REPORTABLE

CASE NO: SA 25/2008

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

NAMIB PLAINS FARMING AND TOURISM CC	**APPELLANT**

And

VALENCIA URANIUM (PTY) LTD	**1st RESPONDENT**
MINISTER OF AGRICULTURE, WATER AND FORESTRY	**2nd RESPONDENT**
MINISTER OF MINES AND ENERGY	**3rd RESPONDENT**
MINISTER OF ENVIRONMENT AND TOURISM	**4th RESPONDENT**
BARBIE HORN	**5th RESPONDENT**
THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**6th RESPONDENT**

Coram: Shivute, CJ, Maritz, JA *et* Strydom, AJA

Heard on: 17/03/2009

Delivered on: 19/05/2011

APPEAL JUDGMENT

SHIVUTE, CJ:

Introduction

[1] The first respondent, a Namibian company and subsidiary of the Toronto Stock Exchange-listed Forsys Metals Corp, is a holder of an exploration licence granting it the right to search for uranium on Farm Valencia No 122, located approximately 75 kilometres southwest of the town of Usakos, in an area described in one of the publications attached to the founding papers as being one of the "most prolific uranium districts" and yet "one of the driest regions in the world".

[2] In preparation for its future mining activities, the first respondent had obtained from the second respondent, the Minister of Agriculture, Water and Forestry, four permits, numbered 10611, 10612, 10613 and 10614. The first two permits authorised it to drill boreholes in the Khan River for mining purposes while permit numbers 10613 and 10614 allowed it to abstract water from boreholes in the Khan River and to abstract and use water for mining purposes from specified existing boreholes respectively. The first respondent alleges that the water sought to be abstracted from the boreholes would be required for the purposes of constructing the mine and not for any mining activity.

[3] The other respondents in the Court *a quo* who are also the respondents in this Court were the Minister of Mines and Energy and the Minister of Environment and Tourism cited as the third and fourth respondents respectively while the fifth respondent, Mr Barbie Horn, is the owner of Farm Valencia. The Government of Namibia was the sixth respondent.

[4] Lying three farms away from Farm Valencia is Farm Namib Plains, the appellant's farm. The appellant states that it was engaged in the business of eco-tourism and that it was the owner of a sizeable number of wildlife on its farm that included Oryx, springbuck, and a number of kudu, zebra as well as ostrich. The appellant furthermore describes the area around its farm as totally undisturbed and a natural habitat of more than 40 bird species. All wildlife and bird species were dependent on naturally occurring underground water. The appellant contended that it was for this reason that its farm had been affected by the permits granted to the first respondent. Consequently, as applicant, the appellant brought an urgent application in the High Court wherein it sought, as Part A, *inter alia* the following relief:

> "1 That applicant's non-compliance with the Rules of the Court be condoned and that this matter be heard as envisaged in rule 6(12).
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> 2. That the first respondent be interdicted from extracting water from any borehole in the Khan River or Palaeo Channel (referred to in the permits annexed to applicant's founding affidavit marked Annexure 'M9' to 'M12' respectively), pending the finalization of the review application instituted simultaneously herewith under Notice of Motion (Part B), alternatively;
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> 3. Reviewing and setting aside the decision taken on behalf of second respondent to issue, and declaring the four permits, with numbers 10611, 10612, 10613 and 10614, null and void and of no legal force.
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> 4. In the event of relief being granted in terms of prayer 2 above, that costs be in the cause, but in the event of the relief in paragraph 3 being granted, that those respondent's opposing the relief, be ordered to pay applicant's costs".

[5] Simultaneous with the above application, the appellant gave notice of its intention to bring an application mentioned in prayer 2 above, as Part B, wherein it would seek an order:

> "1. Reviewing and setting aside the decision taken on behalf of the second respondent to issue, and declaring the four permits, with numbers 10611, 10612, 10613 and 10614 (annexed to applicant's founding affidavit marked Annexure "M9" and "Ml2") … issued to the first respondent; null and void and of no legal force; and for
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> 2. Costs of suit".

[6] The application for the urgent interim relief was opposed by the first respondent on three grounds that were raised as points *in limine*, namely that the High Court did not have the requisite jurisdiction to hear the application; that the appellant had failed to disclose grounds for urgency, and that the appellant in any event did not have the necessary standing to bring the application. The first preliminary point was, however, not pursued during the hearing of the application.

[7] The second, third, fourth and sixth respondents also opposed the application but only to the limited extent that the review portion thereof should not be dealt with on an urgent basis. They abided the decision of the Court as far as the granting of the relief in terms of prayer 2 of Part A of the Notice of Motion was concerned. The fifth respondent did not file a notice to oppose the application. Consequently, there was no appearance on his behalf neither in the High Court nor in this Court.

[8] It was argued in the High Court on behalf of the first respondent that the application for review should not be heard since the record of the proceedings sought to be reviewed had not been made available to the Court. On this score the learned Judge ruled that given the time limits within which papers were to be filed in what he described as a complex matter, the Court was going to determine the preliminary issues only. This ruling notwithstanding, the learned Judge did not decide any of the points *in limine* and went on to dismiss the application on an issue bearing on the merits that the appellant contends was not fully argued. Hence the appeal against the whole of the judgment and order of the High Court, which appeal is predicated on the grounds that:

> 1. [The High Court] failed to deal with the points *in limine,* re urgency and applicant's *locus standi*;
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> 2. The fact that the area, in respect of which the permits were issued, was not declared a subterranean area, could not lead to a finding that the application should be dismissed. To the contrary, if the area was not so declared, the permits were automatically null and void (in essence so found by the Court *a quo*). The only effect that "a non declaration of the area as a subterranean area" could have had was that the appellant could not rely on such fact (i.e. no subterranean area) for purposes of its *locus standi*;
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> 3. In deciding that there was nothing to determine, the court *a quo* committed an irregularity in the proceedings by basically declining to exercise jurisdiction of what it was required to do (i.e. determine the points *in limine*) as envisaged in Article 12 of the Namibian Constitution;
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> 4. The appellant will submit, at the hearing of the appeal, that the judgment and order of costs be set aside, and that the matter be referred to the court *a quo* for determination on the points *in limine"*.

[9] I may mention in passing that the last so-called ground of appeal is no ground at all. It appears to be in the nature of a submission, which rather unconventionally is made in the grounds of appeal.

[10] It is also apposite to point out at the outset that, although it was indicated in the affidavit deposed to on behalf of the first respondent in opposition to the application for condonation that the first respondent supported the judgment and order of the Court *a quo*, counsel appearing for the first respondent made it abundantly clear at the beginning of the hearing that first respondent did no longer sustain the judgment and order of the Court below. Counsel for the remaining respondents who opposed the appeal also initially argued strenuously in support of the judgment and order of the Court *a quo* but in the end submitted that the judgment and order were tainted by irregularities with which the respondents he represented did not associate. The end result is that none of the parties to the appeal appears to sustain the Court *a quo*'s judgment and order.

[11] The first respondent in turn has filed a notice of cross-appeal, conditional upon this Court finding that the appeal launched by the appellant was properly before us and/or upon this Court finding that the appeal should succeed on any of the grounds advanced in the notice of appeal. The grounds for this conditional cross-appeal were couched in the following terms:

> "1. The Court *a quo* erred in law and in fact by not dismissing the application for interim relief with costs, including the costs of two instructed counsel (after the Court found that it was a complex matter) on the grounds that appellant lacked the

necessary *locus standi* to seek the relief in its Notice of Motion either on an urgent basis or otherwise; and/or

2. The Court *a quo* erred in law and in fact by not striking the urgent application for interim relief from the roll with costs (including the costs of two instructed counsel despite the finding that the matter is complex) based on appellant's failure to disclose material evidence and appellant's failure to disclose grounds for the application to be heard on an urgent basis and/or based on appellant's delay in launching the application."

[12] I shall return to deal with the contention concerning the alleged irregularities in the proceedings and with the question whether or not this Court should exercise its review powers in respect of the alleged irregularities in due course, for this contention appears to constitute the kernel of the appellant's grievances in this appeal, but for the moment I find it necessary to present a brief account of the conduct of the proceedings at the hearing of the appeal in this Court.

Conduct of proceedings in this Court

[13] The Appellant filed an application for condonation for the late filing of the record of appeal, which was opposed by the first respondent only. Furthermore, it emerged during the hearing of the appeal that the permits which were the subject matter of the application in the High Court had been withdrawn subsequent to the delivery of the judgment in that Court. According to counsel for the second, third, fourth and sixth respondents, new documents had been issued to the first respondent allowing it to drill boreholes and test-pump water within the Khan River area and the Paleaochannel. It is furthermore common cause among the parties that as a result of the issuing of these documents, a new dispute had arisen

between the parties and that the appellant had lodged a new application in the High Court under Case No. A.41/2009, citing the same respondents and challenging the decision authorising the first respondent to abstract and use water from drilled boreholes. Counsel for the appellant submitted that in all likelihood, the issue of *locus standi* would again be raised in the new application. In the light of this development, we directed counsel to argue the condonation application first and to furthermore address us on the question whether or not we should entertain argument on the issues of urgency and *locus standi* that were dealt with extensively in the parties' written heads of argument seeing that these issues appear to have become academic.

[14] Although Mr Heathcote, who argued the appeal together with Dr Akweenda on behalf of the appellant, conceded at the outset that urgency had become moot following the withdrawal of the permits, he sought to persuade us that the issue of *locus standi* particularly in environmental cases in this country, where environmental concerns and mining may clash, had not previously been addressed by our courts and that it would be in the public interests for those issues to be considered and decided in this Court even though the High Court did not deal with them. Counsel contended that the issue of *locus standi* should be decided by this Court for the additional consideration that its resolution would have implications on the question of costs, which counsel conceded was of great importance to the appellant. Counsel for the appellant *inter alia* relied on Articles 18, 25(2) and 95(1) of the Namibian Constitution for the argument that *locus standi* in environmental cases should be extended to "aggrieved persons" such as the appellant since the appellant was allegedly entitled to protect the

environmental fabric of the area it does business in and as such should be adjudged to have had the requisite *locus standi*. At any rate, so counsel developed his argument, by providing in Articles 18 and 25(2) that aggrieved persons shall have the right to seek redress, the principle of *locus standi* required an extension in environmental cases thereby giving the phrase “persons aggrieved” in Article 18 of the Constitution a wider and more “constitutionally meaningful interpretation” in environmental context.

[15] Ms Vivier, counsel for the first respondent, argued in this regard that in the light of the new developments already referred to, the issues relating to the grant of the permits had become moot and that the Court should avoid expressing opinion on abstract positions of law. It was therefore not necessary, so she contended, for the Court to decide those issues. Mr Swanepoel who argued the appeal on behalf of the second, fourth, and sixth respondents essentially submitted to the same effect. It was Mr Swanepoel’s submission that the only effect the determination of the issues of urgency and *locus standi* would have is on the issue of costs.

[16] Turning for the moment to submissions made by counsel for the appellant, counsel’s constitutional arguments are thought-provoking but, as my Brother Maritz, JA observed during the hearing of the appeal, by insisting on the determination of the issue of standing that was evidently not decided by the Court *a quo* and in the circumstances where there is no wrong precedent that stands to be corrected on that issue, what the appellant was seeking to achieve in this regard was to obtain an advisory opinion from this Court. It has not escaped us

that the opinion will relate to an identical issue likely to arise between the same litigants in the application for review of the decision to issue fresh permits currently pending in the High Court. This Court has over the years adopted the approach that a Court should decide constitutional issues only when it is absolutely necessary. In this connection, we are inclined to reaffirm the approach of this Court in *Kauesa v Minister of Home Affairs and Others* 1995 NR 175 at 184A-B that it should decide no more than what was absolutely necessary for the decision of a case. Constitutional issues in particular ought to be developed cautiously, judicially and pragmatically if they were to withstand the test of time. We were and remain of the firm view that, although the issue of standing in environmental cases is undoubtedly an important matter and about which not much has been said in our jurisprudence, it is not necessary in the circumstances where the substance of the original application for review has become moot to decide an issue on which the High Court has not made any ruling and with which it is likely to be seized in another pending matter.

[17] It was for those reasons that having heard argument on the issues raised by the Court, we ruled that it was not necessary for counsel to address us on the issues of urgency and *locus standi* and reserved judgment on the remaining issues that were argued before us, namely the application for condonation; whether this Court should exercise its review jurisdiction in terms of section 16 of the Supreme Court Act, 1990 to review the alleged irregularities in the proceedings during the hearing of the application in the High Court and the first respondent's cross-appeal. It is to those issues that I turn next.

Application for condonation

[18] Starting with the consideration of the application for condonation and bearing in mind that the consideration of this issue also has a bearing on the merits, rule 5(5)(b) of the Rules of this Court provides that a record of appeal must be filed with the Registrar within 3 months of the date of judgment or order appealed against. As it was held by this Court in *Otto v Channel Life (Pty) Ltd* 2008 NR 432 (SC), breach of rule 5(5) has the consequence that the appeal is deemed to have lapsed and may be struck from the roll. However, an application for condonation may be brought in terms of rule 18 of the Rules of the Supreme Court and, on good cause shown, the failure to comply with the Rules may be condoned and the appeal re-instated if reasonable prospects of success have been established. (See paragraph [39] of the *Otto* judgment (*supra*). See also *Kamwi v Duvenhage* 2008(2) NR 656 (SC) at 663, paragraph [23]; *Ondjava Construction CC v H.A.W t/a Ark Trading* 2010 (1) NR 286.

[19] The appellant was 15 days late and so, as previously stated, it filed an application for condonation. The application is opposed by the first respondent only. The principles relating to the consideration of an application for condonation are well-known. In considering whether to grant such, a court essentially exercises discretion, which discretion has to be exercised judicially upon consideration of all the facts in order to achieve a result that is fair to both sides. Furthermore, relevant factors to consider in the condonation application include the extent of non-compliance and the explanation given for it; the prospects of success on the merits; the importance of the case; the respondent's interest in the finality of the

judgment; the convenience of the court, and the avoidance of unnecessary delay in the administration of justice. (*Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC) at 165G - I. See also decisions of the South African Appellate Division in *Federated Employers Fire and General Insurance Co Ltd v McKenzie* 1969(3) SA 360 (A) at 362G; *United Plant Hire (Pty) Ltd v Hills and Others* 1976(1) SA 717 (A) at 720E - G among others.)

[20] With these principles in mind, I proceed to examine whether or not the application for condonation should be granted. The affidavit attempting to explain the delay in lodging the record of the appeal was deposed to by Ms Gomachas, an employee of the Legal Assistance Centre, the appellant's instructing legal practitioners. Ms Gomachas points out in her affidavit that judgment was delivered on 19 April 2008 and on 6 May 2008 she filed a notice of appeal on behalf of the Appellant. Prior to 18 July 2008 (i.e. the date by which the record should have been lodged in terms of the Rules), "the legal practitioners of the respondents" and the appellant started negotiating a settlement. I placed the "legal practitioners of the respondents" in inverted commas advisedly because during the hearing of the appeal counsel appearing for the second, third, fourth and sixth respondents lamented the fact that he was not part of the settlement negotiations referred to by Ms Gomachas. Ms Gomachas continued with the narrative that the appellant was *bona fide* at all material times and verily believed that there were good reasons to settle. Given the prospect of a settlement, the appellant put the appeal on hold in an attempt to avoid incurring further costs. Unfortunately a settlement could not be reached, so the appellant had to resort to pursuing the appeal. By a letter dated 22 July 2008, the appellant's legal practitioners requested the first respondent to

consent to the late filing of the record of appeal. First respondent's legal practitioners replied by letter dated 23 July 2008 in effect demanding reasons for the neglect to file the record timeously prior to deciding whether or not to consent to the late filing of the record, which explanation was given. By a letter dated 24 July 2008, the first respondent confirmed that it had received the appellant's proposals for a settlement on 4 July 2008 and pointed out that it had replied to it on 21 July 2008. The first respondent's legal practitioner furthermore maintained that she had informed the appellant's legal practitioners by telephone that first respondent was no longer interested in the negotiations for a settlement as early as 11 July 2008. Ms Gomachas confirmed that she had been advised that this was indeed the position. In spite of this acknowledgement, Ms Gomachas states in paragraph 9 of her affidavit:

> "9. I submit that the correspondence referred to above particularly the letters from the legal practitioners of the applicant, give a reasonable and acceptable explanation of the applicant's default in filing the records of appeal on time. The delay was caused by a *bona fide* attempt of the applicant to reach a settlement. I submit that the first respondent contributed to the delay since it received applicant's proposal on 4 July and replied only on 24 July 2008".

[21] Ms Gomachas went on to state that when it became apparent that the matter could not be settled and while preparing for the record, it occurred to her that the court file was incomplete and that it was only on 28 July 2008 that the appellant's legal practitioners had managed to obtain the complete record and proceeded to finalize the pagination, indexing and the making of the copies thereof. This process was completed on 1 August 2008 and the record was then

filed on 4 August 2008. Ms Gomachas asserted furthermore that the appeal enjoyed good prospects of success and that the appellant had established good cause for non-compliance with the Rules. She referred in this regard to the grounds of appeal and points out that at the hearing of the application the parties had agreed that the High Court should decide the points *in limine* concerning urgency and *locus standi* but that the learned Judge allegedly did not exercise his jurisdiction on those issues. She contended that in those circumstances, the appellant had a clear case on appeal.

[22] Ms Angula, the first respondent's instructing counsel who deposed to an answering affidavit on its behalf, strenuously denied that the first respondent in any way contributed to the delay of the late filing of the record of appeal and stressed that the Director of the Legal Assistance Centre, who had the conduct of the matter and with whom Ms Angula had had dealings in connection with the matter, had known since 11 July 2008 that proposals for a settlement had been rejected. She furthermore made a valid point that there had been no explanation for inaction on the part of the appellant during the period between 6 May 2008 and 2 July 2008. Ms Angula contended that the appellant should not have in any event delayed compiling the record pending settlement negotiations since it had been advised well before the filing of the notice of appeal that the first respondent was not amenable to a settlement.

[23] Ms Vivier submitted that there was no evidence that the appellant had intended to appeal against the decision of the High Court and that in the absence of an affidavit to that effect from any of its members, any allegation from Ms

Gomachas that the appellant had intended to pursue the appeal amounted to inadmissible hearsay evidence. She argued furthermore that the explanation put up on behalf of the appellant for the late filing of the record of appeal was inadequate, particularly the unexplained gap of two months of inaction. She submitted that there was no allegation that the appellant had good prospects of success on appeal and on the basis of the well-established principles on condonation, she argued that even if the prospects of success on appeal were good, in view of the lack of explanation for the delay, condonation should not be granted. In any event, so counsel contended, condonation should be refused because the matter had become moot and of academic interest only.

[24] It is trite law that where non-compliance with the Rules is time-related, the explanation must cover the entire period. (*Uitenhage Transitional Local Council v South African Revenue Service* 2004(1) SA 292 (SCA) at paragraph [6].) In this matter, it is to be noted that there is a paucity of explanation in the affidavit of Ms Gomachas regarding inaction for a period of about two months. But for the vague assertion that settlement negotiations had been entered into “prior to 18 July 2008”, she left the Court in the dark about the date on which the negotiations had commenced. In the absence of such an explanation, an inference that the non-compliance with the rules was negligent is hard to resist. Her attempt to apportion blame on the first respondent for the delay is clearly untenable. As the first respondent pointed out in its affidavit and at the pain of being repetitive, the appellant’s legal practitioner who had the conduct of the matter had known since 11 July 2008 that settlement proposals had been rejected. It is axiomatic that Ms Gomachas should have taken steps to prepare the record of appeal at least as

soon as it became known that the settlement negotiations had collapsed. Had she taken the necessary steps at that time, she might still have rectified the record timeously so as to be in a position to file it in accordance with the Rules.

[25] The question that presents some difficulty is whether the appellant should be penalized because of the lack of diligence on the part of its legal practitioner. It is trite law that there is a limit beyond which a litigant cannot escape the consequences of its legal practitioner's remissness. However, as it was pointed out by Van Reenen, J in *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others* 1996(4) SA 411 at 420A - B, it would appear that those cases that have laid down this principle were decided in the context of clients, who with the knowledge that action was required, sat passively by without directing a reminder or enquiries to their legal practitioner entrusted with their matters. See, for example, the two cases cited by Van Reenen, J of *Saloojee and Another NNO v Ministry of Community Development* 1965 (2) SA 135 (A) at 141C - H; *Moraliswani v Mamili* 1989 (4) SA 1 (A) at 10B - D. Those considerations do not apply here. In any event, I am of the firm view that in the circumstances of this case the inadequate explanation for the delay is ameliorated by weighty factors that militate against the refusal of the application for condonation and the reinstatement of the appeal. These factors include the relatively short period of delay (compare, for example, the *Chairperson of the Immigration Selection Board v Frank* case (*supra*) where, because of the good prospects of the appeal succeeding, the majority were prepared to condone the late filing of the record even though there was no explanation whatsoever for the delay of five and half months); the fact that palpably none of the parties to the appeal sustains the reasoning or order of the

Court *a quo*, which attitude in my opinion significantly strengthens the argument in favour of the prospects of the appeal succeeding; the hearing of the appeal was not delayed; this Court was not inconvenienced, and the first respondent did not suffer prejudice consequent to the delay. As soon as the breach was noticed an application for condonation was filed. Under these circumstances, it seems to me that the appellant should not be penalized for the conduct of its legal practitioners, particularly also when the appellant itself played no part in the delay. Contrary to counsel for the first respondent's contention that there was no evidence that the appellant had intended to appeal, it is apparent from the power of attorney that the appellant had given its legal practitioners the power to proceed with the matter to the final determination of the appeal and there are no indications that it had at any time abandoned its intention to appeal. In my respectful view the parties must be heard, particularly because of the existence of reasonable prospects of the appeal succeeding and the importance of the case to all the parties. I would accordingly exercise discretion in granting the application for condonation and reinstate the appeal. I must mention that counsel for the appellant has tendered the wasted costs occasioned by the condonation application and such an order must follow.

Should this Court exercise review powers?

[26] The appellant has urged the Court to exercise its review powers, arguing that there were irregularities in the proceedings of the Court *a quo* allegedly evidenced by the Court *a quo*'s refusal to consider and decide the issues that it had ruled it was going to decide. Counsel for the first respondent, whilst acknowledging, of course, that this Court can *mero moto* invoke its review powers in terms of section 16(2) of the Supreme Court Act, 1990, submitted that the

appeal proceedings are the primary means to correct a judicial error and that as such the alleged irregularity should be corrected by the Court in the exercise of its powers as court of appeal. That this Court may invoke its jurisdiction under section 16 of the Supreme Court Act, 1990 is beyond cavil. (*Schroeder and Another v Solomon and 48 Others*, 2009(1) NR 1 (SC); *Hendrik Christian v Metropolitan Life Namibia Retirement and 3 Others* 2008(2) NR 753 (SC);*S v Bushebi* 1998 NR 239 (SC) at 2*41I – J.*)

[27] The assumption of review jurisdiction under section 16 of the Supreme Court Act, 1990 was characterized in paragraph [18] of the *Schroeder* (*supra*) judgment as an "extraordinary procedure". The reasoning for such a characterization was developed in the paragraphs that followed, but the essence thereof was summarized in paragraph [20] as follows:

> "Being a court of ultimate resort in all cases adjudicated by it, reasons of practice and prudence must curtail the invocation of its jurisdiction to entertain review proceedings as a court of both first and final instance. In the view I take, this court should do so only when it is required in the interests of justice. Whether it is so required or not, must be decided on the facts and the circumstances of each case."

[28] The question that arises then is whether the interests of justice require the invocation of this Court's powers under section 16 in the circumstances of this appeal. For the reasons that follow, I am not persuaded that it is necessary to do so. In *Schroeder* this Court emphasized in paragraph [24] that alleged irregularities in the proceedings before the High Court may be corrected in appeal proceedings. Citing the dictum of Schutz JA in *Pretoria Portland Cement Co Ltd and Another v*

Competition Commission and Others 2003 (2) SA 385 (SCA), the Court pointed out that appeal proceedings are the primary means to correct a judicial error. That appeal proceedings should be a means to address and correct irregularities in the proceedings of the High Court is particularly appropriate when, as in this case, the irregularity is apparent from the record and no evidence falling outside the ambit of the record is required to substantiate it.

[29] I proceed then to determine whether the Court *a quo* committed irregularities in the proceedings as contended for by counsel. A reading of the judgment of the High Court shows that the learned Judge reasoned that before he could decide the points *in limine*, he first had to consider the legislation and regulations relevant to the application before him. The Court went on to examine the provisions of the Water Act, 1954 (Act No. 54 of 1954) (the Act) including sections 27, 28 and 30 thereof which were germane to the application. Section 27 of the Act defines "subterranean water" as follows:

> "In this Chapter 'subterranean water' means –
>
> (a) water which exists naturally underground;
>
> (b) water other than public water which is derived in any manner whatsoever from natural underground sources, and which is contained in an area declared to be a subterranean water control area under section 28".

[30] Section 28(1) of the Act makes it clear that the authority clothed with the power to make the declaration referred to in section 27 of the Act is the President. The section provides:

> "(1) The President may from time to time by proclamation in the Gazette declare any area defined in the proclamation to be a subterranean water control area if the Minister is of opinion that it is in the public interest to do so, or such area is a dolomite or artesian geological area or that the abstraction of water naturally existing underground in such area may result in undue depletion of its underground water resources, and may in like manner withdraw or amend such proclamation".

[31] At the hearing of the application in the High Court, the parties were directed to search for a Proclamation, if any, in terms of which the area might have been declared to be a subterranean water control area. It became apparent that no such Proclamation existed and that the permits had been issued on an erroneous assumption that the area where the bore holes were to be drilled and from which underground water was to be extracted had been declared a subterranean water control area as contemplated in section 28(1) of the Act.

[32] Having referred to the submissions made by counsel on both sides regarding the non-existence of the Proclamation in terms of which a subterranean water control area may have been declared, the learned Judge rightly observed that the appellant's application was anchored on the contention that the permits were issued in respect of a declared subterranean water control area within the meaning of sections 27, 28 and 30(2) of the Act and then stated:

> "I find that no such Proclamation or Proclamations are before me, and the onus is on the applicant to disclose it or them. The fact that the permits were issued by the Minister through his officials, who must know, is of no legal consequence: the simple fact that remains is that there is no Proclamation before this Court".

He concluded as follows:

> "For all the above reasons, I am of the view that if this Court determined this matter – even the points *in limine* – that would be tantamount to the Court perpetuating a legal lie, so to speak; something which this Court must not do under any circumstances. As I say, as far as this Court is concerned, the legal reality is that the aforementioned Permits do not exist: it is as if they had not been issued at all. If that is the case, as I hold it is so established, then logically there is nothing in respect of which an application in the nature of the present application can be brought in this Court for the Court to hear and determine it. It follows inexorably that the present application stands to be dismissed". (Emphasis added)

[33] Mr Heathcote contended, as foreshadowed in the grounds of appeal, that in deciding that there was nothing to determine, the Court *a quo* committed an irregularity in the proceedings as envisaged in section 16 of the Supreme Court Act, 1990 by essentially declining to consider and decide the issues that it was required and had undertaken in its ruling to decide *in limine* and by dismissing the appellant's application on the legal basis that was not fully argued. Counsel for the first respondent on the other hand submitted that the basis upon which the application was decided, namely that the appellant had failed to establish that the area in respect of which the permits were issued had been declared a subterranean water control area was raised in the papers and argued. Mr Heathcote's response was that the issue was indeed raised by the first respondent but only in respect of the *locus standi* and not in relation to the final relief. Counsel contended that the appellant had relied on other grounds *inter alia* the common law, the constitution and existing rights for the contention that it had *locus standi* to institute proceedings and that the Court *a quo* should have dealt with those

grounds. Counsel continued and I did not hear Ms Vivier to argue to the contrary on this aspect, that the parties were not asked to make submissions on the type of order to make in the event that the learned Judge were to find that the area in respect of which the permits were granted had been not declared a subterranean water control area.

[34] It is apparent from the record that the learned Judge expressly indicated at the hearing that he was going to hear argument on and decide the points *in limine* only. Argument was apparently presented by all the parties on this basis. It is also clear that the ruling notwithstanding, the Court *a quo* decided the merits of the application before deciding the preliminary issues.

[35] It seems clear that the first respondent must have applied to the second respondent for permits on the *bona fide* but mistaken belief that the area under which the water was to be drilled for and extracted from was a declared subterranean water control area. As it turned out the area in question was not in fact so declared. In those circumstances, instead of dismissing the application and in the event that the two points *in limine* were decided in its favour, the appellant would have been entitled to a final order, which as we have seen, was prayed for in the alternative or it should have been afforded an opportunity to supplement its papers in terms of rule 53(4) of the Rules of the High Court. The rule provides:

> "(4) The applicant may within 10 days after the registrar has made the record available to him or her, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of his or her notice of motion and supplement the supporting affidavit".

[36] Had it been given the opportunity to do so, the appellant would have conceivably supplemented its papers to incorporate the ground that the permits should be declared null and void for the very reason that the area was not declared a subterranean water control area. In any event, having formed the *prima facie* view that the application could be decided on the basis different from the one argued by the parties, the Court *a quo* should then have invited submissions on the legal premise on which it had proposed to decide the matter and not simply to decide the issue without having heard argument on the order it had considered making.

[37] It follows in my view that by declining to decide the points *in limine* when it had given a ruling to decide those issues only and by dismissing the application on issues that have not been argued in the context of a final relief, the Court *a quo* committed irregularities in the proceedings. These irregularities are not only apparent from the record, but have also been properly raised on appeal. As such they can be and must be addressed by this Court in the exercise of its powers of appeal. It is not necessary for this Court to invoke its extraordinary powers under section 16 of the Supreme Court Act, 1990. In any event, in concluding that because the act of issuing the permits was a nullity (given the non-existence of a Proclamation in terms of which the area in question might have been declared a water control area) it followed that logically there was “nothing in respect of which an application in the nature of the present application (could) be brought in this Court for the Court to hear and determine”, the Court *a quo* committed a serious misdirection. However anomalous it may seem, it is a settled principle of law that even an unlawful administrative act is capable of producing legally valid

consequences for as long as the unlawful act is not set aside by a court of law. See, for example, the South African Supreme Court of Appeal decision of *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at 242B-C where that Court (per Howie P and Nugent JA) observed as follows:

> "The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."

See also *Smith v East Elloe Rural District Council* [1956] 1 ALL ER 855 at 871H for the position of English law which is to the same effect. Had the Court *a quo*'s attention been drawn to these authorities, it might not have come to the "inexorable" conclusion it arrived at.

[38] The facts of this case also make it necessary to briefly discuss the role of a judge in a civil case as opposed to a criminal case. The role of a judge in civil proceedings differs materially from the role of a judge in a criminal trial. For example, in criminal trials sections 167 and 186 of the Criminal Procedure Act, 1977 authorize a judicial officer or Judge, in the circumstances set out in section 186, to call witnesses. (*R v Hepworth* 1928 AD 265). In civil cases a Court cannot do so without the consent of the parties. (*Buys v Nancefield Trading Stores* 1926 TPD 513; *Simon alias Kwayipa v Van den Berg* 1954(2) SA 612 (SR) at 613F -

614). The role of a Judge in a criminal trial is therefore much more inquisitorial than is the case in civil trials.

[39] It would be wrong for judicial officers to rely for their decisions on matters not put before them by litigants either in evidence or in oral or written submissions. If a point which a Judge considers material to the outcome of the case was not argued before the Judge, it is the Judge's duty to inform counsel on both sides and to invite them to submit arguments. (*Kauesa v Minister of Home Affairs* (*supra*) at 182H - 183I).

[40] The above cases amply illustrate that in a civil case a Judge cannot go on a frolic of his or her own and decide issues which were not put or fully argued before him or her. The cases also establish that when at some stage of the proceedings, parties are limited to particular issues either by agreement or a ruling of the Court, the same principles would generally apply. The cases furthermore demonstrate that relaxation of these principles is normally only possible with the consent or agreement of the parties. (See further the passage quoted from the case of *Rowe v Assistant Magistrate, Pretoria and Another 1925 TPD 361* in the case of *Simon alias Kwayipa* (*supra)*) at 613H *in fine* 614A - E.)

First Respondent's Cross-appeal

[41] It remains to consider the first respondent's cross-appeal. As previously noted, the first respondent filed a conditional notice of cross-appeal. Counsel for the first respondent explained that the notice of appeal had been drafted conditional for two reasons. Firstly, counsel was of the initial submission that the

judgment of the Court below was reviewable and not appealable. Secondly, she felt that in the event that it was appealable leave was required. Counsel contended at the hearing of the appeal that in her submission none of the grounds was any longer good. Counsel submitted that the judgment of the Court *a quo* was final both as regards urgency and *locus standi*. She was insistent that this Court could not consider the order granted by the Court *a quo* unless it had first made a finding regarding urgency and *locus standi*. She continued to argue, correctly, that the Court *a quo* did not deal with the issue of urgency at the outset. In counsel's submission, the only way the appellant could approach the Supreme Court was if it had obtained condonation for the non-compliance with the Rules of the High Court. Not having obtained such condonation from the Court *a quo*, the appellant "is not before any Court and until condonation has been granted, no Court can consider *locus standi*". The cross-appeal can be disposed of shortly. Urgency is not an appealable issue in any circumstance. (See, for example *Aussenkehr Farms (Pty) Ltd v Minister of Mines and Energy and Another* 2005 NR 21(SC) at 29E - G). Whether urgency exists in a particular case is a factual question which is determined on a case by case and discretionary basis. There are no public interests to be served for this Court to be seized with the determination of issues of urgency which are dealt with by the High Court on a regular basis and on which there are a plethora of authorities to guide that Court when faced with similar matters. As regards the issue of *locus standi,* for the reasons already given, it is not necessary for this Court to decide that issue for the first time. The first respondent's cross-appeal stands to be struck from the roll. Not much time was spent on the cross-appeal and the issues were the same as in the appeal.

The case has to be remitted to the Court *a quo* to decide the issue of *locus standi*. The question arises whether or not the same Judge should further deal with the matter and it is to this question that I turn next.

Should the matter be remitted to the same Judge or not

[42] We have considered whether we should remit the matter for hearing by the learned Judge against whose judgment the present appeal was noted. Counsel for the first respondent argued that in the event that the matter is remitted to the Court *a quo*, the matter should be heard by another Judge since the Judge who presided over the case had a clear view on the merits. Counsel for the appellant countered that the Judge *a quo* decided the matter on a point of law and the concern that he may have decided it incorrectly is in itself not a justification not to refer the matter back to him. I agree with counsel for the appellant in this regard. There are no indications of bias or clouded judgment on the part of the learned Judge. I would accordingly refer the matter to be heard and decided by the same Judge, if available.

Costs

[43] Counsel for the appellant had argued that should the appeal succeed those of the respondents who oppose the appeal should be mulcted in costs. Whilst not necessarily conceding that the matter should be remitted to the Court below, counsel for the first respondent on the other hand submitted that in the event that the matter is remitted, each party should bear its costs or that no order as to costs should be made until the matter is finalized in the High Court. Counsel contended that all the parties were equally affected by what she characterized as an

"unfortunate" judgment. She added that the judgment and order of the Court notwithstanding, it was still open to the appellant to proceed with the review application in the High Court. The fact that the first respondent did not abandon the judgment granted in its favour and which it does no longer sustain should not be held against it. Mr Swanepoel, on the other hand, contended that as public officials performing administrative functions, those of the respondents he represents should not be ordered to pay costs. Counsel continued to argue that courts generally do not order costs against a public official where his or her action or attitude, though mistaken, was *bona fide*. He relied for this proposition on Herbstein & Van Winsen, *The Civil Practice of the Supreme Court of South Africa* 4th edition on page 723 and on *Coetzeestroom Estate and G.M. Co. v Registrar of Deeds* 1902 TS 216. The passage in Herbstein & Van Winsen relied on by Mr Swanepoel can also be found at page 977, Vol. 2, of the 5th edition of the book (now known as *The Civil Practice of the High Courts of South Africa* by the learned authors Cilliers, Loots and Nel). It is not necessary to decide whether there exists in this jurisdiction a practice not to order costs against a public officer where his or her action or attitude, even if found to be mistaken, is *bona fide* and based on reasonable grounds. In South Africa where the rule propounded in *Coetzeestroom Estate* case that a public official should not be mulcted in costs where his or her action, though mistaken, was *bona fide* was laid down in relation to applications against the Registrar of Deeds arising on matters of practice (*Coetzeestroom Estate case* (*supra*) at 223; *Attorney-General, Eastern Cape v Blom and Others* 1988(4) SA 645(A) at 670F). It has been held that such rule was not an inflexible one that applied in all cases (*Potter and Another v Rand Townships Registrar* 1945 AD 277 at 292; *Die Meester v Joubert en Andere* 1981(4) SA 211(A) at 224D - F;

Fleming v Fleming en 'n Ander 1989(2) SA 253(A) at 262C - D). As such, it should not be elevated into a rigid rule of universal application which fetters judicial discretion (*Attorney-General, Eastern Cape v Blom* (*supra*) at 670F). Consequently, in later cases costs have been awarded against public officers both in this jurisdiction and in South Africa. Herbstein & Van Winsen on pages 978 - 979 of the 5th edition, for example, provides instances in which costs have been awarded against public officers by South African Courts. I cannot find justification for the costs not to follow the event especially in the circumstances of this case where the respondents could have easily abandoned the judgment which they seemingly do not support. In my view costs should follow the event.

Order

I accordingly make the following order:

1. The appellant's failure to lodge the record of appeal timeously is condoned and the appeal is reinstated.

2. The appellant is ordered to pay the respondents' costs occasioned by the application for condonation and reinstatement, such costs to include the costs of both instructing and instructed counsel.

3. The appeal against the judgment and order of the High Court is allowed.

4. The judgment and order of the Court *a quo* is set aside.

5. The matter is remitted to the Court *a quo* for the learned Judge who dealt with the matter, if available, to consider and decide the issues raised *in limine* and if necessary, the remainder of the application.

6. The First Respondent's cross-appeal is dismissed and no order of costs is made in that regard.

7. The respondents (excluding the 5th respondent) are ordered to pay the appellant's costs of the appeal jointly and severally, the one paying the other to be absolved, such costs to include the costs of two instructed counsel and one instructing counsel.

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SHIVUTE, CJ

I concur

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MARITZ, JA

I also concur

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STRYDOM, AJA

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