REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 204/2012

In the matter between:

ESTHER NDAPEWA KANDJELE HAMUTENYA **APPLICANT**

and

MARTIN SHIPANGA N.O
(IN HIS CAPACITY AS A TRUSTEE OF M&N SHIPANGA FAMILY TRUST) **FIRST RESPONDENT**
TUSK INVESTMENT (PTY) LTD **SECOND RESPONDENT**

Neutral citation: *Hamutenya v Shipanga* (A 204/2012) [2013] NAHCMD 164 (13 June 2013)

Coram: PARKER AJ
Heard: **27 May 2013**
Delivered: **13 June 2013**

Flynote: Costs – First respondent's points *in limine* argued fully by both counsel and there is delivered a fully reasoned judgment – In those circumstances costs should not be ordered to be determined in due course or to be in the cause.

Summary: Costs – First respondent raised points *in limine* – Court instructed counsel to argue those points before the merits of the application were heard – Court held that since the points were argued fully by both counsel and a fully reasoned judgment has been delivered it is reasonable and fair that in those circumstances costs are not ordered to stand over for determination in due course or to be in the cause.

Flynote: Practice – Applications and motions – Points *in limine* raised by the first respondent – Points concern non-service of process and non-joinder of certain trustees – Court found that when it granted a rule *nisi* in an earlier proceeding the court had condoned the applicant's non-compliance with the rules – Court found further that that order was a final order and the court has no jurisdiction to set aside its own order, but certain exceptions not present *in casu* – Court dismissing points *in limine* with costs.

Summary: Applications and motions – Points *in limine* raised by first respondent – First point concerns non-service of process on respondents and the second non-joinder of certain trustees – In an earlier proceeding when a rule *nisi* was granted the court had made an order condoning the applicant's non-compliant with the rules, including the non-service and non-joinder – Court found that para 1 of that order which condoned the non-compliance with the rules is a final order and the court has no jurisdiction to set aside that order – Court held that, bar certain exceptions, a judge of the court may not sit in judgment over a decision of another judge of the court on essentially the same facts and issues between the same litigants – Court held further that in the present proceeding none of the exceptions to this principle (eg the court's power to rescind its own judgment) is applicable – Accordingly points *in limine* dismissed with costs.

ORDER

(a) The first respondent's points *in limine* are dismissed with costs which include the costs of one instructing counsel and one instructed counsel.

(b) The legal representatives of the parties must attend a status hearing in open court at 09h00 on 20 June 2013 for the purpose of the managing judge determining the further conduct of the matter.

JUDGMENT

PARKER AJ:

[1] In this proceeding the first respondent has raised points *in limine* in terms appearing in paras 5 et al of the first respondent's answering affidavit; and they concern 'non-service' of process on the first respondent and 'non-joinder' of certain trustees as parties to the application. Mr Khama represents the applicant, and Mr Jones the first respondent. I am grateful to both counsel for their industry, particularly in bringing to the attention of the court authorities on the points under consideration.

[2] The point on 'non-service' concerns the granting of an order by the court, per Van Niekerk J, on 1 September 2012 ('the order') in which the first respondent's contention is that the applicant did not comply with the rule of court on service of process and yet the court granted the order.

[3] For my present purposes, I should say that, with respect, I do not give any deep look at Mr Jones's submission on the distinguishing features of a ruling, a judgment and an order. Counsel's submission is labour lost. It is otiose to garnish this judgment with a discussion on what a ruling is, what a judgment is and what an order is. What should be clear to any reasonable and careful reader of the decision that my Sister Van Niekerk J made is that, as appears in the chapeu of the formulation of the decision, the learned judge 'ordered' the things that are contained in paras 1, 2 and 3 of the order. *Pace* Mr Jones, the decision that the court made on 1 September 2012 amounts to an order through and through. There was a distinct application by the applicant by notice of motion for a definite relief in the notice of motion. (See *Dickinson and Another v Fisher's Executors* 1914 AD 424, approved by the Supreme Court in *Shetu Trading v Tender Board of Namibia* 2012 (1) NR 162.) The court's decision, therefore, as I have decided amounts to an order.

[4] Para 1 of the order reads:

> 'That the applicant's non-compliance with the requirements related to forms and service *is hereby condoned* and the matter is heard as one of urgency as contemplated in Rule 6(12) of the Rules of this Honourable Court.' (Emphasis added)

And the chapeu of para 2 reads:

> 'That a rule *nisi* is hereby issued calling upon the respondents to show cause, if any, on the 28th September 2012 at 10:00 why an order in the following terms should not be made.'

And it consists of subparas 2.1, 2.2, 2.3 and 2.4. Doubtless, para 3 is the paragraph that settles conclusively the point under consideration. It reads – significantly:

> 'That the orders in prayers 2.1, 2.2, 2.3 and 2.4 shall operate with immediate effect pending the finalisation of this application.'

[5] It should also be equally clear to any reasonable and careful reader that para 1 of the order that my Sister Van Niekerk made is a final order; so is para 3. The formulation of para 1 points irrefragably to such inevitable conclusion; and the relevant clause in that paragraph is 'is hereby condoned'. It does not say condoned prima facie or that the condonation granted is to 'operate with immediate effect pending the finalization of this application', as it says about paras 2.1, 2.2, 2.3 and 2.4, as aforesaid. Furthermore, as Mr Jones admitted – unwittingly, I suppose – on the return date the judge seized with the matter would decide whether to confirm the rule *nisi* or discharge it. And counsel admitted also that in that regard para 2 of the order would come into play. Even without counsel's wise admission, which had to be drawn from him after a considerable length of time and much debate, para 3 of the order – as I have found previously – says so.

[6] These reasoning and conclusions lead me to the next level of the enquiry. Mr Jones argued with great zeal and verve that my Sister Van Niekerk J gave the order in the absence of the first respondent. And for counsel that means that the first respondent's constitutional right to a fair trial was breached. That is Mr Jones's bold contention. What Mr Jones fails to see is that what in effect Mr Jones is seeking to

achieve by bringing in the alleged unconstitutionality of that order is that he is asking the High Court to review and set aside the order of the High Court, per Van Niekerk J, that is, the court's own order, for an alleged violation of the right to a fair trial.

[7] In this regard, it has been said that –

'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. 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 it. One of the recognized 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 appeal 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 15 of 1990.'

(See *Mukapuli v SWABOU Investment* 2013 (1) NR 238 (SC) at 241A-D, per Ngaobo AJA who wrote the unanimous judgment of the court.)

[8] The learned acting judge of appeal continued at 242D-I:

'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.

…

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 Constitution or take

those proceedings to the Supreme Court after compliance with the requirements of s 16 of the Supreme Court Act 1990.'

[9] It is as clear as daylight and irrefragable – I must signalize – that the applicant's non-compliance with the rules of court, including the rule on service and the rule on non-joinder, was condoned by the court when it granted the order. And I do not have the jurisdiction to review the earlier proceeding that culminated in the granting of the order. (See *Mukapuli* loc. cit.) For all the aforegoing ratiocination and conclusions, I hold that the first respondent's points *in limine* have no merit; not a modicum of merit, I should say, and so, I respectfully reject them.

[10] As respects costs; I should say that the points *in limine* were argued fully by Mr Khama and Mr Jones for a like period that is normally taken by most counsel to argue some applications before the court, and, what is more, there is delivered a fully reasoned judgment thereanent. That being the case, I think it is reasonable and fair that costs are not ordered to stand over for determination at the hearing of the application in due course or to be in the cause.

[11] For these reasons, I make the following order:

(a) The first respondent's points *in limine* are dismissed with costs which include the costs of one instructing counsel and one instructed counsel.

(b) The legal representatives of the parties must attend a status hearing in open court at 09h00 on 20 June 2013 for the purpose of the managing judge determining the further conduct of the matter.

C Parker

Acting Judge

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APPEARANCES

APPLICANT	:	D Khama Instructed by Sibeya & Partners Legal Practitioners, Windhoek
FIRST RESPONDENT	:	J P R Jones Instructed by GF Köpplinger Legal Practitioners, Windhoek
SECOND RESPONDENT	:	No appearance