an application for leave to appeal where the first to the sixth applicants seek leave to appeal to the Supreme Court against part of the ruling and order handed down on 30 March 2022 with reasons delivered on 04 April 2022. The order and ruling sought to be appealed against is the dismissal with costs of the application for referral to oral evidence in terms of Rule 67, and for leave to be granted to the first to sixth respondents to cross-examine the Prosecutor-General. The application for leave to appeal is opposed. The parties herein are referred to as cited in the main ruling sought to be appealed against.

[2] For the purpose of this ruling, the first to the sixth applicants shall be referred to as the applicants, while the Prosecutor-General shall be referred to as the PG.

[3] In the main application, the applicants sought leave to refer to oral evidence and cross-examine the PG and a witness, Mr Johannes Stefansson on issues set out in the main ruling. The applicants further sought leave to argue *in limine* that the application against them be dismissed. In the ruling, the applicants' application was dismissed with costs. In the present matter, the applicants seek leave to appeal the part of the ruling that dismissed the application to refer to oral evidence in order to cross-examine the PG.

[4] The applicants set out the relief sought in this application for leave to appeal against the ruling where the following relief was dismissed:

'1. Leave is hereby granted that the application is referred to oral evidence in terms of Rule 67, and for that purpose the 17th to 22nd defendant is hereby granted leave to cross examine Martha Olivia Imalwa in her capacity as the Prosecutor-General … in terms of Rule 67 and the provisions of the POCA Act, on the following issues:

1.1 whether the Prosecutor General has shown that 17th to 22nd defendants "is to be charged" in criminal proceedings already instituted by the Prosecutor General against the 1st to 16th defendants and the 1st to 5th respondents in case numbers CC-6-2021 and CC-7-2021, and that 17th to 22nd defendants shall be so charged together with the 1st to 16 defendants and the 1st to 5th respondents in the same criminal trial.

1.2 whether the Prosecutor General has shown that the 17th to 22nd defendants "is to be charged" in the criminal proceedings referred to in paragraph 1.1 above, in circumstances where the Prosecutor General will so charge the 17th - 22nd defendants timeously – or at all – by extraditing the 17th - 22nd

defendants' foreign directors referred to in the Prosecutor General's founding affidavit, Ingvar Juliusson, Egill Arnason and Adelsteinn Helgason, timeously or at all.

1.3 whether the Prosecutor General has shown that Mr Johannes Stefansson will be a witness at the criminal trial as referred to in paragraph 1.1 and 1.2 above.'

[5] The applicants do not seek leave to appeal the ruling on the dismissal of the application to refer to oral evidence and leave to cross-examine Mr Johannes Stefansson. The applicants further do not seek leave to appeal against the dismissal of their application to argue *in limine* that the application brought against them be dismissed.

[6] The applicants seek leave to appeal on the following summarized grounds:

(a) That the court did not exercise a discretion as required in terms of rule 67 of the Rules of Court, and if it did such discretion was vitiated by irregularities;

(b) The court dealt with the application as if a rule *nisi* was already granted against the applicants whereas no such rule *nisi* was granted, that the alleged factual disputes can be resolved on the papers and that the relief will be sought by the PG at the hearing is interim in nature which secures the interim status quo and the applicants will have sufficient opportunity to cross-examine the witnesses during the trial;

(c) That the court erred when it applied the interim relief test when it was alleged that the PG was not *bona fide* when she stated that there is sufficient evidence to conclude that the applicants are to be charged in the upcoming trial together with other respondents while she is still to locate the whereabouts of the foreign directors and, therefore, the court erred when it found the explanation by the PG to be reasonable;

(d) That the PG will never be a witness at the trial and therefore the applicants will not have an opportunity to test the facts relied upon by the PG or her *bona fides* for submitting that the applicants are to be charged and therefore impacting the fairness of the disputed issues;

(e) That the court erred when it held against the applicants that they do not disclose their whereabouts and intend to oppose their extradition proceedings;

(f) That the court erred in finding that the allegation by the applicants that Mr Stefansson will not testify is speculative while this is indicative of an existence of a dispute of fact;

(g) The court erred by adopting the 'on the face of it' test when the PG did not disclose all the relevant facts.

[7] Mr Heathcote appeared for the applicants while Mr Trengove appeared for the PG.

Appealability

[8] The PG raised a point of law that the ruling of this court which dismissed the application for leave to refer to oral evidence against which leave to appeal is sought is not appealable.

[9] Mr. Trengove, ably reminded the court of the following requirements to be considered in determining whether or not a judgment or order is appealable:

(a) That it must be final in effect and not susceptible to alteration by the court of first instance;

(b) That it must be definitive of the rights of parties;

(c) That it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.[1]

[10] That an application for leave to appeal under s 18 of the High Court Act 16 of 1999 involves a two stage inquiry, namely:

(a) Whether the ruling against which the applicants seek leave to appeal, is appealable at all;

(b) If it is appealable, and it is an interlocutory judgment or order, then leave to appeal

[1] *Knowds NO v Josea* 2010 (2) NR 754 (SC) para 10; *Shetu Trading c Chair, Tender Board of Namibia* 2012 (1) NR 162 (SC) paras 18-19; *Di Savino v Nedbank Namibia* 2017 (3) NR 880 (SC) para 51; *Elifas v Asino* 2020 (4) NR 1030 (SC) paras 13-14; *Minister of Finance v Hollard Insurance Company of Namibia Limited* 2021 (2) NR 524 (SC) para 70. *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A).

must first be obtained.

[11] Mr Trengove strenuously submitted that the ruling of the court to dismiss the application for a referral to oral evidence, does not meet any of the aforesaid requirements for a judgment or order to be appealable. He further submitted that the said ruling is not final in effect and is subject to reconsideration at any time if circumstances change. It is not definitive of the rights of the parties as the proceedings are at a stage moving towards an application for a restraint order which order, if granted, will `be of temporal effect pending the final determination of the parties' rights and obligations at the end of the trial. The ruling of the court further does not dispose of any part of the relief sought in the main proceedings for a confiscation order, let alone any of the relief sought in this restraint application.

[12] Mr Trengove drove the non-appealability point home when he submitted that the concerned ruling is a ruling not a judgment or an order. It is a ruling which leaves room for a reconsideration when there is a change in circumstances.

[13] Mr Heathcote, countered with submissions of his own. He submitted with mighty, that it is trite that an order where the court refers certain issues for oral evidence is not appealable as opposed to the refusal to refer for oral evidence.

[14] Mr Heathcote further submitted that the fact that Article 12(1)*(d)* which guarantees a right to cross-examination in criminal cases also finds application in civil motion proceedings. The right to cross-examination must be available in order to secure a fair trial and this right may not be withheld by discretion, so he submitted. He relied on the following passage from a judgment of the Supreme Court of *S v Scholtz,*[2] where it was stated that:

'the right to a fair trial conferred by that provision is broader than the list of specific rights set out … it embraces a concept of substantial fairness which is not to be equated with what - might have passed muster in criminal courts before the constitution came into force,

[15] It was submitted further by Mr Heathcote, that unless the state secures the foreign directors' presence at the criminal trial, no confiscation order may ever be made, hence the need to interrogate the PG, if there is evidence that the applicants will be charged through their foreign directors while she has to date not established their whereabouts.

[2] *S v Scholtz* 1998 NR 207 (SC) at 218-219.

[16] In reference to the principles set out in order to determine if a judgment or order is appealable or not, Mr Heathcote submitted that our courts have adopted the requirements set out in *Zweni (supra)*. He submitted that our courts have, however, went further to state that the principles in *Zweni* are not cast in stone but useful guidelines. Mr Heathcote concluded his submissions with reference to a judgment of the Supreme Court in *Herman Konrad v Shanika Ndapanda*[3] for the contention that a referral to oral evidence is not an ordinary interlocutory application but one which aims to facilitate the parties' substantive right to a fair trial and therefore the refusal of such right is appealable.

[17] The starting point to determine the appealability or not of the ruling of this court of the dismissal of the application for referral to oral evidence is s 18(3) of the High Court Act,[4] which provides that:

'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.'

[18] While considering s 18(3) of the High Court Act, Shivute CJ in *Di Savino v Nedbank Namibia Ltd (supra)*[5] remarked as follows at para 51:

'…The spirit of s 18(3) is that before a party can pursue an appeal against 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.'

[19] The Supreme Court in *Shetu Trading CC v Tender Board of Namibia (supra)* restated the following requirements to be satisfied for a judgment or order to be appealable:

(a) It must be final in effect and not susceptible to alteration by the court of first

[3] (Case No. SA 21/2017), delivered on 28 February 2019 at para 16 where it was stated that: 'The exercise of the court's discretion in Rule 67 should be read with the overriding objective of the court rules to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable. By dismissing the case the court *a quo* left the issue as to 'putative marriage' and the proprietary rights of the parties unresolved despite the disputes being alive in the court. In this instance the court *a quo* failed to resolve the real issues in dispute justly, efficiently and cost effectively as far as practicable.'

[4] High Court Act 16 of 1990.

[5] *Di Savino v Nedbank Namibia Ltd* 2017 (3) NR 880 (SC) para 51.

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.

[20] In *Elifas and Others v Asino and Others,*[6] the Supreme Court per Damaseb DCJ found that the decision of the High Court to direct a deponent to an affidavit in pending motion proceedings to give oral evidence in terms of rule 67(1)(a) was not an appealable judgment or order. The quoted with approval the following passage from *SARFU*[7] to the effect that a referral to oral evidence is just a ruling that is not appealable:

'It is a well-established principle in our law that a referral to evidence constitutes a ruling, not an order, by a Judge. As such, it is open to the court to withdraw that ruling and order that it is unnecessary to hear the oral evidence. We have held that the referral to evidence was clearly wrong and constituted a misdirection by the Judge. The appellants were, therefore, entitled to make an interlocutory application to the Judge seeking a reconsideration of the referral to evidence.'

[21] Whilst there is an abundance of authorities providing that rulings of referral to oral evidence are not appealable no clear authority for the proposition advanced by the applicants that a refusal to refer for oral evidence is appealable, brought to the court's attention, neither could I lay my hands on any on my own.

[22] I hold that it is beyond question that the ruling for refusal to refer for oral evidence is not final and is open to alteration by this Court should circumstances change. I further hold that the said ruling miles away from being definitive of the rights of the parties. I say so in light of the fact that the current proceedings are at a stage where they are in motion towards a hearing of the restraint application, which in itself interim in nature. The ruling complained of, therefore, is of no moment on the rights of the parties in the main application for a confiscation order or at the very least an application for a restraint order. The ruling, furthermore, does not dispose any portion of the relief sought in the main application.

[23] The Supreme Court endorsed the above three requirements to be met in order to determine whether a judgment or order is appealable. Such requirements have been referred to

[6] *Elifas and others v Asino and Others* 2020 (4) NR 1030 (SC) para 15-17.
[7] *President of the RSA v South African Rugby Football Association* 2000 (1) SA (CC) para 248.

as not been cast in stone but as guidelines. Guidelines, as they may be, I find them to be useful guidelines in the determination of the appealability of a judgment or order, and they are guidelines that I adopt and implement without a measure of doubt.

[24] I further find that the remarks made by the Supreme Court in *Shaanika (supra)* are distinguishable from the present matter. The remarks were made at the conclusion of the matter and nowhere does *Shanika* encourage mid-stream appeal of refusal to refer for oral evidence.

[25] I find that, in the premises, that a ruling on dismissing an application for referral for oral evidence is not appealable mid-stream for it is wanting on the above-mentioned three requirements or guidelines for appealability. I could refuse the leave to appeal on this basis but in the event that I am wrong, I proceed to address the merits of the leave sought.

The application for leave to appeal

[26] The approach to an application for leave to appeal was set out in *Shilongo v Vector Logistics*[8] where the remarked as follows:

> '[4] It was observed in *S v Nowaseb* that –
> "[2] (Thus) an application for leave to appeal should not be granted if it appears to the Judge that there is no reasonable prospect of success. And it has been said that in the exercise of his or her power, the trial Judge (or, as in the present case, the appellate Judge) must disabuse his or her mind of the fact that he or she has not reasonable doubt as to the guilt of the accused."'

[27] The test applicable to an application for leave to appeal is not that another court will come to a different conclusion, but rather that there are reasonable prospects of success on appeal and this much, the parties were *ad idem*.

Analysis of the grounds

[28] The parties were in agreement, correctly so, that *Plascon Evans* should not have been referred to in the ruling on the application for referral for oral evidence because no interim restraint order was granted against the applicants before. A rule *nisi* was not issued in this matter against the applicants. The parties were, however, still in agreement, and still on the correct side, that the referral to *Plascon Evans* is of no effect on the present application for

[8] *Shilongo v Vector Logistics* (LCA 27/2021) [2014] NALCMD 33 (7 August 2014).

leave to appeal.

[29] It emphasised, as stated in the ruling for the application for referral for oral evidence, that an application for a restraint order is interim in nature. This position is accepted by the applicants who argue that they may endure a long time before the criminal proceedings are finalised.

[30] It is settled law that a dispute of fact will not be fatal to the application to grant a restraint order because all that the applicant must show is a *prima facie* right even if it is open to some doubt.[9] Only if serious doubt arises will the restraint order not be granted. Given the test applicable at this stage of the proceedings for an interim interdict, the time is not ripe to resolve factual disputes.

[31] The main qualm of the applicants is that the whereabouts of the foreign directors is unknown to the PG, they will not be charged, and she will not be able to extradite them to Namibia to join the pending criminal prosecution. The PG insists that she will extradite the foreign directors, charge the applicants and if she cannot extradite them in time to join the pending criminal prosecution, she will prosecute them separately. I found the explanation of the PG to be reasonable, especially in view of the PG's response that no formal extradition request was sent to Iceland and further that the foreign directors may be anywhere outside Iceland where Iceland cannot refuse the extradition request.

[32] The applicants claims that the PG is not *bona fide* when she stated that the applicants are to be charged. They further complain that they are refused an opportunity to cross-examine the PG as the PG will never be a witness in the criminal trial and this goes against resolving the dispute in a fair manner as envisaged by Article 12 of the Constitution. The PG disputes the assertion that she is not *bona fide*.

[33] I find that the applicants miss the point. What is material in the pending application for a restraint order brought by the PG is whether she will succeed in convincing the court that the applicants are to be charged or not. At the criminal trial, if the PG fails to extradite the directors of the applicants and thus fails to charge the applicants, there can be no conviction of the applicants and ultimately no confiscation order against the applicants. This may render the applicants' call to cross-examine the PG unnecessary and at the same cause no injustice to the

[9] *Setlogelo v Setlogelo* 1914 AD 221; *Webster v Mitchell* 1948 (1) SA 1186 (W); *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) para 41.

applicants.

[34] The applicants laid great store on the court's finding that what is required is a determination whether it appears on the face of it from the application, that that the person will be charged with an offence and that it appears to the court that there are reasonable grounds to believe that a confiscation order may be made against such person.

[35] It is apparent from the wording of s 25(2) and 24(1)*(b)* that the PG is only required to satisfy the Court that it appears on the face of it from the application that a person is to be charged with an offence and that there are reasonable grounds to believe that a confiscation order may be made against such person. The hurdle that the PG is required to meet is light as per the wisdom of the legislature. The purpose, of which is to allow, applications for restraint orders not to be bogged down in disputes of fact, but to rather preserve the assets temporary pending the outcome of the criminal trial and related confiscation application.

[36] The applicants further complain that this court erred when it found that the allegation that Mr Johannes Stefansson will not testify constitutes speculation when the PG did not file a replying affidavit from Mr Stefansson where he confirms that he will testify. The PG disputed the said allegations and stated that Mr Stefansson who is listed as a witness will testify. Nothing more turns on this allegation and I reiterate that it amounts to speculation.

<u>Conclusion</u>

[37] In view of the findings stated above, I am of the opinion that the applicants have failed to establish reasonable prospects of success on appeal and their application for leave to appeal falls to be dismissed.

[38] It is trite in our law that costs follow the event and I have not been persuaded to depart from this principle. The PG has succeeded to oppose the application for leave to appeal and deserves to be awarded costs. I, however, do not find justification to award costs beyond the cap provided for in rule 32 (11) in view of the fact that these are interlocutory proceedings.

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

1. The first to the sixth applicants' application for leave to appeal to the Supreme Court

against the order and ruling of this court for the dismissal of the application to refer the matter to oral evidence and for the applicants' to be granted leave to cross-examine the Prosecutor-General, is dismissed.

2. The first to the sixth applicants are ordered to pay the Prosecutor-General's costs for opposing the application for leave to appeal, jointly and severally, the one paying the other to be absolved, subject to rule 32 (11).

3. The matter is postponed to 30 and 31 January 2023 at 09:00 for the hearing of the application for a restraint order and the rule *nisi* return date hearing.

Judge's signature:	**Note to the parties:**
Sibeya Judge	Not applicable
Counsel:	
1st to 6th Applicants:	**The Prosecutor-General**:
Mr R Heathcote, SC assisted by Mr E Nekwaya Joos Agenbach Legal Practitioners	Mr W Trengove, SC assisted by Mr S Akweenda Office of the Government Attorney