



REPORTABLE

CASE NO.: SA 41/2017
CASE NO.: SA 67/2017

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

**HERBERT WOLFGANG HENLE t/a NAMIB GAME
SERVICES**

Appellant

and

**WILDLIFE ASSIGNMENT INTERNATIONAL
(PTY) LTD**

Respondent

Coram: MAINGA JA, HOFF JA and FRANK AJA

Heard: 8 March 2018

Delivered: 27 March 2018

Summary: This is an appeal brought by Henle against the judgment of the court *a quo* dismissing a recusal application with costs.

The respondent instituted an action against the appellant in the court *a quo* claiming the following; (1) payment of R641 595 and US\$142 988 for the export of 9 elephants to Mexico; and (2) payment of US\$340 624 for an aborted attempt to

export game to Saudi Arabia; (3) *mora* interest and costs on the amounts. Appellant also had a conditional counterclaim premised on the court *a quo* upholding respondent's second claim. Respondent's second claim was withdrawn at the commencement of the trial and as a consequence appellant's counterclaim fell away. Appellant admitted to the first claim, but pleaded set off against a payment allegedly owed to him flowing from a transaction involving buffaloes. After the close of pleadings and when the trial date was set, appellant filed a tender in terms of rule 64 of the High Court rules. He tendered the amounts of respondent's first claim, 'excluding interest and costs'. Respondent closed its case and proceeded to seek an order for costs and interest (without leading any evidence). Appellant at this point made an application for absolution from the instance with costs. The court *a quo* dismissed this application with costs. The matter was again set down for continuation of trial to start on 8 May 2017. On 19 April 2017, appellant brought an application for the judge *a quo* to recuse himself because according to appellant, the judge had prejudged the issue of the interest payable in the absolution judgment without affording appellant the opportunity to present evidence as to why he should not be ordered to pay *mora* interest. This recusal application was dismissed with costs. Appellant noted an appeal against the recusal application.

This notice was filed in this court and the court *a quo* as required by rule 7 of this court (the previous rule 5 of this court). Respondent insisted that the matter continue in the court *a quo* because appellant's filing of the Notice of Appeal was invalid as appellant did not obtain leave to appeal from the court *a quo*. An application to stay the proceedings was brought by appellant in the court *a quo*

which the court *a quo* granted with a cost order against the respondent. Respondent counter-appeals this cost order with leave of the court.

Arguments on appeal revolved around the issues of leave to appeal, counter-appeal, recusal and the question of costs.

Leave to appeal – the issue between the parties was not whether the judgment dismissing the recusal application was appealable, but whether leave to appeal was required or whether appellant could appeal as of right. The test to decide whether leave to appeal must be obtained is contained in *Di Savino* and other supporting decisions and requires a two-step consideration of the case in question. The first step is to determine whether a judgment or order is appealable. As it was common cause that the judgment dismissing the recusal application was appealable, the first step needed no further consideration. The second step is to determine whether the judgment or order that is sought to be appealed against is interlocutory or final. If interlocutory, leave needs to be obtained, and, if final an appeal lies as of right. The general definition of ‘interlocutory’ contained in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* is still relevant in our jurisdiction. Under this premise, the refusal of the recusal application is an interlocutory order. It did not dispose of any portion of the relief sought by appellant, it merely confirmed the competency of the judge *a quo* to proceed with the matter.

Held that, the order refusing a recusal application is interlocutory and appellant had to obtain leave to appeal from the court *a quo*, consequentially, the appeal stands to be struck from the roll with costs.

Counter-appeal – court *a quo* had to consider whether a valid appeal was noted in the absence of obtaining leave to appeal. This was also not the only consideration relevant to the stay application. Other considerations included the effect of a piecemeal adjudication matter, the prejudice to the respective parties and the prospects of success on appeal.

Held that, the considerations relevant to a stay including the fact that there were no prospects of success on appeal did not justify the stay order.

Held that, the stay order and the stay application should have been dismissed with costs. Counter appeal upheld.

APPEAL JUDGMENT

FRANK AJA (MAINGA JA and HOFF JA concurring):

Introduction

[1] For the sake of convenience the parties to this appeal will be referred to as follows: the appellant as Henle and the respondent as Wildlife.

[2] Wildlife instituted an action against Henle in the High Court which consisted of two claims. The first claim involved the export of 9 elephants to Mexico and in respect whereof Wildlife claimed R641 595 and US\$142 988. The second claim involved an aborted attempt to export game to Saudi Arabia and in respect

whereof Wildlife claimed US\$340 624. The usual orders as to *mora* interest and costs formed part of the claims.

[3] As far as the first claim was concerned, Henle admitted it, but pleaded set off against a payment allegedly owing to him flowing from a transaction involving buffaloes. As far as the second claim was concerned, Henle maintained that the transaction to export the game to Saudi Arabia was terminated on grounds irrelevant to his obligations and hence denied any liability.

[4] Apart from the plea Henle also filed a conditional counterclaim. This claim was premised on the court *a quo* upholding the second claim of Wildlife.

[5] The particulars of claim states that a reconciliation by Dr van Niekerk was drafted in October 2012 and that 'end of October/November 2012 the parties orally agreed to the correctness of the statement'. In the plea Henle admits he 'was indebted to plaintiff in the amounts claimed' in respect of the first claim. In his affidavit opposing summary judgment he also admitted his indebtedness in respect of the first claim and stated 'I also agree with the reconciliation statement annexed to the particulars of claim as annexure "A"'. As already mentioned he pleaded set off in respect of an indebtedness allegedly owed to him by Wildlife.

[6] In the 'Parties' Joint Proposed Pre-Trial Order' the following is stated under the heading 'relevant facts not in dispute – statement of agreed facts':

'4. Defendant's (Henle's) indebtedness to plaintiff (Wildlife)

.....

10. That during October 2012 Dr C van Niekerk drafted a reconciliation statement as per Annexure "A" to the Particulars of Claim, to which both defendant and plaintiff agreed.

11. That an amount of N\$460 988 as well as an amount of US\$142 988 were due and payable by defendant to plaintiff as at October 2012.'

[7] After the close of pleadings and pursuant to the case management process, the parties filed their witness statements and the trial was scheduled for 4 - 18 September 2015. On 8 September 2015 Henle filed a tender in terms of rule 64 of the High Court rules. In this tender, he tendered the amounts of Wildlife's first claim 'excluding interest and costs'. The notice continues to state (presumably pursuant to rule 64(d), that:

'Defendant does not tender *morae* interest and costs as plaintiff's claim of payment was disclosed for the first time on 20 August 2015 when the witness statement of MJC Krog was filed on behalf of plaintiff.'

[8] It seems that the payment to Henle referred to in the witness statement of Mr Krog disposed of his defence of set off, ie. the amount in respect of the transaction involving the buffalo which he maintained Wildlife had not paid and which he, in his plea wanted to set off against the first claim of Wildlife. When the matter was called at the trial, counsel for Wildlife informed the court that the second claim would not be persisted with. This, by necessary implication meant that Henle's counterclaim also fell by the wayside as it was conditional and

premised on Wildlife's second claim being successful. Counsel for Wildlife thus sought an order for costs and interest, and indicated that the orders for interest and costs would be sought without any evidence being presented and closed Wildlife's case. Counsel for Henle thereupon moved for absolution in respect of the claim for interest. From the judgment of the court *a quo* it is not clear when exactly the rule 64 tender was disclosed to the court, but it is clear it was in the court's possession when it considered the issue of interest.

[9] The court *a quo* in a short judgment referred to the fact that Wildlife sought *mora* interest and not interest based on the terms of an agreement, that Henle admitted in the Pre-trial Order that the amounts claimed were due and payable as at October 2012' and hence that the *mora* interest accrued *ex lege* from that date. The application for absolution was dismissed with costs and the matter was referred for a status hearing on 1 December 2016.

[10] For the purpose of the status hearing scheduled for 1 December 2016, the parties filed a 'Status Report' indicating among others, the following:

'With defendant's application for absolution from the instance having been dismissed regarding the interest, the defendant has decided to lead evidence regarding the interest and close his case.'

[11] The trial was to continue on 8 May 2017. However on 19 April 2017 Henle brought an application for the judge *a quo* to recuse himself. In the affidavit in support of this application, the legal practitioner for Henle explains that, had Henle

been aware of the fact that the indebtedness he sought to set off against Wildlife's first claim had indeed been paid as Henle discovered once the witness statement of Mr Krog to this effect was verified, Henle would have paid the amounts claimed in the first claim of Wildlife earlier. The amount claimed by Henle was according to his lawyer 'paid into an account not regularly checked' by Henle. On this basis it is maintained that Henle was entitled to present evidence as to why he should not be ordered to pay *mora* interest. It is then alleged that, because the judge *a quo* stated that as Henle admitted his indebtedness from October 2012 'I am of the view that the plaintiff is entitled to *mora* interest as from that date', that the judge indicated that the hearing of further evidence would not change his mind as this finding, according to the lawyers of Henle '. . . does not allow for a different finding at the end of the trial. It is also neither a contingent nor a provisional finding. It squarely placed the issue relating to the defendant's liability to *mora* interest as from October 2012 beyond any dispute'. According to his lawyer the judge prejudged the issue and for the trial to continue before the judge would amount to 'a charade devoid of any hope to ever achieve a finding favourable to defendant'.

[12] The recusal application was heard on the day reserved for the continuation of the trial (8 May 2015) and was dismissed with costs. Henle noted an appeal against this judgment. His notice was filed in this court and the court *a quo* as required by rule 7 of this court (the previous rule 5 of this court).

[13] The lawyers of Wildlife took the position that the filing of a Notice of Appeal was invalid as Henle could not do so without seeking and obtaining leave from the court *a quo*. Wildlife thus insisted that the matter proceed. This stance by Wildlife

led to an application by Henle to stay the proceedings pending the finalisation of the appeal noted by him. The court *a quo*'s approach was that there was an appeal pending in the Supreme Court and the Notice of Appeal had not been struck down. Further that the High Court could not adjudicate whether an appeal to the Supreme Court was properly noted as this was a matter for the Supreme Court to decide. The stay was accordingly granted and Wildlife was ordered to pay the costs of the application. Wildlife counter-appeals this costs order with leave of the court *a quo*.

Appeal as of right or with leave only

[14] The parties are ad idem that the judgment dismissing the recusal application is appealable. That this is so, is borne out by a recent case with regard to the refusal of a recusal application in this court.¹ The real issue between the parties is whether leave to appeal had to be obtained or whether Henle could appeal as of right.

[15] The test to decide whether leave must be obtained to appeal or not has been spelt out by this court in *Di Savino v Nedbank Namibia Ltd*.² As I read this judgment the first step in considering an appeal is to determine whether a judgment or order is appealable at all. If it is not because it amounts to nothing more than a ruling, that is the end of the matter. As it is common cause, and in my view correctly so, that the judgment dismissing the recusal application is

¹ *S v Lameck* 2017 (3) NR 647 (SC).

² 2017(3) NR 880 (SC).

appealable, the first step needs no further consideration. The second step is to determine whether the judgment or order that is sought to be appealed against is interlocutory or final. If interlocutory leave needs to be obtained, and, if final an appeal lies as of right.

[16] In *Di Savino* this court applied the test articulated in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*³ to determine whether the matter before it required leave to appeal. This test determined that:

‘ . . . the term interlocutory refers to all orders pronounced by the court, upon matters incidental to the main dispute, preparatory to or during the progress of the litigation.’

[17] In *Wirtz v Orford and another*⁴ the then Chief Justice in an appeal against the dismissal of an interim interdict stated that:

‘In my opinion the order of the court a quo was not decisive of any of the rights of the parties, nor did it dispose of a substantial, or, for that matter, any portion of the leave claimed by the applicant in the main application. The relief claimed by the appellant in the interim order was procedural in nature, which, by itself, is a strong indication that the relief claimed was interlocutory.’

[18] From *Di Savino* it is apparent that the distinction between interlocutory orders having a final effect and mere or simple interlocutory orders are not of relevance in this country. However, the general definition of ‘interlocutory’ referred

³ 1977 (3) SA 534 (A).

⁴ 2005 NR 175 (SC) at 191B-C.

to in *South Cape Corporation (Pty) Ltd* is still of relevance and can be stated as follows:

‘In a wide and general sense the term interlocutory refers to all orders pronounced by the court, upon matters incidental to the main dispute, preparatory, or during the progress of the litigation.’⁵

[19] It goes without saying that on the above approach the refusal of the recusal application was an interlocutory order. It did not dispose of any portion of the relief sought by Henle. It simply confirmed the competency of the judge *a quo* to proceed with the matter. It was not dispositive of any of the issues relevant to the disputes between the parties which had to be adjudicated.

[20] In *Aussenkehr Farms Pty Ltd v Ministry of Mines and Energy*⁶ this court held that for an order to be appealable, it had to dispose ‘of at least a substantial portion of the relief claimed in the main proceedings’ and referred in this regard to the South African case *Zweni v Ministry of Law and Order*.⁷

[21] In terms of the test articulated in *Zweni*⁸ no order not dealing finally with merits or a substantial portion thereof or is definitive of the rights of the parties is appealable. That this was not the complete and only test was recognised in *Knouwds NO (in his capacity as provisional liquidator of Avid Investment Corporation (Pty) Ltd v Josea and another*⁹ where Strydom CJ in an *obiter dictum* stated as follows:

⁵ *Di Savino* para 31.

⁶ 2005 NR 21 (SC) at 29B-D.

⁷ 1993 (1) SA 523 (A) at 536A-C.

⁸ *Aussenkehr* at 29C-D.

⁹ 2010 (2) NR 759 (SC) para [12].

'In the matter of *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) the court recognised that there were instances which did not fit the mould set out in *Zweni's* case but where the effect of the court's finding might be final and definitive of the rights of the parties. These instances, which are of a final bearing on the rights of the parties, are such that they are not interlocutory orders and are appealable as of right. However, for the same reasons set out above, the order of the court *a quo* was in my opinion not final and therefore not appealable in this instance.'

[22] In *Di Savino*¹⁰ reference is made to the above extract from the *Knouwds* case as follows:

'At para 12 of the *Knouwds* judgment, with reference to the decision of the South African Appellate Division in *Moch*¹¹, Strydom AJA observed that situations may arise where the effect of a court's order may be such that it has a final bearing on the rights of the parties. In such an instance, the order is not interlocutory and is appealable as of right.'

[23] In the *Moch* case, which dealt with the refusal of a recusal application, leave to appeal was sought from the then Appellate Division of South Africa as the court *a quo* refused leave to appeal. Therefore no question of a right to appeal arose. The issue was whether an order refusing a recusal application was appealable at all. This is clear from the first paragraph of the judgment of Hefer JA which reads as follows:

¹⁰ Para [41].

¹¹ *Moch* at 6I-J.

'This matter came before us as an opposed application for leave to appeal . . . The main issue is the appealability of an order dismissing an application to an Acting Judge of the Witwatersrand Local Division to recuse himself from the proceedings . . .'¹²

[24] The respondent in the *Moch* case submitted that the order was not appealable as it did not meet the criteria stipulated in the *Zweni* case. It is in this context that Hefer JA mentioned it was 'not merely the form of the order' that had to be considered but, 'also, and predominantly, its effect'. It is when considering the potential effect of the judge continuing with the matter where he should have recused himself, that a decision is made that a refusal to recuse constitutes an appealable decision.¹³ No decision was made that the appellant had a right to appeal as suggested in *Knouws* and *Di Savino*. In fact, Hefer JA is careful to point out that, the old authority he referred to in respect of the position where a plea to jurisdiction was raised, was delivered in the context where a distinction was still drawn between 'simple interlocutory orders and interlocutory orders having a final and definitive effect' and that the law made express provisions for appeals relating to the court's jurisdiction.¹⁴ The obiter references in both *Knouws* and *Di Savino* referred to above by this court to the effect that *Moch* established a principle that certain matters (and especially the refusal of a recusal application) were appealable as of right was not correct. What *Moch* did do was to establish the appealability of such order but not that it was appealable as of right.

[25] Henle's counsel relies on extracts from *Moch* where reference is made to the fact that the question 'goes to the root of the matter' as it affects the

¹² *Moch* at 6I-J.

¹³ *Moch* at 10B-C and 11B-C.

¹⁴ *Moch* at 11A-B.

competency of the forum and hence, it must be 'regarded as radical or definitive and not merely interlocutory'. He submits that because of the effects where a refusal to recuse is incorrectly made, which vitiates the proceedings, such order cannot be described as 'simply a procedural or interlocutory order'. Firstly, the decision referred to which used the phrase 'regarded as radical or definitive and not merely interlocutory' did so in the context described by Hefer JA above. It was to determine whether the decision was appealable or not and had nothing to do with whether leave was necessary for an appeal in the current context and statutory set up. Secondly, whereas the effect of the judgment may determine its appealability as per *Moch* and *Knouws* it has no bearing on whether it is interlocutory in the context of whether leave to appeal needs to be obtained or not.

[26] It follows from what is stated above that Henle had to obtain leave to appeal from the court *a quo* and that the appeal stands to be struck from the roll.

Counter appeal

[27] Wildlife sought leave to appeal the costs order granted against it when the court *a quo* determined the stay application in favour of Henle. The uncompleted proceedings in the court *a quo* was stayed pending the finalisation of Henle's appeal and Wildlife who opposed the stay application was ordered to pay the costs of the application.

[28] The granting of the stay application (like the refusal of the application for absolution) fails the first test in respect of appealability set out in *Di Savino*. They

do not meet the requirement to be labelled judgments or orders in this context. They amount to rulings and are hence not appealable. Counsel for Wildlife probably realised this and hence the application to apply for leave to appeal against the costs order only which approach is expressly sanctioned by s 18(3) of the High Court Act¹⁵, and which was granted. It is clear counsel for Wildlife in this manner sought to revisit the judgment on the merits of the stay application as the 'Notice of Application for Leave to Appeal' expressly states:

'Whereas the cost order as a final order was granted consequent to the interlocutory ruling granting a stay, the costs order is appealed against by raising grounds of appeal against the ruling itself.'

[29] The grounds of appeal featuring in the said Notice seeking leave to appeal all raise criticisms against the judgment on the merits of the application. Thus, it is stated that the court *a quo* erred in not declaring whether an appeal to this court was properly brought and did not consider any of the other circumstances that normally features in such applications to find that there were exceptional circumstances justifying the stay.

[30] Based on South African case law¹⁶ both counsel accepted that the above approach was also warranted in this country. For the purpose of this appeal I deal with the matter on this basis. Both counsel in the heads of argument also dealt with the criticism of the judgment on the merits as stipulated in the notice seeking leave to appeal.

¹⁵ Act 16 of 1990.

¹⁶ *Pretoria Garison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 389 (A) at 863-864 and *De Vos v Cooper and Ferreira* 1999 (4) SA 1290 (SCA) at 1294, 1295 and 1301H-I.

[31] From the court *a quo*'s judgment it appears that it considered one aspect only, namely, whether it could determine whether the Notice of Appeal filed in this court was invalid. It determined that this was an issue for this court and granted the stay. This approach was flawed and constituted a misdirection as the court *a quo* misapprehended the nature of the discretion vested in it in this regard.

[32] The notice of appeal as per the old rule 5 of this court had to be filed in the High Court and this court. The High Court was thus the court to determine the validity of the notice filed in the High Court. This is especially so where the appeal noted in this court had not yet proceeded beyond the notice.¹⁷ Even if the court *a quo* was not willing to make a definitive finding on the question as to whether the appeal was properly noted without leave, it was a factor that had to be weighed up in the exercise of its discretion *albeit* not the only factor. To totally side-step the issue amounted to a misdirection.

[33] Without attempting to lay down exhaustive criteria as to what must be considered in cases like the present the following, at least, should have been considered by the court *a quo*. The stage in the proceedings in conjunction with the adverse consequences flowing from a piece meal adjudication of the matter.¹⁸ The prospects on appeal taking cognisance of the consequences (spelt out in *Moch*) if the appeal is to be upheld. Tied in with this is a consideration whether a grave injustice may arise if the matter is finalised prior to the hearing of an

¹⁷ *D + H (Pty) Ltd v Sinclair* 1971 (2) SA 157 (W).

¹⁸ *Shetu Trading CC v Chair, Tender Board of Namibia & others* 2012 (1) NR 168 (SC) para 20.

appeal.¹⁹ As already pointed out a consideration of the issue relating to whether a valid appeal was noted. Whether the stay sought was an abuse of process as it together with an appeal noted was simply a manner to delay the proceedings.²⁰

[34] As *Di Savino* had not yet seen the light of day when the court *a quo* dealt with the stay application it would have noted that there were contradictory decisions relating to whether the refusal of a recusal application was appealable immediately and as of right.²¹ The court *a quo* could then have dealt with the issue in a number of ways. It could have regarded the issues as neutral and not impacting on the discretion. It could have taken a view on the probabilities to favour one or the other approach and see where this leads to in respect of further delaying a final decision. If a stance was taken that leave was probably required then the intended appeal would serve no purpose but to lead to a delay in the finalisation of the matter.

[35] It was clear that Henle would only call one witness. This probably meant that the matter would be finalised within another two days. What prejudice Henle would suffer if he had to wait for the matter to be finalised and if aggrieved by the final judgment, took the matter on appeal (inclusive of the refusal application) had to be considered. This in the context of the undesirability of piecemeal appeals in general where this can be avoided. Factored into this consideration would be the effect if the appeal is upheld articulated in *Moch*. Here it must be borne in mind that no evidence had been led and to finalise the matter would only take another

¹⁹ *National Housing Enterprise v Beukes & others* 2015 (2) NR 577 (SC) para 20.

²⁰ *Kalpi v Hochobeb & another* 2014 (1) NR 90 (HC).

²¹ *Muller and Cloete v Lady Grey Divisional Council* 1929 EDL 307 and *Gabriel v Gamulike Nkosi* 1922 NLR 419.

two days. It is not as if a long trial accompanied by substantial costs was contemplated that would go wasted if the appeal succeeded.

[36] It appears to me that, unless Henle could show real prospects of success on the merits on appeal the other considerations militated against the granting of a stay.

[37] When it comes to the test in considering a recusal application, I do not intend to trawl through all the authorities quoted in the heads of argument in this regard. Suffice to refer to the test as set out in *Tobias Aupindi v Magistrate Helvi Shilemba and others*.²²

‘Test for recusal is actual bias or a reasonable apprehension of bias. The applicants’ case was based on an apprehension of bias. In this regard the test has been set out as follows:

“[19] First, the test is whether the reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge will not be impartial.

[20] Secondly, the test is an objective one. The requirement is described . . . as one of 'double reasonableness'. Not only must the person apprehending the bias be a reasonable person in the position of the applicant for recusal but the apprehension must also be reasonable. Moreover, apprehension

²² *Aupindi v Magistrate Shilemba* (SA 7-2016) [2017] NASC (14 July 2017) at page 18-19.

that the Judge may be biased is not enough. What is required is an apprehension, based on reasonable grounds, that the Judge will not be impartial.

[21] Thirdly, there is a built-in presumption that, particularly since Judges are bound by a solemn oath of office to administer justice without fear or favour, they will be impartial in adjudicating disputes. As a consequence, the applicant for recusal bears the onus of rebutting the weighty presumption of judicial impartiality. As was pointed out by Cameron AJ . . . the purpose of formulating the test as one of 'double-reasonableness' is to emphasise the weight of the burden resting on the appellant for recusal.

[22] Fourthly, what is required of a Judge is judicial impartiality and not complete neutrality. It is accepted that Judges are human and that they bring their life experiences to the Bench. They are not expected to divorce themselves from these experiences and to become judicial stereotypes. What Judges are required to be is impartial, that is, to approach the matter with a mind open to persuasion by the evidence and the submissions of counsel.”

The double reasonableness test has recently been confirmed in this court as also applicable in Namibia. So has the presumption of impartiality when it comes to judges with its concomitant that this presumption can only be rebutted by cogent and convincing evidence to the contrary. The onus was on the applicant in the recusal application to so rebut the perception of impartiality.’

[38] It took Henle and his lawyers nearly 6 months to determine that, according to them, the judge made a final determination on the question of interest which he would not reconsider once further evidence had been led. I have dealt with the gravamen of the attack on the judge above, namely, the fact that in his judgment he states 'I am of the view that plaintiff is entitled to *mora* interest as from that date'. Henle seeks to wish away the context of this statement so as to submit this was indicative of a final view. One wonders if this was so, why the matter was referred to a status hearing on 1 December 2016. The judgment must be seen in the context of the absolution application which was, after all, what gave rise to the judgment. Here it must be borne in mind that by that stage no evidence had been led. The capital amount had been admitted as well as the fact that it was due and owing from October 2012. Further, the reason given in the rule 64 tender as to why full interest was not tendered was nothing but inscriptions on a document. No evidence had been led to establish the facts averred in the tender. There was simply no evidence whatsoever why the normal rules as to the entitlement of *mora* interest should not apply. For the court *a quo*, in these circumstances to have made the statement complained of cannot be faulted. It is obvious that this is what the evidence before the court at that stage warranted. If the judge *a quo* had stated, 'from the evidence currently before me, I am of the view that the plaintiff is entitled to *mora* interest as from that date', there could have been no complaint. But this is exactly and implicitly what is stated if the context is taken into consideration.

[39] Henle and his lawyers have not even begun to meet any of the requirements spelled out in *Aupindi* quoted above. The whole basis of the recusal of the application speaks of unreasonableness and a fixation on one paragraph of

the judgment which had to be taken totally out of context to attempt to build up a case of an apprehension of bias.

[40] Firstly, if regard is had to the context and the facts, no reasonable, objective and informed person would reasonably apprehend bias. There were simply no reasonable grounds from which such apprehension could arise. Secondly, bearing in mind the presumption of judicial impartiality, there is not an iota of evidence (direct or by way of inference) that can be described as cogent and convincing to displace the presumption. What one has, is a fixation on the literal grammatical meaning of a sentence in the judgment taken out of context to attempt to make a case for apprehension of bias. This falls far short of the type of evidence needed to rebut the presumption. Lastly, the Judge was entitled to state the position as he did as there was, at that stage, no contrary evidence as indicated above. On this basis Wildlife did much more than only meeting the low threshold necessary to avoid absolution.²³ Wildlife established a *prima facie* case.

[41] It follows from what is stated above that Henle had no prospects of success on appeal and the stay application should have been refused instead of granted. It further follows that it is Henle that should have been mulcted with costs and not Wildlife as the latter should have been the successful party. The counter-appeal will thus be allowed.

Costs

²³ *Stier & another v Henle* 2012 (1) NR 370 (SC) at 373.

[42] From the history of the events relating to the application for absolution and the recusal application, an inference arises that both applications were raised for ulterior motives. This is so because of the baseless nature of these two totally unmeritorious applications. As no reasonable legal practitioner could have thought that they were even arguable, they must have been brought for some ulterior purpose not disclosed or evident from the record.

[43] Counsel for Wildlife thus seeks a cost order on an attorney and client scale. Counsel for Henle countered by submitting that, had this criticism or inference been raised in the answering affidavit in the recusal application, Henle would have been able to deal with it and explain his position and that he would have been able, potentially at least, to have furnished facts or reasons which would have dispelled the inference that is sought to be drawn.

[44] Whereas I think it is very unlikely that Henle would have been able to dispel the inference seeing that it is based on the criteria of reasonableness in respect whereof which he should have been advised by his lawyers, I cannot discount it totally. I suspect Henle and his lawyers are lucky that this was not raised in the said answering affidavit, but this not enough to warrant a special costs order against Henle and/or his lawyers.

Conclusion

[45] In the result I make the following order:

1. The appeal is struck from the roll with costs.
2. The counter-appeal succeeds and the cost order of the High Court in the stay application is set aside and substituted with an order that the costs of that application is to be borne by the respondent in the counter-appeal (Henle).
3. The above cost orders are to include the costs of one instructing and one instructed counsel.

FRANK AJA

MAINGA JA

HOFF JA

APPEARANCES

APPELLANT:

T A Barnard, SC

Instructed by Behrens & Pfeiffer,
Windhoek

RESPONDENT:

P C I Barnard

Instructed by Du Pisani Legal
Practitioners, Windhoek