

REPORTABLE

CASE NO.: SA 48/2011

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

JASON MUKAPULI

1st APPELLANT

MARTHA MUKAPULI

2nd APPELLANT

and

SWABOU INVESTMENT (PTY) LIMITED

1st RESPONDENT

FIRST NATIONAL BANK OF NAMIBIA LIMITED

2nd RESPONDENT

Coram: Maritz JA, Mainga JA *et* Ngcobo AJA

Heard on: 02/04/2012

Delivered on: 13/08/2012

APPEAL JUDGMENT

NGCOBO AJA:

[1] This appeal concerns the question whether the High Court is a competent court to review the constitutionality of earlier proceedings between the same – or essentially the same - parties before another Judge of the High Court. This question arises from the order made by Swanepoel J striking from the roll the

appellants' application to rescind the order made against them by Heathcote AJ on 23 September 2009 at the conclusion of the trial.

[2] The appellants are Mr Jason Mukapuli and Mrs Martha Mukapuli. They are husband and wife, and they are pensioners who reside at Erf 2997 Soweto, Katutura, Windhoek (the property). They were both defendants in an action instituted by Swabou Investment (Pty) Limited, the first respondent in this appeal, in which it sued for the repayment of certain sum of money previously advanced to the appellants as a home loan. The first respondent obtained judgment in its favour before Heathcote AJ on 23 September 2009 and subsequently obtained an order declaring that the property is executable. In due course, First National Bank of Namibia Limited, the second respondent in this appeal, bought the property at a sale in execution and obtained an eviction order against the appellants. A writ of ejectment was issued.

[3] The appellants resisted eviction. They brought an application in the High Court for an order setting aside the eviction order and, in the alternative, they sought the stay of the writ of ejectment pending the institution of an application to rescind the judgment and order of Heathcote AJ. The application for a stay succeeded and the appellants subsequently brought an application in the High Court for an order rescinding the judgment and order of Heathcote AJ on the ground that they were not accorded a fair trial. This application came before Swanepoel J.

[4] Swanepoel J, in an *ex tempore* judgment, concluded that the High Court was not a competent court within the meaning of Article 25 of the Constitution to review the constitutionality of the proceedings of the High Court but that the Supreme Court is. He accordingly struck the application for rescission from the roll and, in the exercise of his discretion, made no order for costs. The present appeal is against that order.

[5] In this appeal we are concerned with a procedural question, namely, whether the appellants went to a wrong court to enforce their fundamental right to a fair trial that is guaranteed by Article 12 of the Constitution.

[6] The question presented in this appeal is governed by Article 25(2) and (3) of the Constitution, which provide:

"(2) Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.

(3) Subject to the provisions of this Constitution, the Court referred to in Sub-Article (2) hereof shall have the power to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms conferred on them under the provisions of this Constitution, should the Court come to the conclusion that such rights or freedoms have been unlawfully denied or violated, or that grounds exist for the protection of such rights or freedoms by interdict."

[7] The question is whether the High Court is a “competent court” within the meaning of Article 25(2) of the Constitution. The Constitution does not tell us what a competent court is. However, in its ordinary meaning, the word competence means the legal authority to deal with a particular matter. It is a relative concept that must be construed purposively and in the light of the jurisdiction of the particular court in relation to the particular dispute in question. The purpose of Article 25(2) was to clothe courts with legal authority to deal with alleged violations of fundamental rights. But the drafters of the Constitution were mindful of the fact that courts are subject to a hierarchy system that regulates the exercise of legal authority and that determines their various jurisdictions in relation to subject matter of the dispute. This is apparent from Article 78 which vests the judicial power in the Supreme Court, High Court and Lower Courts.

[8] More importantly the Constitution recognises that the jurisdiction of the Namibian courts will be determined by their status in the hierarchy system of courts. Thus Article 79 sets out the jurisdiction of the Supreme Court, which includes the power to “hear and adjudicate upon appeals emanating from the High Court, including appeals which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed” by the Constitution¹.

[9] The jurisdiction of the High Court is governed by Article 80 which, in relevant part, provides:

¹ Article 79(2)

“(2) The High Court shall have original jurisdiction to hear and adjudicate upon all civil disputes and criminal prosecutions, including cases which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder. The High Court shall also have jurisdiction to hear and adjudicate upon appeals from Lower Courts.

“(3) The jurisdiction of the High Court with regard to appeals shall be determined by Act of Parliament.”

[10] The High Court has original jurisdiction and appellate jurisdiction in matters referred to in Article 80(2). It is therefore clearly a “competent court” as contemplated in Article 25 on those matters,² but it has no appellate jurisdiction in regard to appeals from itself, that is to say a judge of the High Court may not sit in judgment over a decision of another High Court judge on essentially the same facts and issues between the same litigants. Nor can the High Court review its own decision under those circumstances. The High Court considered the issues between the parties ventilated at the trial and decided them in a considered judgment. Subject to a few well-known exceptions to the rule, the court is *functus officio* once it has pronounced its order in the matter and cannot correct, alter or supplement it³.

² Compare: *S v Heidenreich* 1995 NR 234 (HC) (1996 (2) SACR 171) at 238F – G; *Government of the Republic of Namibia and Others v Mwilima and All Other Accused in the Caprivi Treason Trial* 2002 NR 235 (SC) at 247C and *Onesmus v Minister of Labour and Another* 2010 (1) NR 187 (HC) at 195A par [13].

³ See: *Road Accident Fund and Another v Mdeyide* 2011 (2) SA 26 (CC) at 52F par [96]; *Brown and Others v Yebba CC t/a Remax Tricolor* 2009 (1) SA 519 (D) at 524J par [24]; *Bekker No v Kotzé and Another* 1996 (4) SA 1287 (NM) at 1290G and *Firestone SA (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306F: “The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes *functus officio* : its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased.” (*per* Trollip JA)

[11] One of the recognised exceptions to this principle is in the case of a rescission of a judgment. The power to rescind one's own judgment is an exception to this rule. And the grounds of rescission are very narrowly specified. Outside of these grounds, an aggrieved litigant must challenge any irregularity in the proceedings which gave rise to the order by way of appeal⁴ or, if this Court has assumed review jurisdiction in the matter, by way of review to the Supreme Court under s. 16 of the Supreme Court Act, 1990. In the case of *Schroeder and Another v Solomon and 48 Others* this court gave detailed directions of what was required of a party who wanted to bring an irregularity in proceedings to the notice of the Supreme Court or to one of its judges.⁵

[12] In *S v Malumo and Others* this Court explained the circumstances under which its power to review the the proceedings may be exercised and said:

"Section 16 is an extraordinary provision which allows this court, as a court of first instance, to correct irregularities in proceedings before the High Court and any other tribunal or authority established by law. This power can only be exercised by this court once it takes cognisance of such irregularity and assumes jurisdiction. Subsection (2) specifically prohibits any party to bring review proceedings in the Supreme Court as a court of first instance. The existence of an irregularity in proceedings may come to the notice of the court or any of its judges, in which case it may mero motu assume jurisdiction and give directions in terms of its rules to deal with the matter. Perhaps the most likely manner in which an irregularity of that nature would be brought to the attention of the court or any of its judges, is by

⁴ Compare: *Cement Co Ltd and Another v Competition Commission and Others*, 2003 (2) SA 385 (SCA) at 402D as approved and applied by this Court in *Schroeder and Another v Solomon and 48 Others* 2009 (1) NR 1 (SC) at 14A par [25] and subsequently confirmed in *S v Malumo and Others* 2010 (2) NR 595 (SC) at 602D par [15].

⁵ See note 4, at para [15].

means of a complaint by an aggrieved party involved in the proceedings or through a third party with an interest therein.”⁶

[13] The phrase “competent court” in Article 25(2) must therefore be construed purposively to refer to a court that has the jurisdiction to hear the particular matter. It should not be construed to confer jurisdiction upon a court that does not have jurisdiction to consider the particular dispute.

[14] What in effect the appellants sought to achieve by bringing the application for rescission in the High Court was to review and have set aside the judgment and order of Heathcote AJ for an alleged violation of the right to a fair trial. A judge of the High Court does not have the jurisdiction to review earlier proceedings between the same or essentially the same parties before another judge of the High Court. The court that has the legal authority to adjudicate the complaint by the appellants that the High Court violated their fundamental rights to a fair trial is the Supreme Court.

[15] Realising this difficulty, counsel for the appellants accepted that he could not contend for a general principle that a High Court is competent to review its own decision but nevertheless contended that the inherent power of the High Court to regulate its own procedure is wide enough to include the power to review its own decision. It is not necessary to determine the nature and the scope of the inherent power of the High Court under Article 78(4). It is sufficient to say whatever the

⁶ See note 4 at para [15].

nature and scope of the inherent power of the High Court is, it simply does not include conferring upon it jurisdiction that it does not have.

[16] A judge of the High Court has no jurisdiction to review the constitutionality of the earlier proceedings in the same litigation before another judge of the High Court. The remedy of a litigant who alleges that a High Court has violated his or her fundamental right is either to appeal to the Supreme Court which has the power to hear appeals from the High Court, “including appeals which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed” by the Constitution⁷ or take those proceedings to the Supreme Court after compliance with the requirements of s.16 of the Supreme Court Act, 1990.

[17] It follows that the High Court was correct in its conclusion that the competent court in relation to the appellants’ complaint against the judgment and order of Heathcote AJ is this Court.

[18] Then to the issue of costs.

[19] In the exercise of its discretion the High Court did not make any order for costs. I agree with this order. But what about the costs in this Court?

[20] The issue of costs is a matter that is in the discretion of the court. The general approach is that the costs should follow the result. However, the court

⁷ Article 79(2)

may, in the exercise of its discretion depart from this rule. To my mind, this is one of those occasions which calls for a departure from that rule. I say this for the following reasons.

[21] The appellants are both pensioners. They say they have no regular income except for the monthly pension grants that they receive. Their combined income is N\$2 400,00, they say. Trying to secure legal representation has been a costly exercise for them. It has drained their financial resources. This ultimately left them to defend themselves in the proceedings before Heathcote AJ. They brought the application for rescission in the High Court and pursued that application in this Court through the assistance of the legal aid which secured legal representation for them.

[22] The importance of the case to them cannot be gainsaid. It concerns their house, the property. They have lived in this house for more than 33 years. They say if the house is sold off, they may well be forced to live on the streets. And at this advanced age they will not be able to rebuild their lives. This explains why they have defended the action against them. They are adamant they do not owe the bank any money. Whether that is so is a question that is not before us. What is before us is their determination to resist being evicted from their home that they have occupied for more than 33 years.

[23] What is more the issue they sought to argue will have an impact far beyond the present litigants. It concerns the right to legal representation in civil disputes. It is a novel issue of public importance. The only problem is that they followed a

wrong procedure in raising this important issue. They should have raised the issue by way of an appeal to this Court. They have since done that. That appeal was heard by a differently constituted panel of this Court. On behalf of the appellants it was submitted that it is not appropriate to impose a cost order in a matter involving an alleged violation of a fundamental right. The rationale for this proposition is that a costs order may have a chilling effect on litigants and this in turn may inhibit the enforcement of fundamental rights.

[24] There is much to be said for this view. This is a principle that should no doubt be taken into consideration in the exercise of discretion. But it is a principle that must be taken into account in combination with other factors in the case bearing in mind that the ultimate question is whether the court should in the exercise of its discretion depart from the general rule that costs should follow the result. Blind adherence to this principle may well encourage vexatious and frivolous litigation at the expense and to the prejudice of other litigants . And this is not conducive to the proper administration of justice. That said, on the record before us I cannot say that the constitutional issue raised by the appellants is frivolous. On the contrary it is an issue of considerable importance to the public and the State.

[25] It is true that the appellant must take responsibility for the actions of their legal representative, albeit a legal aid representative. But one cannot lose sight of the fact that they cannot be blamed for the procedure that was followed; that decision was that of their legal representative and they had no reason to believe that it was not the proper procedure to follow. All they were interested in was to

save their home and for how to go about doing this they relied on their legal representative.

[26] In all the circumstances of this case, I am satisfied that this is an appropriate case for a court, in the exercise of discretion, to depart from the general rule that costs should follow the result. The High Court did so and this must be so on appeal. The costs should therefore lie where they fall.

[27] In the event the appeal is dismissed and there is no order for costs.

NGCOBO AJA

I agree.

MARITZ, JA

I agree.

MAINGA, JA

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