



**NOT REPORTABLE**

CASE NO: SCR 1/2017

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**CATO FISHING ENTERPRISES**

**(PROPRIETARY) LIMITED**

**First Applicant**

**DIANFU GUAN**

**Second Applicant**

and

**WISTA CONSTRUCTION CC**

**First Respondent**

**WINDHOEK CONSULTING ENGINEERS**

**(PROPRIETARY) LIMITED**

**Second Respondent**

**Coram:** SHIVUTE CJ, MAINGA JA and SMUTS JA

**Heard:** 15 November 2017

**Delivered:** 22 November 2017

**SUMMARY:** This is an application for review as envisaged in section 16 of the Supreme Court Act 15 of 1990. The application stems from proceedings in the court *a quo* in which the applicants instituted an action against the respondents. The claim against the respondents is based on written agreements reached between the parties dating back to December 2008.

As the matter became defended, it proceeded to case management process and a case planning conference was scheduled. The parties filed a case plan and in it, the first respondent signalled its intention to raise an exception on the ground that the particulars of the claim were vague and embarrassing. When the matter was called at the hearing, the managing judge informed the parties that unnecessary interlocutory applications would not be entertained and directed the applicants to rectify and amend their particulars of claim.

Aggrieved by the managing judge's ruling, the applicants requested this court to invoke its review jurisdiction so as to review and set aside the decision of the court *a quo*. Section 16 gives this court powers to review proceedings of the lower court if they are tainted by an irregularity.

The applicants contend that the managing judge failed to afford them an opportunity to be heard on the intimated grounds of exceptions raised in the case plan. The applicants claim that the conduct of the managing judge constitutes an irregularity in the proceedings.

The court is satisfied that an irregularity had occurred in those proceedings justifying the exercise of this court's review jurisdiction. The court is further satisfied that the decision of the High Court constitutes an irregularity in the proceedings as contemplated in s 16 of the Act. The application for review is granted. No order as to costs is made.

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## **REVIEW JUDGMENT**

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SHIVUTE CJ (MAINGA JA and SMUTS JA concurring):

[1] This is an application for review and setting aside of the proceedings and order of the High Court on the basis that an irregularity has occurred in the

proceedings of the High Court as contemplated by s 16 of the Supreme Court Act 15 of 1990 (the Act).

### Background

[2] Applicants (as plaintiffs) instituted action against the respondents (as defendants) in the court *a quo* claiming payment of the amount of N\$4 905 396,67 and interest thereon, from date of service of summons to date of final payment, alternatively from date of judgment to date of final payment. The claim is said to arise from the respondents' alleged breach of the written agreements reached between the parties in December 2008.

[3] The respondents entered an appearance to defend the claim. Thereafter the matter proceeded to case planning process.

[4] Pursuant to the Rules of the High Court, the managing judge on 6 December 2016 issued a case planning conference notice, directing the parties or their legal practitioners to attend a case planning conference on 20 February 2017. The managing judge further directed the parties or their legal practitioners to submit a joint case plan at least three days before the conference. The said notice warned the parties that should they fail to submit a joint case plan, they would be barred from applying for summary judgment or filing a notice to except or strike.

[5] A closer scrutiny of the record reveals a divergence of views as to the exact date the case plan was filed with the court. The applicants contend that a case plan was filed on e-justice on 17 February 2017, three days before the case planning

conference. The managing judge on the contrary, says that a case plan by the applicants was only filed a day before the conference. As to the joint case plan, the managing judge insists that that document remains outstanding, as it has not been uploaded on e-justice and that although it forms part of the bundle of the request for review, the managing judge did not take cognisance of it.

[6] For the purposes of deciding the review, nothing much turns on this divergence of views. One thing becomes apparent from the case plan and it is that the first respondent expressly signalled its intention to raise an exception against the particulars of claim as being vague and embarrassing. It is also clear that the parties had proposed dates for the exchange of papers and the hearing of the prospective exception.

[7] The parties, as directing by the notice, attended to the case planning conference on 20 February 2017. After considering the content of the case plan and submissions by the parties, the managing judge informed the parties that unnecessary interlocutory applications would not be entertained in the matter. The managing judge then directed the applicants to file a notice to amend their particulars of claim on 28 February 2017 and the respondents, if so advised, to file their objections thereto on or before 9 March 2017. The matter was postponed to 13 March 2017 for a status hearing.

[8] Aggrieved by the managing judge's ruling, the applicants petitioned the Chief Justice on 21 April 2017 requesting this court to invoke its review jurisdiction as

envisaged in s 16 of the Act in order to review the proceedings and set aside the order of 20 February 2017.

[9] In light of the information contained in the applicants' affidavit, the Chief Justice was satisfied that a case had been made out that there were good grounds that an irregularity had occurred in those proceedings justifying the exercise of this court's review jurisdiction as envisaged in s 16. The Chief Justice, through the registrar of this court, issued several directions regulating the conduct of the review proceedings. The applicants were directed, amongst others things, to bring a review application on notice of motion informing the first and second respondents as well as the presiding judge of the review application and to afford them an opportunity to oppose the application if so advised or minded.

[10] Neither the defendants in the court *a quo* nor the managing judge opposed the review. Although the request for review was unopposed, the managing judge, upon invitation by the Chief Justice, filed several submissions regarding the conduct of the parties during the proceedings in question for consideration. Before I consider the principles applicable to review applications and the alleged irregularities, it is useful to first summarise the managing judge's response to the request for review.

#### Submissions by the managing judge

[11] The managing judge submits that the applicants omitted to provide the Chief Justice with all relevant information in the matter. It is submitted that the applicants' legal practitioners failed and omitted to inform the Chief Justice that the case

planning notice directed the parties or their legal practitioners to submit a joint case plan at least three days before the conference.

[12] The managing judge further submits that the parties were warned that should they fail to submit a joint case plan, they would be barred from applying for summary judgment or filing a notice to except or strike.

[13] The case plan which is attached to the applicants' petition, was only filed a day before the scheduled conference. As to the joint case plan, although it is attached to the request for review, the managing judge could not take cognisance of it during the hearing as it did not form part of the documents filed on e-justice. The managing judge says that despite the warnings sounded in the notice, the parties failed to give effect to the directives contained in the notice.

[14] According to the managing judge, under these circumstances the court was entitled to make the order as it did, barring the parties from filing a notice to except. The managing judge considers the conduct of the matter and the order of the court to be within the confines of the overriding objectives of the Rules of the High Court. In light of the above, the managing judge concludes that the application for review is ill-conceived as no irregularities were committed.

[15] In reply to the legal submissions and conclusions made in the managing judge's response, the legal practitioner for the applicants filed a reply thereto in which he dealt comprehensively with the issues raised by the managing judge. As noted above, the issues on which the applicants and the managing judge have

differences of opinion are not germane to the resolution of the review. As such, it is not necessary to deal with this issue further.

### The application of s 16 of the Act

[16] As noted above, this matter is reviewed in accordance with the provisions of s 16 of the Act. At this stage, I hasten to observe that the approach followed by this court to invoke its review jurisdiction in terms s 16 of the Act is well captured in judgments of this court,<sup>1</sup> which for the purposes of this judgment, I do not find necessary to restate in detail.

[17] In *Ardea Investments (Proprietary) Limited v Namibia Ports Authority & others*<sup>2</sup>, this court recently restated the principle that the Supreme Court has jurisdiction to review proceedings of the High Court or any lower court, or any administrative tribunal or authority established or instituted by or under any law if they are tainted by an irregularity. The court further noted that the phrase ‘irregularity in the proceedings’ as a ground for review relates to the conduct of the proceedings and not to the result thereof.

[18] It is now part of our civil procedural law that the party who alleges that an irregularity had occurred in the proceedings, bears the onus to satisfy the court that good grounds for review exist. As correctly stated in *Ardea*, what would precisely

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<sup>1</sup> See *Schroeder & another v Solomon & 48 others* 2009 (1) NR 1 (SC); *S v Bushebi* 1998 NR 239 (SC); *Christian v Metropolitan Life Namibia Retirement Annuity Fund & others* 2008 (2) NR 753 (SC).

<sup>2</sup> *Ardea Investments (Proprietary) Limited v Namibian Ports Authority & others* (SCR 4-2013)[2017] NASC (28 March 2017).

constitute ‘good grounds’ in any given case is dependent on the facts and the circumstances of the case.

### The alleged irregularity

[19] As already noted, the protest by the applicants is directed at the manner in which the proceedings were conducted in the High Court. The applicants, in their application, set out circumstances which they consider to constitute reviewable irregularities in terms of s 16. I now turn to the complaints as motivated by the applicants.

[20] The applicants contend that during the case planning conference, the managing judge failed to afford the applicants an opportunity to be heard on the grounds of exceptions raised in the case plan. In support of this contention, the applicants referred to rules 32(9) and 57(2) of the Rules of the High Court which provide the procedural mechanisms available to parties in the event of an exception based on the grounds that a pleading is vague and embarrassing. According to the applicants, by not affording the parties of the benefits of rules 32(9) and 57(2), the managing judge infringed their right to fair trial as guaranteed by Article 12 of the Namibian constitution.

[21] I deal with the second complaint. The applicants state that after hearing the parties and having considered the case plan, the managing judge made an order directing the parties to amend their pleadings. The applicants contend that, as a general rule, the managing judge has no power or authority in the circumstances to direct the parties to rectify and amend their pleadings. The applicants argue that the

procedure adopted by the managing judge falls short of what is required by the rules in that the prospective exception was supposed to be adjudicated upon first prior to any other ensuing process in the action. The applicants thus claim that their fundamental right to a just and fair hearing was violated.

[22] In support of the reviewable irregularity, the applicants cite *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd & others*<sup>3</sup> and state that the process undertaken by the managing judge ignored the authority of this court to the effect that it would be wrong for judicial officers to rely for their decisions on matters not put before them by litigants neither in evidence nor in oral or written submissions.

[23] Having considered all the relevant circumstances of this particular matter, I am of the view that the managing judge was entitled in terms of the rules of the court to bar the parties from filing a notice to except if the parties failed to submit a joint case plan. In order to give meaningful effect to the overriding objective of case management, parties and their legal practitioners are expected to cooperate among themselves and with the court in order to attain expeditious and just disposal of cases by the court. It is for this reason that the parties or their legal practitioners are required to comply with directions given by the court.

[24] However, as to the directions to amend the pleadings, the process set in motion by the managing judge cannot be supported. It is plain that the first respondent's intended exception was not brought or argued before the managing

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<sup>3</sup> 2011 (2) NR 469 (SC).

judge directed the applicants to amend their particulars of claim so as to take away the objection. By deciding on what was not presented before the court, the managing judge deprived the applicants of the opportunity to make representations, advance arguments and address the court on the exception (once properly formulated and delivered). The applicants were also deprived of the procedural requirements and advantages envisaged in rules 32(9) and 57(2) of the Rules of the High Court. Overall, the procedure adopted by the managing judge detracts from the applicants' rights to a fair hearing. I therefore agree with the applicants that the managing judge had no power or authority to direct the parties to amend their pleadings in the circumstances where all that was before him was intimation that an exception would be raised. The order to remove the cause of complaint before the exception had been filed and argued had the effect of deciding the exception before it was brought.

[25] Rule 32(9) of the Rules of the High Court provides as follows:

'(9) In relation to any proceeding referred to in this rule, a party wishing to bring such proceeding must, before launching it, seek an amicable resolution thereof with the other party or parties and only after the parties have failed to resolve their dispute may such proceeding be delivered for adjudication by the court.'

[26] Rule 52(2) of the same rules reads:

'(2) Where a party intends to take an exception that a pleading is vague and embarrassing he or she must, within 10 days of the period allowed to do so, by notice afford his or her opponent the opportunity of removing the cause of complaint.'

[27] The objective the managing judge sought to achieve by in effect ordering the applicants to remove the cause of complaint before the exception had been raised, could have easily been achieved by postponing the matter for a status hearing and allowing rules 32(9) and 57(2) to take their course.

[28] There can be no doubt that the order by the managing judge to remove the cause of complaint was made in a *bona fide* but mistaken belief that the tenor and spirit of judicial case management allowed the adoption of the procedure. It thus follows that the procedure adopted constitutes a reviewable irregularity in the proceedings and the order of the High Court stands to be reviewed and set aside.

[29] As the application for review is unopposed, I propose that no order as to costs be made.

#### Order

[30] The following order is accordingly made:

1. The order of the High Court in case no: HC-MD-CJV-ACT-CON-2016/03830, dated 20 February 2017, is reviewed and set aside.
  
2. The matter is remitted to the High Court to be placed under judicial case management to determine its further conduct.

3. No order as to costs is made.

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**SHIVUTE CJ**

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**MAINGA JA**

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**SMUTS JA**

APPEARANCES

APPLICANTS: G Dicks  
Instructed by De Klerk Horn &  
Coetzee Inc

FIRST & SECOND RESPONDENTS: No appearance