



**NOT REPORTABLE**

CASE NO: P 15/2022

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**JAMES NEPENDA HATUIKULIPI  
SAKEUS EDWARD TWELITYAAMENA  
SHANGHALA  
PIUS NATANGWE MWATELULO**

**First Applicant  
Second Applicant  
  
Third Applicant**

and

**RICARDO JORGE GUSTAVO  
STATE**

**First Respondent  
Second Respondent**

In re:

In the petition for leave to appeal by:

**RICARDO JORGE GUSTAVO**

**Petitioner  
(Applicant in the court  
*a quo*)**

and

**STATE**

**Respondent  
(Respondent in the court  
*a quo*)**

**Coram:** FRANK AJA, SHONGWE AJA and MOSITO AJA

**Heard:** 17 November 2022

**Delivered:** 17 November 2022

**Reasons released:** 6 December 2022

**SUMMARY:** The applicants, co-accused of Mr Gustavo, face charges under the Anti-Corruption Act 8 of 2003, the Prevention of Organised Crime Act 29 of 2004 and fraud. At present, the applicants are currently incarcerated as trial awaiting prisoners. Mr Gustavo launched a bail application before the Magistrates' Court. The same was refused, and the High Court upheld the findings of the Magistrates' Court. Thereafter, Mr Gustavo applied to the judge for his recusal on the basis that the judge had also presided over an erstwhile urgent application launched by him and the present applicants in the High Court who sought to set aside their arrests as being invalid and based on certain findings made when upholding the decision of the Magistrates' Court not to grant Mr Gustavo bail.

The applicants, as co-accused of Mr Gustavo, seek to intervene in the proceedings in that they have a direct and substantial interest in the matter as they are entitled to a trial by an impartial judge. The State seeks condonation for their non-compliance with the rules of this Court in order to oppose the intervention application.

*Held*, while the Rules of the Court do not provide for intervention applications, by the operation of the principle of *ubi jus ibi remedium*, parties do not lose rights that they may have. In such cases, the court will, in its inherent jurisdiction, deal with the matter to do justice to the parties.

*Held*, it is trite law that for condonation to be granted, parties must first show that there is a reasonable explanation for the non-compliance, and secondly, what the prospects of success are in relation to the issues raised in response to the relief sought.

*Held*, the focus in common law intervention applications is on the interest of the applicant and not on the case he or she wants to make once he or she is allowed to

intervene. Hence, the applicant must, at least, satisfy the court that what he or she would bring to the proceedings he or she is about to join will be worthy of consideration by the judge(s) presiding over the proceedings. The opposing affidavit however made submissions only as to why the case law of this court on the subject matter of recusal of judges should be distinguished from the facts so as not to apply in the present matter, without attacking the applicants' stance that they have a direct and substantial interest in the outcome of the petition.

*Held*, it cannot be countenanced that parties can decide to ignore the laid down procedures whenever it does not suit them.

*Held*, the condonation application is refused as the belated filing was neither reasonable, nor did it have prospects of successfully avoiding the intervention application.

*Held*, the intervention application proceeds unopposed. The applicants established on a *prima facie* basis that they have an interest that would probably be affected by the outcome of the petition, and that they have a common cause of action with Mr Gustavo as far as the petition is concerned.

Applicants are accordingly allowed to intervene in the petition as ordered.

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### **JUDGMENT IN APPLICATION TO INTERVENE**

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FRANK AJA (SHONGWE AJA and MOSITO AJA concurring):

#### Introduction

[1] This matter was heard on 17 November 2022 and on that day this court granted an order in the terms set out at the end of this judgment. When handing down the order, it was indicated that the reasons for the order would be provided in due course. What follows are the reasons for the order.

## Background

[2] The first respondent (Mr Gustavo) is a trial awaiting prisoner. He together with others, including the applicants, face charges under the Anti-Corruption Act 8 of 2003, the Prevention of Organised Crime Act 29 of 2004 and fraud. It is alleged that all the accused persons involved acted with a common purpose when the alleged crimes were committed.

[3] After the arrest of Mr Gustavo and the applicants, they launched an urgent application in the High Court seeking to set aside their arrests as being invalid. This application was struck from the roll on the basis that a case was not made out for it to be heard on an urgent basis. The warrant of arrest was however, at a later stage, set aside in the High Court and Mr Gustavo was released. This release was however of a short duration as he was re-arrested on a new warrant and has been incarcerated since this latter arrest. What the position of the applicants was during this time does not appear from the record in this matter, but it is clear that they are also currently incarcerated as trial awaiting prisoners.

[4] Mr Gustavo launched a bail application in the Magistrates' Court. This application was opposed by the State and the Magistrate who heard the evidence of the applicant and that of an investigator of the Anti-Corruption Commission (Mr Cloete) in the bail application refused the application.

[5] Aggrieved by the decision of the Magistrate to grant him bail, Mr Gustavo appealed this decision to the High Court. In the High Court, the matter was heard by

the same judge who earlier presided over the urgent application. The judge dismissed the appeal. Mr Gustavo, subsequent to the dismissal of the appeal, applied to the judge for his recusal based on certain findings made in his judgment upholding the decision of the magistrate to refuse his bail. This recusal application was likewise dismissed, and so was the application for leave to appeal against its dismissal.

[6] As a last resort, Mr Gustavo filed a petition pursuant to s 316(6) of the Criminal Procedure Act 51 of 1977 with the Chief Justice, seeking leave to appeal the recusal judgment. This petition, under Case No. P 15/2022, is currently before the judges designated by the Chief Justice to deal with it.

#### The intervention application

[7] The applicants in the intervention application who, as mentioned above, are all co-accused of Mr Gustavo seek to intervene in the petition proceedings so as to become co-petitioners with Mr Gustavo and hence also, should the petition be successful, co-appellants with Mr Gustavo.

[8] The applicants point out that they made common cause with Mr Gustavo that the judge involved should recuse himself by reason of certain findings he made in the appeal judgment and also because of his prior dealings with them in the urgent application and with Mr Gustavo, in the bail appeal.

[9] The applicants point out that they were not parties to the bail application, the bail appeal, the application for recusal, or the application to appeal against the

recusal judgment, and hence their approach to this Court to become parties to the petition of Mr Gustavo filed with the Chief Justice.

[10] The applicants submit that as co-accused with Mr Gustavo they have a direct and substantial interest in the matter as to whether the judge should continue with the trial as they are entitled to a trial by an impartial judge and not a trial where they harbour a reasonable apprehension of bias in respect of the judge. They further point out that they are entitled to act to defend their position in this regard which raises the same issues that Mr Gustavo raised and are not expected to leave their interests in the hands of Mr Gustavo and his legal practitioner when they desire to do so themselves through their chosen legal practitioner.

[11] Applicants refer to a number of cases decided by this Court to bolster their application dealing with situations where judges made credibility findings, where such findings could also be relevant at the trial and where judges continued with the trial in circumstances where prior dealings with accused persons made this inappropriate<sup>1</sup>.

[12] As the Rules of this Court do not provide for intervention applications, the applicants utilised rule 5 which provides for interlocutory applications. Respondents were thus given ten days to file answering affidavits if they intended to oppose the application.

[13] Rule 5 is clearly inapplicable as 'interlocutory matters' are defined in the rules to mean:

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<sup>1</sup> *Minister of Finance v Hollard Insurance Company of Namibia Limited* [2019] NASC (28 May 2019); *S v Munuma* 2013 (4) NR 1156 (SC) and *S v Lifumbela & others* 2022 (1) NR 205 (SC).

‘ . . . any matter relevant to a pending appeal where the decision on it does not dispose of the appeal’.

In this matter, there is no pending appeal but only a pending petition which may or may not lead to an appeal, depending on the outcome of the petition. Neither is rule 29 which grants powers to the court to condone non-compliance with any rules applicable. This is so because there is no rule relating to intervention applications that was not complied with.

[14] The fact that there is no rule of this Court that specifically provides for the procedure where the party intends to intervene in a matter such as the present, does not mean that such party loses any right he/she may have. This is so because *ubi jus ibi remedium*<sup>2</sup>. In such case the court will, in its inherent jurisdiction, deal with the matter so as to do justice to the parties involved. As was stated in *Minister of Defence v Mwandingi*<sup>3</sup>:

‘There is no doubt that the Supreme Court possesses an inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice. . . .’

In fact s 37(2) of the Supreme Court Act 15 of 1990 also expressly grants the court extensive powers in this regard:

‘Nothing in this section contained shall preclude the Supreme Court from dealing with any matter before it, in such manner and on such principles so as to do substantial justice and to perform its functions and duties most efficiently.’

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<sup>2</sup> Where there is a right, there is a remedy.

<sup>3</sup> *Minister of Defence v Mwandingi* 1993 NR 63 (SC) at 76H.

[15] As the manner in which the application was brought caused no prejudice to the respondents, the court dealt with the matter in the exercise of its inherent jurisdiction.

#### Condonation application

[16] The intervention application was lodged with this Court and served on the State on 26 September 2022. As mentioned above, the State was granted ten days to file an answering affidavit so as to oppose the application. This did not happen and the notice of set down was forwarded to parties on 9 November 2022 indicating that the matter was set down for hearing on 17 November 2022.

[17] During the afternoon of 16 November 2022, the State responded by the filing of a 'Notice of opposition and application for condonation'.

[18] It is trite law that for condonation to be granted to the State for their late entry into the fray, two broad considerations are normally at play, firstly; is there a reasonable explanation for the non-compliance(s) with the stipulated rules of procedure, and secondly; what are the prospects of success in relation to the issues raised by such party in response to the relief sought. I say normally because where the non-compliance is flagrant or deliberate, the court will decline the condonation application on such basis only without considering the prospects of success in respect of the applicant's stance.

[19] According to the deponent on behalf of the State, when the application was served on it 'we initially thought it was of no consequence, since Mr Gustavo's petition was already pending before the Honourable Court'. Why they thought it was



of no consequence is difficult to fathom as the pending petition is exactly why the intervention application was lodged. The fact of the matter is that the State, after service of the application on it deliberately decided not to oppose it.

[20] However, after receipt of the notice of set down on 9 November 2022, the State revisited the matter and decided that the intervention application was without merit and instructions were received to oppose it. This led to the condonation application and answering affidavit being filed in the afternoon prior to the date of hearing (ie seven days after deciding to oppose the application).

[21] It simply cannot be countenanced that parties, for whatever reasons, can decide to ignore the laid down procedures whenever it does not suit them, or they think the process is of no consequence and then revisit the matter when they think it is apposite to do so in their own time and at the eleventh hour seek to oppose the matter with all the potential disruption to the proceedings this would normally entail.

[22] When it comes to the prospects of success, it seems that the State laboured under the misapprehension that this Court would, when hearing the application, deal with the merits of the applicants' submissions based on the case law referred to by them and mentioned above. The State thus resorted to dealing in the opposing affidavit with the said case law and attempted to distinguish it on the facts from the present matter so as to submit that those cases did not apply. The applicants' stance that they have a direct and substantial interest in the outcome of the petition is not questioned or attacked at all.

[23] The focus in common law intervention applications such as the present one, as this Court has no rule in this regard, is on the interest of the applicant and not on the case he or she wants to make once he or she is allowed to intervene. The common law principle has been stated as follows:

'The principle of the common law of intervention is, that if any third person consider that his interest will be affected by a cause which is pending, he is not bound to leave the case of his interest to either of the litigants, but has a right to intervene, or be made a party to the cause, and take on himself the defence of his own rights, provided he does not disturb the order of the proceedings. The intervener may come at any stage of the cause, and even after judgment, if an appeal can be delivered against such judgment.'<sup>4</sup>

[24] I accept for the purpose of this application that the applicant must indicate that the application is not frivolous and for this purpose, must at least satisfy the court that what he would bring to the proceedings he is about to join will be worthy of consideration by the judge(s) presiding at the proceedings. In the present matter, this is clearly the case as is evident from the opposing affidavit which, as mentioned above, makes submissions only as to why the case law of this Court on the subject matter of the recusal of judges should be distinguished on the facts so as not to apply in the present matter.

[25] It follows that not only are the reasons for non-compliance to timeously file the opposing affidavit not reasonable, but also that the belatedly filed affidavit has no prospects of successfully avoiding the intervention application. The condonation application is accordingly refused.

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<sup>4</sup> *[President and Members of the] Orphan Board v [Johannes Gysbertus] Van Reenen & Bayley* (1829) 1 Knapp 82 (PC), 12 ER 252 at 255, as quoted in *Suderhavid v Ferina* 1992 NR 316 (HC) at 319F-G.

[26] I should mention that in the opposing affidavit the point is taken that the applicants did not follow the correct procedure as rule 5(1) of this Court regulates interlocutory proceedings which the intervention application was not. No suggestion was made as to what procedure should have been followed, nor was any prejudice alleged to be caused to the State by the use of rule 5(1) by the applicants. I have dealt with this issue above and for the reasons already mentioned, this point is also without merit.

#### Disposal

[27] As the condonation application was declined, the intervention application became unopposed and had to be dealt with as such.

[28] As it a the common law intervention application, the applicants had to establish on a *prima facie* basis that they:

(a) Have an interest in the petition and their interest will probably be affected by the outcome of the petition; and,

(b) They have a common cause of action or a common ground with Mr Gustavo as far as the petition is concerned.<sup>5</sup>

[29] This, the applicants did establish as they are co-accused with Mr Gustavo, who also seek the recusal of the trial judge for similar reasons as those of Mr Gustavo and are, as accused persons, entitled to a fair trial by an impartial judge.

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<sup>5</sup> *Elliot v Bax* 1923 WLD 228 and *Ex parte Ferreira Deep Supply Stores* 1932 TPD 271.

[30] In so far as they had to establish that the application was not a frivolous one it suffices to say that the case law of this Court referred to by them and mentioned above are of such a nature that they deserve to be brought to the attention of those judges designated to consider the petition of Mr Gustavo.

[31] It is for the above reasons that the following order was granted at the hearing of 17 November 2022:

(a) The condonation application by the State is refused.

(b) Applicants are allowed to intervene in the petition of Ricardo J Gustavo, Case No. P15/2022 as petitioners 2 to 4 respectively.

(c) The founding affidavit to the intervention application will be used as the supporting affidavit in the petition.

(d) The State is to file their answering affidavit in the petition, if it so desires, within 10 days from the date of this order.

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**FRANK AJA**

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**SHONGWE AJA**

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**MOSITO AJA**

## APPEARANCES

FIRST TO THIRD APPLICANTS: V Soni, SC (with him R Kurtz)  
Instructed by Murorua Kurtz Kasper Inc.

FIRST RESPONDENT: No appearance

SECOND RESPONDENT: E E Maronedze (with him C K Lutibezi)  
Of the Office of the Prosecutor-General