



REPORTABLE
CASE NO: SA 51/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MINISTER OF FINANCE

Appellant

and

HOLLARD INSURANCE COMPANY NAMIBIA

First

Respondent

HOLLARD LIFE NAMIBIA LIMITED

Second

Respondent

SANLAM NAMIBIA LIMITED

Third

Respondent

SANTAM NAMIBIA LIMITED

Fourth

Respondent

MOMENTUM SHORT TERM INSURANCE LIMITED

Fifth Respondent

TRUSTCO LIFE LIMITED

Sixth Respondent

TRUSTCO INSURANCE COMPANY LIMITED

Seventh

Respondent

KING PRICE INSURANCE COMPANY OF NAMIBIA LTD

Eighth

Respondent

OUTSURANCE INSURANCE COMPANY OF NAMIBIA LTD **Ninth Respondent**

NEDNAMIBIA LIFE ASSURANCE LTD

Tenth

Respondent

BONBENASSURANCE NAMIBIA LTS T/A BONLIFE

Eleventh

Respondent

OLD MUTUAL LIFE ASSURANCE

COMPANY OF NAMIBIA LTD

Twelfth Respondent

NAMIBIA NATIONAL REINSURANCE CORPORATION

Thirteenth

Respondent

Coram: SAKALA AJA, SHONGWE AJA and CHINHENGO AJA

Heard: 3 March 2021

Delivered: 29 April 2021

Summary: The matter before the court *a quo* is an application to review and set aside a decision made by the Minister in the form of Government Notices in 2017, these Notices intended to give effect to sections 39, 40, 43, and 47 of the Namibia National Reinsurance Act 22 of 1998. The respondents sought to set aside the notices as well as all decisions underpinning the notices.

The respondents rule 76(6) application prayed the court to direct the Minister to discover documents which the respondents believed to be relevant to the decisions embodied in the Notices. The application was lodged after the Minister delivered a record in terms of rule 76(2)(b). The parties approached the managing judge in chambers in terms of rule 76(8) whereafter they were directed to file a written on-notice application for the resolution of dispute. All the applications were filed and the managing judge with consent of parties decided the matter on the papers and did not hear any oral arguments *and* made an order, interlocutory in nature. The appeal before this court is with leave of the judge *a quo*.

The appeal is mainly concerned with an order for production of further documents in terms of rule 76(6). The minister contended that respondents were not entitled to the documents under rule 76 by way of general discovery or particular discovery. The court had to decide on the appealability of the court *a quo*'s order, it being determinative of the issue whether the matter is properly before the court and whether leave to appeal should have been granted.

Held that, the production of documents in review proceedings in terms of rule 76 is a procedural issue; it is not related to the merits of the review application and therefore not final in effect as it is susceptible to alterations by the court of first instance.

Held that, the order is purely interlocutory in nature and therefore not appealable and thus leave to appeal should not have been granted.

Held that, the appeal should be struck from the roll.

APPEAL JUDGMENT

CHINHENGO AJA (SAKALA AJA and SHONGWE AJA concurring):

Introduction

[1] This is an appeal from a decision of the High Court granting an order compelling the appellant (the Minister) to produce further documents in terms of rule 76(6) of the High Court Rules 2014 (the High Court Rules).

[2] The main matter before the High Court is an application to review and set aside a decision of the Minister, in the form of Government Notices 332, 333, 334, 335, 336, 337 and 338, promulgated on 29 December 2017 (the 2017 Notices). Those Notices are intended to give effect to sections 39, 40, 43 and 47 of the Namibia National Reinsurance Act 1998 (No. 22 of 1998) (the Act). It is doubtful if the review procedure adopted by the respondents is appropriate for challenging the exercise of law-making power by the Minister in the circumstances of this case. It would seem that the relief sought by the respondents in paragraphs 1.8

and 1.9, being alternative prayers to paragraph 1.1 and paragraphs 1.2 to 1.7 respectively, declaring Government Notices 332 to 338 contrary to Articles 8,16 and 21(1)(j) of the Namibian Constitution, would be all that is necessary for their purpose. This, however, is a matter for the presiding judge to decide upon hearing the review application.

[3] The respondents' rule 76(6) application prayed the court to direct the Minister 'to discover documents which the applicants [respondents in this appeal] believe are *relevant to the decisions* embodied in the December 2017 Notices.¹ The application was lodged after the Minister delivered a record of his decision in terms of rule 76(2)(b). I note, in passing, that rule 76(6) requires that an applicant under that rule must entertain a belief that there are other documents *in the possession*, in this case, of the Minister, and considered by him, which are relevant to the decision or proceedings to be reviewed and set aside, and not merely those that are relevant to the decision or proceedings whether or not they are in his possession and were considered by him. An applicant holding that belief may, in terms of rule 76(6), give notice to the decision maker that further documents be discovered.

[4] Rule 76(8) of the High Court Rules provides that if a dispute arises as to whether any further documents should be discovered, the parties may approach the managing judge in chambers who must give directions for the dispute to be resolved. In the premises, the managing judge directed the respondents, by order dated 20 February 2019, to file a written on-notice application for the resolution of the dispute. All the pleadings and submissions in that application were duly filed

¹ Para 2 of Jacobus Celliers Lamprehct's affidavit.

and the learned judge, with the consent of the parties, decided the matter on the papers before him. He did not hear oral argument. His order, being interlocutory in nature, the appeal against it to this Court is accordingly with leave of the judge.

[5] It seems to me that a managing judge should not routinely direct that such an application on notice be lodged. A dispute concerning the production of further documents in review proceedings in terms of rule 76(8) is a matter that should, in the normal course of the management of the proceedings, be resolved quickly by the managing judge in chambers. That, in my view, is the true spirit of rule 32, in particular subrule (3) which provides that –

‘The managing judge must after hearing an interlocutory matter give a ruling there and then or within 15 days thereafter, except that if it involves a complex question of law the ruling may be given within 30 days after the hearing.’

[6] The request for further documents in this case did not give rise to a particularly complex question of law and a direction to file an on notice-application, could well not have been resorted to. A ruling could have been given on the turn, after hearing the parties.

[7] It is also important to note that in the notice of motion in the review application, the respondents seek not only the setting aside of the 2017 Notices, but also the setting aside of ‘all decisions by the [Minister] underpinning the notices’. This formulation of the relief gives rise to the question as to whether the respondents would, in any event, be entitled to challenge on review ‘all decisions . . . underpinning the notices’ without specifying or identifying those decisions as required by rule 76(3).

[8] At the hearing of this appeal Mr. Heathcote clarified the position. He stated that the decision under review is that constituted by the 2017 Notices and the reference to 'all decisions ... underpinning the notices' is a formulation adopted by legal practitioners as a matter of practice in order to avoid potential criticism that other related decisions, if any, were left out from the ambit of the review application. He appreciated that the requirement in rule 76(3) cannot be met when such formulation is used. The subrule requires that the 'decision or proceedings sought to be reviewed must be set out.' Going by the record of the review proceedings before this Court it would have been well-nigh impossible for the respondents to identify and set out 'all decisions . . . underpinning the notices'. Mr. Heathcote's clarification puts it beyond doubt that the respondents are challenging the 2017 Notices and not any other decisions.

Background

[9] The necessary background to this appeal is the following. The Act establishes the Namibia National Reinsurance Corporation (the Corporation) as a corporate entity and reinsurer. The Act is administered by the Minister of Finance. In general terms, sections 39 to 43 of the Act require every registered insurer and registered reinsurer to cede in reinsurance to the Corporation a percentage of the value of each policy issued or renewed in Namibia in accordance with such terms and from such date as the Minister may specify by notice in the *Gazette*. The Minister is empowered by those sections to determine and specify the class or classes of reinsurance business and the percentage value of each insurance policy to be ceded by a registered insurer or reinsurer to the Corporation as

provided in s 39(4); to determine and specify the classes of insurance business and the percentage value of each insurance policy to be ceded to the Corporation in terms of s 39(1); to determine and specify the classes of insurance business to be exempted under s 39(8) from the provisions of s 39(1) and (4); and to determine and specify the rate of commission payable by the Corporation in terms of s 43(1). The Minister is also empowered by s 47(1) to make regulations in relation to matters specified in s 47(1)(a) to (g).

Process of implementation of Act and resistance thereto

[10] The Minister, first in 2016 and then in 2017, sought to give effect to the objects of the above-mentioned provisions of the Act, which include developing domestic reinsurance capacity through the Corporation and curbing capital outflows through the placement of reinsurance outside the country. It is the Minister's estimation that the capital outflows are about N\$1 billion each year.

[11] In 2016 the Minister attempted to give effect to the provisions of the Act through Government Notices, 266, 267 and 291 (the 2016 Notices), which were published in the *Gazette*. After encountering resistance from some operators in the insurance industry, he withdrew the 2016 Notices on 14 February 2017. On that day the Minister, by written notice, invited all interested parties to participate in consultations based on draft Government Notices accompanying the notice, which later morphed into the 2017 Notices. The Minister thus embarked on a year-long consultation process that culminated in the promulgation of the 2017 Notices in December of that year. Those Notices are the subject of the review proceedings in the High Court from which this appeal on an interlocutory matter, arose.

[12] The respondents' opposition to the Government's efforts to implement the provisions of the Act has been relentless since 2016, if not before. In a multi-pronged challenge of the Act and in resistance to Government Notices to be promulgated or promulgated under the Act, as the case may be, the respondents instituted proceedings in the High Court, namely, two review applications on 20 December 2016 to set aside the 2016 Notices, a court application on 30 June 2017 to compel the Minister to produce certain information in relation to the 2017 Notices (the Information Application), a court action on 24 November 2017 to declare sections 39, 40 and 43 of the Act unconstitutional, and the review application in which the order in the present appeal was granted.

[13] In the 'Information Application' the respondents sought the production by the Minister of a number of documents, which, they averred, he and those advising him relied upon or considered before he published the 2017 Notices or amended related regulations. The documents sought include regulatory impact assessments or cost benefit analyses, financial reports, feasibility study reports, actuarial reports, micro- and macro-economic impact study reports, comparative studies on social and economic impact of similar initiatives sub-regionally, regionally and internationally and 'all other documents, representations or reports in the Minister's possession or under his control that would allow the [respondents] to understand why exactly [he] proposed what he did on 14 February 2017' and later published as the 2017 Notices on 29 December 2017. These same documents are also sought in the review proceedings and are a part of the further documents that the Minister has been ordered to discover under rule 76(6).

[14] The review proceedings are therefore the fourth prong in respondents' challenge of the Government Notices and regulations. The decision to publish the 2017 Notices was taken by the Minister on 15 December 2017 before they were published on 29 December 2017.

Genesis of rule 76(6) application

[15] The parties came unstuck in the review proceedings when the Minister was called upon, in terms of rule 76(2)(b), to serve on the respondents a complete record of the decision or proceedings sought to be corrected or set aside and, in response, the Minister, produced certain documents and reasons for his decision as constituting the complete record required by that rule. In his response the Minister outlined the consultative process that he had embarked upon and in which the major private insurers and reinsurers declined to participate, partly if not entirely, on the grounds that the affidavits filed on their behalf in the legal challenge of the 2016 Notices were to be taken as their submissions in relation to the 2017 Notices. The Minister also outlined the process that he had followed leading up to the publication of the 2017 Notices.

[16] The documents required under rule 76(2)(b) and the Minister's reasons were furnished in June 2018. In the Minister's view the documents and reasons so furnished constituted the complete record of proceedings required under the rule. Upon perusal of the Minister's reasons and the documents the respondents, believing that there were other documents relevant to the Minister's decision, filed on or about 4 July 2018, the rule 76(6) notice requiring him to deliver other

documents. The Minister responded by way of an affidavit. He declined to produce a vast majority of the specified documents. He stated that the respondents were not entitled to further documents either because those documents were not in his possession, or that he did not consider any of them in coming up with the 2017 Notices, or, to the best of his knowledge, the documents did not exist or that they were not relevant to his decision. He averred, generally, that the respondents were not entitled to the documents in terms of rule 76 or by way of general discovery. As I have earlier stated, the High Court granted an order compelling the Minister to produce most of the additional documents sought. That order was granted on 21 January 2020.

Additional affidavits of Minister

[17] During the course of resolving the dispute over the production of further documents the parties failed to register significant progress in interlocutory hearings in terms of rule 32, in particular subrules 32(9) and (10). In the process, the Minister was constrained to file two further affidavits, one by himself and the other by his legal representative. The parties locked horns again over the admissibility, purpose and meaning of the affidavits. The Minister sought to explain what he meant to convey to the respondents where he stated, in his response to the request for documents under rule 76(2)(b), that certain documents were 'not before him' or that 'to the best of his knowledge the documents did not exist', phrases that the respondents considered were vaguely and evasively used by the Minister in order to avoid committing himself as to whether or not he was in possession of the documents concerned or he had, or had not, considered such documents.

[18] In his further affidavit the Minister indicated that he was agreeable to producing documents requested in paragraphs 1.7, 1.8 and 1.9 of the notice of application, and that, whilst he did so, his concession was not to be construed as setting a precedent that in every similar case in the future, a respondent would be entitled, as of right, to production of documents under rule 76. He stated that he was producing those documents without any obligation to do so but only in the interests of curtailing the proceedings and avoiding unnecessary procedural disputes. The affidavits also explained the Minister's reasons for refusing to produce documents requested under paragraph 1.4, 1.11 and 1.13 of the notice of application, it being that he was either denying their existence or they were never in his possession or were irrelevant to his decision. He attempted to clarify that, where in his affidavit he stated that the documents were 'not before him', he was in fact conveying the message that he was not in possession of the documents, or that they did not exist, or that he had had no regard to them, as the case may be.

[19] The judge *a quo* refused to admit the further affidavits and thereby also declined to determine the application to admit those affidavits on the grounds that there had been a failure to comply with rules 32(9) and (10). This refusal gave rise to the Minister's first ground of appeal as shown later in this judgment. For present purposes and in light of the issues that I think are relevant to this appeal, it will be unnecessary to deal any further with the affidavits or the decision thereon.

Rule to be considered

[20] The subrules that are up for consideration in this appeal are 76 (6), (7) and (8) of the High Court Rules. They provide as follows-

'(6) If the applicant believes that there are other documents in possession of the respondent, which are relevant to the decision or proceedings sought to be reviewed, he or she must, within 14 days from receiving copies of the record, give notice to the respondent that such further reasonably identified documents must be discovered within five days after the date that the notice is delivered to the other party.

(7) The party receiving a notice in terms of subrule (6) must make copies of such additional documents available to the applicant for inspection and copying and the respondent must supplement the record filed with the registrar within three days after the applicant is given access to the additional documents.

(8) If a dispute arises as to whether any further documents should be discovered the parties may approach the managing judge in chambers who must give directions for the dispute to be resolved.'

Court order of 21 January 2020

[21] In this appeal, as earlier stated, we are concerned with an order for the production of further documents in terms of rule 76(6). It is significant to reiterate that in reaching his decision, the managing judge did not hear oral argument but decided the dispute on the papers and submissions before him. The order he granted is the following:

1. Prayers 1.1, 1.2, 1.3, 1.4, 1.5, 1.7, 1.8, 1.9, 1.10, 1.11 and 1.12 of the Notice of Motion, dated 5 March 2019, are hereby granted.

2. The request made in paragraph 1.6 of the Notice of Motion, dated 5 March 2019, is refused.

3. The request made in paragraph 1.13 of the Notice of Motion, dated 5 March 2019, is hereby granted in part and is limited to those documents evidencing compliance with section 12 of the Namibia National Insurance Corporation Act, 1998) (No 22 of 1998, relevant to any NamibRe Board meetings convened for the taking of resolutions regarding

the implementation or enforcement or giving effect to sections 39(5) and (8), and 43(2) of the said NamibRe Act.

4. This order is limited to the production of those documents in the First Respondent's actual possession or under his control, alternatively to those documents which are in the possession or under the control of officials within the First Respondent's Ministry and in any event this order is to apply also to all those documents/materials which the Minister may be able to obtain by virtue of the powers vested in his office.

5. Prayers 2, 3, and 4 of the Notice of Motion dated 5 March 2019, are also granted.

6. This case is postponed to 19 February at 08h30 for Status Hearing.

7. The parties are to file a joint status report indicating their proposals on the way forward.'

Relief granted in detail

[22] It is necessary, for a fuller appreciation of the issues in this appeal, that I outline in some detail the actual terms of the prayers granted. The Minister was ordered to produce, in accordance with -

(a) prayer 1.1, drafts prepared for him or by him that enabled him to file his reasons for the decision to promulgate the 2017 Notices and documents indicating when his reasons were finalised;

(b) prayer 1.2, the agenda, minutes and resolutions created by the Cabinet dealing with the implementation or enforcement of the Act, namely, the agenda, minutes and resolutions of Cabinet where the decisions referred to in NamibRe's letter dated 28 September 2018 were taken and other documents showing that the Cabinet revoked the referenced decisions;

(c) prayer 1.3, documents on which the Minister relied for his decision as reflected in the 2016 Notices;

(d) prayer 1.4, specific documents from four African countries, Ghana, Kenya, Tanzania and Morocco, with allegedly similar or comparable compulsory reinsurance dispensations and from those countries referred to in the footnotes of the NamibRe submission discovered in the review record, which the Minister considered in reaching his decision, namely –

(i) specific constitutional and legislative provisions, documents containing commentaries on the constitutional and legislative provisions of the countries concerned;

(ii) specific judgments from the mentioned countries dealing with review proceedings where provisions of the legislation were implemented by way of administrative decision;

(iii) respective regulatory impact analyses and cost benefit analyses from those countries;

(iv) feasibility study reports in respect of the allegedly comparable dispensations in the mentioned countries;

(v) actuarial reports in respect of the allegedly comparable dispensations in the mentioned countries;

(vi) documents reflecting or comparing the stage of development and maturity of the Namibian reinsurance market against the markets of the mentioned countries with respect to local retentions; and

(vii) micro- and macro-economic impact study reports on consumers, the insurance industries and the economies of the mentioned countries undertaken in those countries;

(e) prayer 1.5, documents requested in the Information application. [I have listed these in para [13];

(f) prayer 1.7, documents proving that the Minister's file and 'Counsels' Memorandum' were indeed delivered to him;

(g) prayer 1.8, documents proving instructions given to legal draftspersons for them to finalise the 2017 Notices;

(h) prayer 1.9, documents proving that instructions were given to publishers of the *Government Gazette* in which the 2017 Notices were published;

(i) prayer 1.10, minutes of all meetings between the Minister and representatives of NamibRe, such as the Board of Directors and all persons advising or consulting with the Minister regarding any of the matters in the 2017 Notices, before and after the Minister received the insurance industry's submissions relating to the 2016 Notices and before he received Counsels' Memorandum;

(j) prayer 1.11, notes, draft documents, calculations and discussion documents produced by or on behalf of the Minister before and after receiving the industry submissions and Counsels' Memorandum;

(k) prayer 1.12, documents mentioned in the application to set aside the 2016 Notices which are not publicly available, namely NamibRe's actuarial valuations for the years 2014 to 2015 and 'various other internal documents provided by the Corporation'; and

(l) prayer 1.13, documents proving compliance with s 12 of the Act relating to the Corporation's Board meetings convened for purposes of taking resolutions regarding the implementation or enforcement or giving effect to sections 39(5) and (8), and 43(2) of the Act and forwarded to the Minister.

[23] In general terms, the position of the Minister, as I have already outlined, is basically that the respondents were not entitled, under rule 76 or by way of general or particular discovery, to the documents for the reasons that he gave. He made this clear in his affidavit in response to the rule 76 notice and affidavit of Jacobus Lamprecht, the latter which he describes as based on speculation as to the existence of the documents concerned and as 'vague and generalised assertions of legal entitlement to documents.' The learned judge *a quo* rejected most of the Minister's contentions and granted an order largely in favour of the respondents, together with costs of the application.

Grounds of appeal

[24] The Minister relies on nine grounds of appeal as set out in the notice of appeal in challenging the order of the High Court. In the end, counsel relied on six only of those grounds in the written submissions. The first of the nine grounds of appeal is founded upon the refusal by the court *a quo* to determine the application for the admission of, and to admit, the further affidavits filed by the Minister to which I have referred.

[25] The other grounds of appeal, in their sequence, are that the court *a quo* erred in finding that –

- (a) the Minister was under a legal duty to make available documents referred to by the Corporation during the consultative process when those documents were neither considered by him in making his decision nor were

those documents in his possession. Further in this regard, the court erred by relying on *Johannesburg City Council v The Administrator Transvaal and another (1)*² and *Aonin Fishing (Pty) Ltd v Minister of Fisheries and Marine Resources*³;

(b) Rule 76(2)(b) must be widely interpreted to include documents 'incorporated by reference' whether or not the decision maker considered them or had them in his possession or under his control;

(c) the Minister is obliged to produce documents referred to in paragraphs 2, 3 and 5 of the notice of motion when those paragraphs are not concerned with the production of any documents but with the period when documents must be discovered, the granting to the respondents of leave to supplement the record of proceedings and costs contemplated under Rule 32(10), respectively;

(d) the Minister must discover documents on which he relied for his decision on the 2016 General Notices when that decision was not challenged in the review proceedings and in this regard further erred in relying on *Johannesburg City Council*, which is distinguishable on the facts;

(e) Cabinet is expected to make decisions on the basis of an 'agenda, minutes and resolutions of Cabinet' and consequently, by virtue of his membership of Cabinet, the Minister is in possession of all cabinet

² 1970 (2) SA 89 (T) at 92A-D.

³ 1998 NR 147 (HC) at 150B-F.

documents including those sought by the respondents, and in finding that the alleged cabinet decision was present in the Minister's mind when he made his decision;

(f) the Minister should produce documents specified in paragraph 1.1 of the notice of motion on the basis that the documents may still be in existence or in the possession of officials within his Ministry when the Minister stated on oath that no such documents existed and that he did not consider any such documents and drafts as they were not relevant to his decision;

(g) the Minister's response to the request for documents in prayer 1.10 was ambivalent when he had stated under oath that such documents do not exist, and he did not consider them in making his decision; and

(h) the Minister should produce notes, draft documents, calculations and discussion documents sought in prayer 1.1 of the application notice when the Minister had stated on oath that no such documents, to his knowledge existed in circumstances where there was no warrant for the court to conclude that it was likely such documents in fact exist.

Analysis of Order: paragraph 4 in particular

[26] Paragraph 4 of the High Court order appears to me to be a climb down by the learned judge after he must have probably realised that his order went beyond what is contemplated by rule 76. After stating at paragraph 1 of the order that

prayers 1.1 to 1.5 and 1.7 to 1.12 and a part of prayer 1.13 in the notice of motion are granted, he then sought to amplify or clarify its ambit in paragraph 4 thereof. In doing so he, in my view, infused some uncertainty into the relief granted.

Paragraph 4 reads:

'This order is limited to the production of those documents in the First Respondent [Minister]'s actual possession or under his control, alternatively to those documents which are in the possession or under the control of officials within the First Respondent's Ministry and in any event this order is to apply to all those documents/materials which the Minister may be able to obtain by virtue of the powers vested in his office.'

[27] Some criticism, I think, may legitimately be levelled against paragraph 4. Dissecting it, the paragraph has three rungs to it: the Minister is ordered to produce documents - (a) in his actual possession or under his control, (b) in the possession or under the control of officials in his Ministry, and (c) all those documents/materials which he may be able to obtain by virtue of powers vested in his office.

[28] Now, in relation to (a), all the judge should have done, in my view, was to make a positive factual finding on the evidence before him that the documents concerned were in the Minister's possession, reasonably identified and relevant to the impugned decision and, in consequence thereof, ordered production. That would have accorded with Rule 76(1) and (6). He did not make that finding. The requirement that the documents should also be 'under his control' is strictly not envisaged by the rule unless the judge was using the words 'under his control' synonymously with 'in his actual possession'. The use of the word 'or' suggests to

me that that was the judge's intention. He used the same terms in relation to officials in the Ministry. The reader is left to wonder which documents in paragraph 1 of the order did the judge find to have been in the Minister's possession. This, against the Minister's averment that he was not in possession of the documents. It does not look to me as if paragraph 4 detracts from the Minister's stance on the issue or requires him to do more than he has already done.

[29] In relation to (b), the documents concerned cannot possibly be different from documents in (a). The Minister is the political head of the Ministry of Finance and documents held by his Ministry are documents in his possession as such head. It is axiomatic that the Minister is sued in his official capacity and not in his personal capacity. Necessarily, documents held by any official in his Ministry are as much in his possession as they are in the possession of the Ministry and the official concerned. No employee of the Ministry holds any Ministry documents in his or her personal capacity. It would be untenable if Ministers were able or permitted to assert that documents in the possession of officials in their Ministries are not in the Ministers' possession. Perhaps the learned judge's formulation of this part of paragraph 4, especially the use of the words 'under his control' was intended to clarify this trite proposition.

[30] In relation to (c) the Minister is required to produce documents which he may be able to obtain by virtue of powers vested in his office. This qualification of the order, which is a catch all phrase, is problematic in at least two respects. It does not specify the relevant powers vested in the office of Minister that would enable him to obtain documents from other sources. It does not live up to the

requirement of rule 76 that the Minister must produce documents in his possession. While the Minister has power to obtain documents referred to in (b) because he is head of the Ministry, it is doubtful that he has power to obtain documents from other government ministries, institutions or departments. Again, the learned Judge should have made a positive finding as to the Minister's power in that regard. I do not find that positive finding of fact in the judgment.

[31] It is my view that paragraph 4 creates uncertainty as to the full extent of the relief granted in the Judge's order. It may in fact open the way for the Minister to simply restate his position, now known, that he is not in possession or control of the documents concerned or that he is unable to obtain the documents from other sources. It may make compliance by him beyond what he has already done less possible or achievable. To this extent it might not be an order achieving what the Judge may have intended. At the pain of repeating myself, the Judge should have made positive findings that the Minister was indeed in possession or even in control of the further documents and should have directly ordered him to produce them. The requirement of rule 76 that the documents must be in the decision maker's possession, reasonably identified and relevant to the impugned decision, are necessary findings which if made will render it unnecessary to further explain or qualify an order of further discovery under rule 76(6). In saying this I am alive to the fact that this inevitably touches on the merits of the Judge's decision, which I may not have to deal with in light of my inclination on the appealability of the order. I turn now to deal with the issue of the appealability of the order.

Appealability of order

[32] The first and perhaps decisive issue for consideration in this appeal is the appealability of the judge *a quo*'s order. It was raised by the parties in their heads of argument and in oral submissions to this Court. Pointedly, the Minister did not raise it as one of his grounds of appeal for obvious reasons. It was however canvassed on his behalf at some length in the heads of argument in anticipation of the respondents raising it. The respondents, as anticipated, indeed extensively dealt with the issue in their heads of argument. Both sides made sustained oral submissions on it as well. The appealability of the order, it must be apparent, is determinative of the issue whether the matter is properly before this Court and whether leave to appeal should have been granted at all. In other words, the appealability of the order is potentially dispositive of this appeal if this Court were to hold that the decision was not appealable even with leave of the High Court.

[33] The question as to how it came to be that both parties dealt with the appealability of the order in their heads of argument without any of them having raised it as an issue in the appeal exercised our minds as a Court and we put it to counsel. Obviously, the Minister would not have raised the issue in his notice of appeal because he was content with the order. The respondents were the party to have raised the issue, it being them that had failed in their opposition to the granting of leave to appeal despite valiant efforts in that regard. They still oppose it. The reason why the respondents did not cross appeal against the granting of leave, as explained to us, is merely that it is an established practice that a cross appeal is not necessary in the circumstances of this case.

[34] Rule 7(4) to (7) of the Supreme Court Rules 2017 set out the procedure for cross appealing against orders granting leave to appeal. A notice of cross appeal must, I must say, answer to the requirements of rule 7(4) in the same way as a notice of appeal, that is to say, it must set out the part of the judgment or order appealed against and set forth concisely and distinctly the grounds of appeal and the findings of fact and conclusions of law to which objection is taken. The substance of counsel's submissions was that the appealability of an interlocutory order is a point of law and can be raised by the court. That the court may so raise the issue is correct. It is the raising of the issue by a party to the appeal without such party having alerted the court prior to the filing of heads of argument that is worrisome. Counsel submitted that it is the practice in this jurisdiction that the issue can be raised by any of the parties on appeal whether or not it was formally raised as an issue in the appeal by way of a notice of cross appeal. We accepted this submission but not without some misgivings.

[35] When a party is before the High Court and wishes to appeal against an interlocutory order, such party can do so orally as soon as the decision on the interlocutory order is handed down. It is different when the issue of leave is to be taken to an appellate court: there must be some formality to follow, as indicated in the preceding paragraph, in order that it becomes an issue in the appeal. It appears that the position taken by counsel is supported, so far as the parties are concerned, by the decision in *Shetu Trading CC v Chair, Tender Board of Namibia*⁴, where this Court said the following at para [24], and reiterated at para [38] of the judgment:

⁴ 2012 (1) NR 162 (SC).

[24] The fact that leave to appeal is granted by a lower court does not put an end to the issue whether a judgment or order is appealable. The question of appealability, **if an issue in the appeal**, remains a question for the appellate court to determine. If it decides that, despite the fact that leave to appeal has been granted by the lower court, the judgment or order is not appealable, the appeal will be stuck from the roll.'

[38] If the High Court grants leave to appeal against a decision that does not constitute a 'judgment or order' within the meaning of s 18(1), the Supreme Court is not bound to decide the appeal. The court must always first consider whether the decision is appealable. If the decision against which leave to appeal has been granted does not fall within the class of 'judgments or orders' contemplated by s 18(1), then it is not appealable at all.

[36] The words I have underscored in the quoted para [24] above highlight the fact of appealability being '**an issue in the appeal**'. To my mind, appealability can become **an issue in the appeal** if it is raised by the Court *mero motu* or by a party to the appeal in a notice of cross appeal or by a party having taken some step with similar effect to a notice of cross appeal. I do not read *Shetu* as having dealt with the procedure by which a party may make appealability an issue in an appeal. The Supreme Court may raise the issue *mero motu* but where it does not, I think, a party cannot just spring it up for the Court to decide without having alerted the Court by way of a notice of cross appeal or otherwise raising it as a point *in limine*.

[37] We accepted the representation that raising appealability in heads of argument is an established practice but we think that it would be a salutary practice for a party dissatisfied with the granting of leave to appeal, as was the case with the respondents in this appeal, to note a cross appeal in the normal way, even if only to alert the Court that the issue will be raised and argued in the

appeal. In *Elifas and others v Asino and others*⁵ the issue of appealability was raised as one of several points *in limine*. Because of their number, the points must have been raised as such and not sprung up for the court in the heads of argument or at the hearing. *Elifas* cannot therefore be authority for the practice. In *Shetu* the Court invited the parties by notice given three days before the hearing that the parties were required to answer the question whether or not the order implicated therein was appealable or not.⁶ Nothing of the sort happened in the instant case.

Consideration of appealability of order on merits

[38] In *Shetu*⁷ this Court stated that it ‘has considered the appealability of judgments or orders of the High Court on several occasions’ and listed seven such cases as examples⁸. From the outset it is therefore important to understand the import of subsections 18(1) and (3) of the High Court Act 1990 (No. 16 of 1990) for purposes of appreciating the contentions of the parties. The subsections provide as follows:

‘(1) An appeal from a judgment or order of the High Court in any civil proceedings or against any judgment or order of the High Court given on appeal shall, except in so far as this section otherwise provides, be heard by the Supreme Court.

...

⁵ 2020 (4) NR 1030 (SC) para [7].

⁶ *Shetu* para [13].

⁷ *Shetu* para [18].

⁸ *Shetu* para [18] and listed- *Vaatz and Another v Klotzsch and Others* (unreported) SA 26/2001 dated 11 October 2002; *Aussenkehr Farms (Pty) Ltd and Another v Minister of Mines and Energy and Another* 2005 NR 21 (SC); *Wirtz v Orford and Another* 2005 NR 175 (SC); *Handl v Handl* 2008 (2) NR 489 (SC); *Minister of Mines and Energy and Another v Black Range Mining and (Pty) Ltd* 2011 (1) NR 31 (SC); *Knouwds NO (in his capacity as provisional liquidator of Avid Investment Corporation (Pty) Ltd v Josea and Another* 2010 (2) NR 754 (SC); *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd and Others* 2011 (2) NR 469 (SC).

(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.’

[39] Arising from s 18(1) and (3) above, the first issue for determination is whether the order of the judge *a quo* is an order contemplated by these provisions. If it is not, then that is the end of the matter. The order is not appealable. The second issue, depending on the outcome on the first, is to determine whether the granting of leave to appeal was a correct decision. In *Knouwd's* the court stated:

‘In order to decide the appealability of the court’s order this Court must determine what the order is about and to do so it is necessary to look at the reasons for the order.’⁹

[40] This is the right approach. I will accordingly consider the parties’ contentions on appealability in the light of the law as set out in the cases to which I have referred above. It is appropriate at this stage to sum up the general proposition deriving from the authorities. It is to this effect. In terms of s 18(3) there are two stages to a consideration of the appealability of a judgment or order of the High Court. The judgment or order must itself be appealable. Where the judgment or order is interlocutory, leave to appeal must be granted by the High Court and if refused, it must be granted by the Supreme Court. *In casu* the learned Judge found that the judgment or order was appealable and further that it was proper in the circumstances to grant leave to appeal. The question before this Court is whether the learned Judge was correct.

⁹ Para [9].

Contentions by parties: appellant

[41] The respondents' contention, which failed in the court below, was that the order was not appealable and leave to appeal should have been refused.

[42] Before this Court Mr Gauntlet SC QC, for the Minister, as earlier stated, anticipated that the respondents would raise the issue again. He supported the decision of the Judge *a quo*. He set out general principles relevant to a determination whether an order is appealable or not. The first derives from established authority¹⁰. It is that a judgment or order is appealable if (a) it is final in effect and not susceptible to alteration by a court of first instance; (b) it is definitive of the rights of the parties in the sense that it must grant a definite and distinct relief; and (c) it disposes of at least a substantial portion of the relief claimed in the main proceedings. These requirements, he submitted, are affirmed in *Di Savino v Nedbank Namibia Limited*¹¹.

[43] The second principle is that the requirements mentioned above are not immutable but serve as a useful guide. They are 'not rigid principles to be applied invariably'. He relied on *Shetu*¹² for this submission. According to him this means that an order that does not have all three attributes may still be appealable.

¹⁰ *Shetu* and the cases referred at note 8 above in particular *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 531H-533B.

¹¹ 2017 (3) NR 880 (SC) at 892A-C.

¹² *Shetu* at para [22].

[44] The third principle is that where an order is incompetent, it is *a fortiori* appealable, even if interlocutory. For this proposition counsel relied on *Minister of Finance v Hollard Insurance Company of Namibia Limited*¹³.

[45] The fourth principle is that leave to appeal will be granted where it would be in the interests of justice for the matter to be determined by the Supreme Court. He placed reliance on *Firststrand Bank Limited t/a First National Bank v Makaleng*¹⁴; *Von Weidts v Minister of Lands and Resettlement and Another*¹⁵, and *Lameck v The State*¹⁶.

[46] Dealing with the above principles Mr Gauntlet submitted that the High Court order was appealable and referred in particular to *Knouwds NO v Josea*¹⁷ and *Shetu*, for this submission. He submitted that while the application to compel further discovery in terms of rule 76(6) is interlocutory, ‘the judgments or orders granted by **this Court** are final in effect and not susceptible to variation by the High Court’. It is not clear which court he was referring to by use of the words ‘**this Court**’ which I have highlighted. If he meant the Supreme Court that goes without saying. But in the context of the authorities cited, when we talk about a judgment or order with final effect and not susceptible to change by the court that is in reference to the court of first instance, in this case the High Court. The submission cannot be correct if it is made in reference to the Supreme Court. The principle does not deal with finality of a Supreme Court decision but that of the High Court.

¹³ (P8-2018) [2019] NASC (28 May 2019) *Hollard* paras 107 and 108.

¹⁴ **(034/16) [2016] ZASCA 169 (24 November 2016) para 13.**

¹⁵ 2016 (2) NR 500 (HC) para 5.

¹⁶ (CC 15/2015) [2014] NAHCMD 85 (10 April 2015) paras 10 and 11.

¹⁷ 2010 (2) NR 754 (SC) paras 10 and 11 and *Shetu* paras 19 and 42.

[47] Counsel further submitted that in the instant case the High Court finally determined the scope of documents which are to comprise the record of the Minister's decision. As such the order is definitive of the parties' rights. That may be so in relation to the further documents sought but, again, the principle implicated here is concerned with the rights of the parties in the main review application.

[48] The third submission was that the orders directing the Minister to produce documents which are not in his possession or which he has stated on oath do not exist, 'fall within the category of orders which are incompetent and thus *a fortiori* appealable. He found support in *Firstrand Bank Limited*, which he said is to the effect that even where a decision does not bear all the attributes of a final order, it may nevertheless be appealable if some other worthy considerations are evident. He cites *Von Weidts* and *Lameck* as further supporting authority. I will examine this submission in greater detail when I discuss the relative merits of the submissions made for both parties.

[49] Mr Gauntlett's final submission was that even if the order was not appealable on other considerations, it is in the interests of justice that this Court, following *Tshwane City v Afriforum and another*¹⁸ should find that the order is appealable. From *Tshwane City*, at least two principles can be distilled, namely, that the test for leave to appeal now allows for flexibility and eschews a rigid application of the 'triad' of factors, and that the interests of justice are relevant and

¹⁸ 2016 (6) SA 279 (CC) para 39.

sometimes decisive in granting leave to appeal. In this connection he submitted that the proper construction of rule 76(6) is not only important to the parties, but it is also of significant public importance given its potential application to future judicial reviews. This, he said, becomes more evident in light of the judge *a quo*'s statement that the judgment 'broke new ground' in the interpretation and application of rule 76(6), relying, as it did, on *Helen Suzman Foundation v Judicial Service Commission*¹⁹ for the 'ground-breaking principles'. He submitted that that conclusion on its own warrants the attention of this Court. He concluded his written submissions on this issue by boldly stating that 'there can be no genuine or sensible debate that the High Court judgment and orders are appealable, and that leave to appeal was correctly granted to this Court.'

Contentions by parties: respondents

[50] Mr Heathcote, for the respondents, contended that the Judge *a quo*'s order is merely a ruling²⁰ on a procedural matter and not appealable at all, let alone with leave of court. *Shetu* is to the effect that an order to produce documents is a ruling:

'This summary [from *Vaatz* on the triad of factors determinative of whether a judgment or order is one contemplated by s 18] is drawn directly from *Zweni v Minister of Law and Order*. In that case the South African Appellate Division referred to the distinction between 'judgments and orders' that are appealable and 'rulings' that are not.'²¹

¹⁹ 2015 (2) SA 498 (WCC).

²⁰ See *S v Malumo* 2010 (2) NR 595 (SC) para 31.

²¹ *Shetu* para [19].

[51] He referred to Harms²² who states that discovery orders are instances of rulings, and to Herbstein and van Winsen²³ to the effect that an order for discovery or production of documents is interlocutory in nature and form, and not appealable at all: it is a mere procedural directive. He referred to South African cases in regard to the procedural nature and purpose of rule 53 which is equivalent to rule 76 – *Standard Bank of South Africa Limited v The Competition Commission of South Africa*²⁴ and other cases referred therein; *General Council of the Bar of South Africa v Jiba and others*²⁵ , *Helen Suzman Foundation v Judicial Service Commission*²⁶ and *Democratic Alliance and others v Acting National Director of Public Prosecutions and others*²⁷.

[52] All these cases, it was submitted, explain the nature and purpose of the South African rule 53, which is in *pari materia* with rule 76, and hold that the production of documents under that rule is a procedural issue. In reference to *Standard Bank* case, he stated that two of the judges specifically made this point at paras [220], [222] and [223]:

[220] Rule 53 is a rule of procedure. Disclosure of the record under the rule decides nothing about the substance of the dispute between the parties.

[222] In applications, the parties' affidavits serve as pleadings that define the issues a court must decide. Disclosure of a review record under rule 53 is a valued procedural mechanism to provide further evidence for the proper decision to be made by the court eventually hearing the review. An order for production of the review record decides no factual or legal issue in dispute in the main review application – it merely provides the court

²² *Civil Procedure in the Supreme Court* at T15.

²³ *The Civil Practice of High Courts of South Africa* 5th ed., at 2110.

²⁴ 2018 JDR 0893 (CAC); (165/CA March 18) [2018] ZACAC 3 (22 June 2018).

²⁵ 2017 (2) SA 122 (GP).

²⁶ 2018 (4) SA 1 (CC).

²⁷ 2012 (3) SA 486 (SCA).

with the further evidential material upon which it must decide those factual or legal issues. If a party contends that a legal point should be determined at the outset of the of the application proceedings, the rules make provision for it. So too for striking out irrelevant evidential material, or for non-disclosure of parts of the whole record....

[223] A determination of any of them would still not have disposed of any factual or legal issue that may or may not be determined by the [court below] depending on its review jurisdiction.'

[53] Having dealt with the nature of the order as a mere ruling, counsel for the respondents then proceeded to deal with the particular submissions of the Minister as set out by Mr Gauntlet SC.

[54] He submitted that it cannot be correct that the order is final in effect. *Zweni* and other cases in this jurisdiction all state that an order of this nature can be changed by the court. In this regard the concern should not be with the likelihood of that happening but only with the principle thereof. *Knouwds* is clear that only if a matter is rendered *res judicata* would it not be liable to alteration by the court of first instance. I have already dealt with the Minister's argument that a decision on the issue by the Supreme Court is not the one envisaged under this principle.

[55] The next contention that respondents' counsel dealt with is that the order finally determined the scope of documents which comprise the record of the Minister's decision. Counsel submitted that the rights of the parties in respect to which the order is definitive must be those implicated in the relief sought in the review application and no such rights have yet been determined. He submitted that the request for other documents under Rule 76(6) is similar to a request for further particulars in action proceedings and is simply intended to regulate the

conduct of the litigation and does not dispose of any rights in the review proceedings.

[56] The Minister's contention that the order is incompetent is much more problematic because it touches on the merits of the appeal. Mr Heathcote submitted that the order was predicated on the Minister's prevarication as to whether he could not secure the documents sought as well as the contention that he played with words when he stated that the documents were either not before him or to the best of his knowledge they did not exist, without, in the latter case, indicating the source of any such knowledge. In submitting that the Minister's contention that the judge *a quo*'s order is incompetent 'is wrong and also factually incorrect', he elaborated thereon in the heads of argument stating the following:

'There is not a single instance where the Minister said he was unable to secure the documents. It was the Minister who did word play (played with words). The High Court did not direct the Minister to produce a single document in respect of which the Minister had stated under oath that the document did not exist. Even if the High Court had done so, it had specifically qualified all its orders for discovery with [paragraph 4 of the] order.'

[57] Indeed, the judge qualified his order, so, all that the Minister would have to do is perhaps to state truthfully and unequivocally that the documents do not exist.

[58] The final contention that respondents' counsel dealt with is that the interests of justice require this Court to determine this appeal. In this connection he submitted that the Minister did not address, head-on, the contention that the order did not dispose of any portion of the relief sought in the review application and, accordingly the Minister conceded on that issue. Counsel advanced two

submissions in regard to the Minister's contention. First, he said that the proposition that the interests of justice is relevant to determining the first leg of the inquiry is not supported by the authorities referred to. Second, the principle against piecemeal appeals is determinative of the issue. He adverted to the reasoning of the court *a quo* that, but for the interests of justice, he would not have granted leave to appeal. He argued that there is no merit in the submission that merely because the judge *a quo* described his ruling as ground-breaking and that it may be followed in the future. That he so described the decision does not make his ruling appealable as of right or with leave of a court. In this regard counsel referred to *Vaatz v Klotsch*²⁸ for applicable logic.

[59] Similarly, it was submitted, the order in the instant case simply does not meet any of the triad of factors referred to in the many cases that serve as authority on this point. In this connection counsel further submitted that the contention that a judgment or order which does not have all the three attributes may still be appealable is wrong. Whilst *Shetu*, at para [22], is to the effect that if one of the attributes is missing the judgment or order may still be appealable, it does not go as far as stating that if all three attributes are missing the judgment or order may still be appealable. *Shetu*, it was submitted, went further at the same paragraph to lay down the principle that a judgment or order may still not be appealable even if it meets all the three attributes if hearing the appeal would render the issues in the main case being considered in a piecemeal fashion.

Discussion

²⁸ Unreported Supreme Court judgment, Case No. SA 26/2001, delivered 11 October 2002.

[60] The procedural character or nature of an interlocutory judgment or order was acknowledged and affirmed in *Namibia Financial Exchange (Pty) Ltd v Chief Executive Officer of NAMFISA and others*²⁹ in these words:

'*Knouws* makes it clear that in determining the appealability of an order the emphasis is on the effect of the decision rather than its form.'³⁰

And:

'*Knouws* establishes an important principle. If a court's order relates to a purely procedural issue unrelated to the merits, it is not appealable. In addition, if all that is required of a party against whom the order is made is to put right the unprocedural defect, an appeal is not the appropriate remedy.'³¹

[61] The issue that was before the High Court in the instant case was one of adequacy of the record of proceedings delivered by the Minister, not whether he had delivered any record at all. The dispute therefore centred around the scope or extensiveness of the production of documents and not the purpose or nature of rule 76. It was a narrower and different question from the wider question of compliance with rule 76(2)(b) generally and limited in scope to the refusal to produce other documents under rule 76(6). To this extent, the issue for determination is whether the demand for other documents in terms of rule 76(6) is a procedural issue in the same way that a similar request is under rule 76(2)(b). The answer can only be in the positive.

²⁹ 2019 (3) NR 859 (SC).

³⁰ Para [54].

³¹ Para [55].

[62] The production of documents in review proceedings whether in terms of rule 76(2)(b) or in terms of rule 76(6) is a procedural issue. It makes no difference to its procedural nature under what subrule the production is sought. The order to produce documents or further documents is not related to the merits of the review application. It is not final in effect and it is susceptible to alteration by the court of first instance. It is not definitive of the rights of the parties in the sense that it grants a definite and distinct relief. It does not dispose of at least a substantial portion of the relief claimed in the review proceedings. It is purely procedural in nature and therefore not appealable. This conclusion finds authoritative support in *Di Savino* where the Chief Justice said-

‘... the spirit of s 18(3) is that before a party can pursue an appeal against a 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. The test whether a judgment or order satisfies the first requirement is as set out in many judgments of our courts as noted above and it is not necessary to repeat it here.’

[63] The above conclusion also finds further support in *Elifas*. In that case the Deputy Chief Justice referred with approval to *Di Savino* and, after considering the facts of the case before him and applying the law to them, he held that the decision of the Judge *a quo* was on a procedural issue. The appeal before him involved an order permitting the leading of oral evidence in application proceedings where a dispute of fact was foreseen. In striking off the appeal from the roll with costs, the learned DCJ stated:

'... the impugned ruling related to a matter of procedure. The merits would be decided only after the oral evidence was received. The ruling did not have the effect of disposing of a substantial issue between the parties and was therefore not appealable. The High Court was therefore not competent to grant leave. The order is for that reason of no force and effect.'

[64] This appeal should, on the same basis, be struck off from the roll.

[65] The Minister's contention that perhaps warrants some further consideration is that the order is incompetent for the reason that it requires the Minister to produce documents which he stated on oath were not in his possession or which he did not consider in coming to his decision. This contention, in my view, is defeated by the respondents' argument, with which I agree, that the competency of the order is to be considered at the second leg of the inquiry. The first leg is whether the order is appealable at all. As I have earlier stated, if the order is not appealable at all, then *cadit questio*.

[66] The other contention that also warrants some further consideration is that the interests of justice is a proper factor to take into account in determining the appealability of an interlocutory order even where it does not meet the triad of factors referred to in *Di Savino* and other cases. Implicit in the submissions on this issue by both counsel is that the interests of justice is a principle applicable to the second leg of the inquiry. Although the learned judge described his articulation of the interests of justice principle as 'ground-breaking', that remains a consideration at the second leg of the overall inquiry. I agree with counsel for the respondents that the mere fact that the learned judge described his decision as 'ground-

breaking' does not make it so or make the order appealable either as of right or with leave of the court. If the order is not appealable, it does not matter what label is given to it by the presiding judge. It remains unappealable.

[67] The second leg of the inquiry, to wit, whether leave should be granted if the order is interlocutory is embarked upon only if the order is appealable. In that event it would be necessary to consider whether the decision maker was in possession of the documents concerned, whether the documents have been reasonably identified and whether they are relevant to the decision to be reviewed and set aside. The Minister's case however falls on the first hurdle thereby rendering it unnecessary to consider the second hurdle.

[68] It is clear to me that the High Court order in this case was purely interlocutory. In *Pieters v Administrator, SWA*³² it was held that where an applicant believes that a record is incomplete, he can call upon the decision maker to fill gaps in the record by producing further documents and, at 228C, that the process authorised by the subrule is producing documents and not making discovery. While I agree with counsel for the Minister that a direction that a complete and true record of the impugned decision be produced is no warrant 'for discovery in disguise, an interrogatory, or a trawl through documents,' and that a decision maker should not be required to extract documents from third parties but only to produce 'what he/she has, as foundational to his/her decision' or that the decision maker should not be required to produce 'what the decision maker did *not* have

³² 1972 (2) SA 220 (SWA).

but which the applicant contends was vital to his decision', I am satisfied that the procedural nature of the order is decisive with regards to its appealability.

[69] The respondent fervently argued against the proposition that the interests of justice is a proper consideration whether or not an interlocutory order is appealable where it does not meet the triad of factors referred to in *Di Savino* and other cases. It was submitted for the Minister that the test for leave to appeal is flexible and that the interests of justice are clearly relevant in granting leave. In the present matter, the learned judge invoked the interests of justice and since litigants are likely to follow that decision, unless it is pronounced inapplicable by the highest court, the interests of justice require that the issue be determined by this Court. Not so contended the respondents. If the order is not appealable, it does not matter what label is given to it by the presiding judge. It remains unappealable. In this regard in *Vaatz v Klotsch*³³ the court said:

'However the fact that the judge refused to listen to argument, and as far as he personally was concerned, his ruling was final, does not seem to me to meet the requirement for a final order in the sense used in cases such as the *Zweni* case supra, as was submitted by Mr Barnard. The finality, which is referred to, must be inherent in the order itself and does not depend on the attitude of a particular judge. The order or ruling in the present instance, is, in my opinion, procedural in nature, and there is nothing that I know of which would preclude the judge to change his ruling and allow the legal practitioners to remain on record or to again come on record. Nor does the ruling seem to me to be definitive of the rights of the parties in the sense that it granted definite and distinct relief to them...

Under the circumstances the argument that the ruling could or would result in an unfair trial, and that it would taint all further proceedings, seems to me to be, at the best, highly speculative. I have therefore come to the conclusion that the order or

³³ Unreported Supreme Court judgment, Case No. SA 26/2001, delivered 11 October 2002.

ruling is not one as was envisaged in the case of *Moch, supra*, and that it cannot be said that it has a very definitive bearing on the case.'

[70] In order to decide the appealability of any judgment or order the starting point is of course subsections 18(1) and (3) of the High Court Act, which were considered at length in *Shetu*. In my view, *Shetu* lays down two principles of law in regard to interlocutory orders. It was a decision on a refusal by the High Court to entertain an application on urgency after that court determined that the matter was not urgent. Leave to appeal had been granted. This Court analysed subsections 18(1) and (3) and came to the following conclusion. The wording of the comparable provision in South Africa is different from our provision. The South African provision proscribes appeals in civil matters to the Supreme Court unless leave to appeal has been granted by the court of first instance or by the Supreme Court. Subsections 18(1) and (3) are concerned with the appealability of 'a judgment or order' of the High Court in any civil proceedings or any judgment or order of the High Court given in exercise of its appellate jurisdiction. Subsection (1) provides that such judgment or order may be appealed to this Court. Subsection (3) makes an exception of a judgment or order that is interlocutory or is an order as to costs left by law to the discretion of the court. This type of judgment or order is appealable only with leave of the High Court or of this Court where leave has been refused. The Court, it seems to me, accepted the approach in South Africa that for subsection 18(3) to be applicable, the judgment or order must in effect be a 'ruling' as the word is understood in South African jurisprudence, that is to say, a judgment or order that does not meet the three attributes that have been accepted in a plethora of authority in South Africa and this jurisdiction,

namely, that an appealable judgment or order must be final in effect and not subject to alteration by the court of first instance; it must be definitive of the rights of the parties; and it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. If a judgment or order does not meet any one or all of these attributes, it is a ruling and must be classified as such. It is unappealable entirely. In *Shetu* the Court said the following:

‘Nevertheless, the South African Supreme Court of Appeal has recognised that the question of appealability is ‘intrinsically difficult’, a ‘vexed issue’ and the principles set out in *Zweni*³⁴ are not ‘cast in stone’ but are ‘illustrative, not immutable’. There are thus times where a court has held a ‘judgment or order’ to be appealable when one of the attributes in *Zweni* is missing and even that a judgment or order is appealable, despite all three attributes being present, when hearing the particular appeal would render the issues in a case being considered piecemeal. The principles in *Zweni* are therefore useful guidelines, but not rigid principles to be applied invariably.³⁵

[71] The discussion by the Court in *Shetu*³⁶ of *Aussenkehr Farms (Pty) Ltd and another v Minister of Mines and Energy and Another*³⁷, *Moch’s case*³⁸ and *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd and others*³⁹ shows the correctness of the passage quoted in the preceding paragraph. In this connection the Court stated:

‘The dictum in *Valencia Uranium* suggest that decisions on urgency are never appealable whereas one of the dicta in *Aussenkehr* suggests that decisions on

³⁴ *Zweni v Minister of Law and Order* 1993(1) SA 523.

³⁵ Para 22. See also the many cases cited therein in support of the propositions advanced.

³⁶ Paras 25 -31.

³⁷ 2005 NR 21 (SC).

³⁸ 1996 (3) SA 1 (A) at 10F-G.

³⁹ 2011 (2) NR 469 (SC).

urgency will ordinarily not be appealable but leaves open the possibility that there may be rare examples where the decision on urgency is appealable because it might have a final or definitive effect on the rights of the parties...’.

[72] My reading of *Shetu* is that it endorses the principle that even with ‘rulings’ there may be cases in which they are appealable with leave depending on its effect on the rights of the parties or where ‘it has ‘a very definitive bearing’ on the determination of the rights of the parties, such as a wrong refusal of an application for recusal⁴⁰ or a refusal of urgency in the circumstances that arose in *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service*.⁴¹ The law, as I see it, is that while judgments or orders that are purely interlocutory, properly classified as rulings, are not appealable generally, this is not a hard and fast or immutable principle: ultimately the determination whether a ruling is appealable will depend on the facts of each case.

[73] I have determined that the order granted by the court *a quo* is not a ‘judgment or order’ contemplated by s 18(3) but just a ruling that is not appealable. There is a further and perhaps more important reason why, on the facts of this case, an appeal against the order is not the way to go.

[74] There is much to be said about the general principle that the interests of justice are not served by entertaining appeals in a piecemeal fashion. This case is illustrative of the correctness of that principle. The review application was lodged in 2018. Soon thereafter the Minister delivered documents in terms of rule 76(6).

An application was mounted for him to produce further documents in terms of rule

⁴⁰ See *Shetu* paras 27 and 28.

⁴¹ 1996 (3) SA 1 (A) ([1996] ZASCA 2).

76(6), and an order to that effect granted. The order at best, as I have analysed it, required no more than that the Minister should produce documents in his possession or control or in the possession or control of officials in his Ministry, or documents that he could secure by virtue of powers vested in him. All the Minister should have done in order to comply with the order of the court as qualified by paragraph 4 thereof, was to at least re-state more clearly either that he or any of his officials were not in possession or control of the further documents sought or that he had no power to secure them from other sources. That to me seems to have been the quickest way to resolve the issue. As had already happened, the respondents would not have been able to go behind the Minister's statement whether on affidavit or otherwise because they had been denied the right to cross examine him on his statements.

[75] The review application has been pending since April 2018 when it was lodged, through 2019 and 2020 to 2021, a period of very close to three years. The review matter has hardly commenced in earnest. The answering affidavit will only be filed after this appeal has been finalised. A delay of more than two years occasioned by an appeal against an interlocutory order, which in any case is not appealable, as this Court holds, cannot be justified on any reasonable basis. Application proceedings, including review proceedings, should be finalised quickly in the interests of justice. In *Health Professions Council of South Africa and another v Emergency Medical Supplies and Training CC t/a EMS*⁴² the court correctly stated that-

⁴² 2010 (6) SA 469 (SCA).

'... a piecemeal determination of issues is not desirable ... it was not only expensive, but generally all issues in a matter should be disposed of by the same court at the same time ...even if, technically, an order is final in effect, it may be inappropriate to allow an appeal against it when the entire dispute between the parties has yet to be resolved by the court of first instance.'

[76] The court referred to Harms AJA's statement in *Zweni* that –

'... if the judgment or order sought to be appealed against does not dispose of all issues between the parties the balance of convenience must, in addition favour a piecemeal consideration of the case. In other words, the test is then 'whether the appeal – if leave is given - would lead to a just and reasonably prompt resolution of the real issue between the parties.'

[77] Another case to similar effect referred to in *Health Professions Council* is *National Director of Public Prosecutions v King*⁴³ where the court said-

'It is, however, necessary to emphasise that the fact that an 'interlocutory' order is appealable does not mean that leave to appeal ought to be granted, because if the judgment or order sought to be appealed against does not dispose of all the issues between the parties, the balance of convenience must, in addition to the prospects of success, favour a piecemeal consideration of the case before leave is granted. The test is then whether the appeal, if leave were given, would lead to a just and reasonably prompt resolution of the issue between the parties. Once leave has been granted in relation to 'a judgment or order' the issue of convenience cannot be visited or revisited because it is not a requirement for leave, only a practical consideration that a court should take into account.'

[78] In similar vein, Nugent JA, in the same case said:

⁴³ 2010 (2) SACR 146 (SCA); (2010) (7) BCLR 656 para 46.

‘... when the question arises whether an order is appealable, what is often being asked is not whether the order is capable of being corrected, but rather whether it should be corrected in isolation and before the proceedings have run their full course.’

[79] I have referred to the *Health Professions Council*, a case cited by counsel, for the purpose of emphasizing the cogency of the principle against piecemeal appellate consideration of interlocutory orders. In this case a pragmatic approach would have militated against the appealability of the order and the review application would not have been this prolonged.

[80] It is for the reasons outlined in this judgment that I come to the conclusion that the appeal against the order of the court *a quo* delivered on 21 January 2020 should be struck off the roll. It was purely interlocutory in nature and not appealable. Leave to appeal in regard thereto was wrongly granted.

[81] Regarding the issue of costs, there is no reason why the costs should not follow the event.

Order

[82] In the result, the court makes the following order:

(a) The appeal is struck off the roll.

(b) The appellant shall pay the respondents’ costs of two instructed and one instructing legal practitioner.

CHINHENGO AJA

SAKALA AJA

SHONGWE AJA

APPEARANCES:

Appellant:	JJ Gauntlett SC QC (with LC Kelly and E Nekwaya) Instructed by the Office of the Government Attorney, Windhoek
First and Second Respondents:	R Heathcote (with him R Maasdorp) Instructed by Francois Erasmus & Partners,
Third to Eleventh Respondents:	Instructed by Van der Merwe-Greeff Andima Inc, Windhoek
Twelfth Respondent:	Instructed by Engling, Stritter & Partners, Windhoek