**20REPUBLIC OF NAMIBIA**

**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

**CASE NO.: A 76/2015**

In the matter between:

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| **J B COOLING AND REFRIGERATION CC** | **APPLICANT** |
| and | |
| **DEAN JACQUES WILLEMSE t/a WINDHOEK ARMATURE WINDING** | **FIRST RESPONDENT** |
| **E H NANDAGO** | **SECOND RESPONDENT** |
| **CLERK OF THE CIVIL MAGISTRATES COURT KATUTURA MAGISTRATES COURT** | **THIRD RESPONDENT** |
| **THE MINISTER OF JUSTICE** | **FOURTH RESPONDENTS** |

Neutral citation: *JB Cooling and Refrigeration CC v Dean Jacques Willemse t/a Windhoek Armature Winding and Others* (A 76/2015) [2016] NAHCMD 8 (20 January 2016)

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| Coram: | **UEITELE J** |
| Heard: | **15 OCTOBER 2015 & 11 NOVEMBER 2015** |
| Delivered | **15 OCTOBER 2015** |
| Reasons handed down | **20 JANUARY 2016** |

**Flynote:** ***Practice —*** Applications and motions—*Locus standi*—Minimum requirement for deponent of founding affidavit to state authority — If there is any objection to the authority to bring the application, such authorisation can be provided in the replying affidavit; - Even if there was no proper resolution in respect of authority, it can be taken and provided at a later stage and operates retrospectively.

***Review*** - When application for review to be brought - To be brought within reasonable time in absence of statutory period of prescription - Such question one of fact, and not discretion – Such fact to be decided in light of all the relevant circumstances.

***Review*** - From Magistrates' Court — Applicant seeking to review and set aside proceedings in Magistrates' Court in terms of s 20 of High Court Act 16 of 1990 — Court finding in lower court took into account inadmissible opinion evidence — Court setting aside proceedings in Magistrates' Court.

**Summary:** These are reasons for the order I made on 15 October 2015 in the review application the applicant brought to review and set aside the whole judgment delivered in the Magistrates' Court for the District of Windhoek by Magistrate Nandago on 8 January 2015. The judgment by the magistrate was in favour of the first respondent.

During October 2010, the first respondent instituted action to recover certain amounts from the applicant which were due for services rendered by the first respondent to the applicant. The applicant stated that he had to take the compressors to South Africa for the reparation and rewiring. It was only after that that they started functioning properly. Applicant argues that the first respondent did not repair and rewire the compressors in a professional and workmanlike manner.

During the proceedings in the court *a quo*, none of the parties filed expert notices as required by rule 24 of the Magistrates' Court Rules and none of the parties called an expert witness to testify.

A Ms Van Zyl had deposed to and signed the supporting affidavit attached to the notice of motion. She is employed as a financial manager by the applicant and states that she was duly authorized to bring these proceedings.

The applicant alleged in its founding affidavit that during the trial, the magistrate allowed and accepted inadmissible, incompetent and irrelevant opinion evidence by the first respondent's witness, Mr. Shisande and Mr. Hainyanyula in respect of the compressors. Only the second respondent opposed the application. In her opposition, second respondent raised three points *in limine*: (1) Ms Van Zyl's authority to institute the proceedings; (2) the alleged failure by applicant to comply with rule 76 and (3) the alleged delay by the applicant to institute the review proceedings.

*Held*, it is immaterial whether the resolution authorizes Ms Van Zyl to launch the application or ratifies her action of launching the application. In the matter of *Ganes and Another v Telecom Namibia Ltd* Streicher JA held that the deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. The first point *in limine* accordingly fails.

*Held further* that, the second point *in limine* is meritless and must fail.

*Held furthermore* that, the length of time that had lapsed between the cause of action arising and the launching of the review is not by itself an indication of unreasonable delay. The court found that the launch of the review application on 9 April 2015 would not have prejudice any of the respondents nor did it have a negative impact on the finalization of the matter.

*Held furthermore* that, the evidence on which the second respondent relied to find that the repairs of the compressors were done in a professional and workmanlike manner is not direct evidence based on the witnesses personal knowledge but were inferences drawn by the witnesses from other facts and was thus opinion evidence. That opinion evidence was irrelevant and therefore inadmissible, it did not matter how credible or reliable the witnesses were.

## REASONS

**UEITELE, J**

Introduction

[1] The applicant in this matter is JB Cooling and Refrigeration Close Corporation. On 6 February 2015 it noted an appeal against the whole of the judgment delivered in the Magistrates' Court for the District Windhoek by Magistrate Nandago on the 8th of January 2015. Prior to the appeal being set down for hearing the applicant, on 7 April 2015, caused a notice of motion to be issued out of this court in terms of rule 76 of this court's rules in which notice the applicant sought an order calling upon the respondents to show cause why the following orders should not be granted:

> '1. The proceedings conducted by the second respondent in the Civil Magistrates Court for the District of Windhoek held at Katutura, in the action instituted by the first respondent against the applicant during 2013 ("the proceedings") and the judgment delivered by the second respondent on 8 January 2015, should not be reviewed and set aside.
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> 2. In the alternative to prayer 1 above, that the proceedings conducted by the second respondent and the judgment delivered by the second respondent on 8 January 2015 be declared null and void as being in conflict with Articles 12, 18 and 21(1)(j) of the Namibian Constitution, and be set aside on that basis.
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> 3. Granting such further or alternative relief as the above Honourable Court may deem fit.
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> 4. Ordering the first and second respondents to pay the costs of the applicant jointly and severally the one paying the other to be absolved, including the costs of one instructing and one instructed counsel

[2] The first respondent is Mr. Dean Jacques Willemse T/A Windhoek Armature Winding. He was the plaintiff in the Magistrates' Court, he gave notice that he intends to oppose both the appeal and the review application. In respect of the review application he abandoned his intention to oppose that application and thus did not file an answering/opposing affidavit. The second respondent is Magistrate Nandago who presided over the civil trial in the Magistrates' Court. The second respondent is the only party who opposes the review application. The third respondent is the Clerk of the Civil Magistrates' Court: Katutura Magistrates Court. This is a misnomer as there is no Katutura Magistrates Court. The fourth respondent is the Minister of Justice. Although the notice of intention to oppose the review application was also filed on behalf of these respondents they did not file any opposing affidavits and as such did not persist with their opposition of the review application. When the matter was called on 15 October 2015 the legal practitioners who represented the parties agreed that the review application be heard first. I thus proceeded and heard arguments in respect of the review application.

Background

[3] During October 2010, the first respondent instituted action to recover certain amounts from the applicant which were allegedly due for services rendered by the first respondent to the applicant. The first respondent's claim against the applicant revolved around the repair and rewiring of compressors by the first respondent. The applicant defended the action and filed a plea in the action. The applicant's defence was that the amount claimed was not due and payable to the first respondent because the first respondent's service was done neither in a workmanlike nor in an efficient manner.

[4]. The applicant specifically pleaded that the compressors only properly functioned after they had been repaired and rewired in South Africa. The basis of this plea was the fact that the applicant returned the compressors on three occasions to the first respondent but the compressors would still not function properly and thereafter, the applicant sent the three compressors to South Africa to be repaired and rewired by a third party. After such repairs and rewiring the compressors were functioning properly.

[5] It is common cause that, at the trial of the matter in the court *a quo*, none of the parties filed expert notices as required by Rule 24 of the Magistrates' Court Rules ("Magistrates' Rules") and that no party called an expert witness to testify. At the conclusion of the trial, the second respondent found in favour of the first respondent and upheld his claim. On 8 January 2015 the second respondent delivered a written judgment providing reason for her findings. In that judgment she amongst other things said the following (I quote verbatim from the judgment):

> '[17] …The only question which is too difficult to answer is the second question if the repair was done in a workmanlike manner. However with the help of the evidence of Mr. Shisande and Mr. Hainyanyula though none of the party in this case called an expert witness, the evidence of Shisande and Hainyanyula can tell better that the repair was done correctly the only problem was the power line which was not sufficient and if the power was enough then the three motors were supposed to function as normal as the fourth one which was on a different line…
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> [18] The issue of whether the work was done in a workmanlike manner was discussed in the case of Durand v NJV Motors (I 3402) 204 NAHCMD delivered 13th February 2014 that the defendant failed to repair the gearbox in a workmanlike manner which is not the case in our current situation. In this case all the time the motors were taken to the plaintiff they were repaired and tested and even at the time they were installed they function properly, the only problem was that the power line were they were running was not correct as a result they were burned while the four motor which was on the line which was supplying electricity properly was not burning…
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> [19] As a result of that the court rule in the favour of the plaintiff that the motor were repaired in a workmanlike manner but the problem was the power line so the plaintiff is entitled to the payment as claiming for the service they rendered to the defendant…'

[6] It is the trial leading to that judgment and the judgment which the applicant sought to have reviewed and set aside. On 15 October 2015 after I heard arguments from the parties I made the following order:

> 'The proceedings conducted by the second respondent in the Civil Magistrates' Court for the District of Windhoek held at Katutura, in the action instituted by the first respondent

> against the applicant during 2013 ("the proceedings") under case No. 9306/2010 and the resultant judgment delivered by the second respondent on 8 January 2015, are reviewed and set aside.'

In respect of the cost I enquired from the parties as to whether I could grant a cost order against a judicial officer in the performance of their judicial functions. The parties indicated that they need time to make submissions in that respect. I accordingly postponed submission in respect of costs to 11 November 2015 for arguments. On that day I heard arguments in that regard and my decision on cost is incorporated in these reasons.

Preliminary Observation

[7] There is a matter of grave concern that I need to point out relating to the papers filed in this matter, particularly by the second respondent. Ordinarily, the second respondent sits in the position of a judicial officer and he should ideally steer away from filing affidavits in matters of review such as the present. Masuku J[1] observed that 'it will normally suffice if he causes a true copy of the record of proceedings to be filed, avoiding in the process, descending into the arena and being caught in the dust of the conflict.' The learned Judge in his judgment cited with approval the sentiments expressed by Hull C.J., with which I endorse, in *Director of Public Prosecutions v The Senior Magistrate, Nhlangano and Another*[2] where the following is recorded:

> 'Criminal trials, and applications for review, are of course not adversarial contests between the judicial officer and the prosecutor. It is wrong and unseemly that they should be allowed to acquire that flavor. Ordinarily on review, the judicial officer whose decision is being called into question is cited as a party for formal purposes only. He will have no need to do anything beyond arranging for the record to be sent up to the High Court, including any written reasons that he has or may wish to give for his decision.
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> It may be necessary, very occasionally, for him to make an affidavit as to the record. This is, however, to be avoided as far as possible. It is, generally, undesirable for a judicial officer to give evidence relating to proceedings that have been taken before him. In principle, there

[1] In the unreported judgment of the High Court of Swaziland, *Nxumalo and Others v Fakudze and Others* Case No. 2816/08 delivered on 04 June 2010

[2] 1987-1995 S.L.R. 17 at 22 G-I,

may be a need for a Magistrate to be represented by counsel upon a review, if his personal conduct or reputation is being impugned but these too will be in exceptional circumstances'.

[8] I am of the view that the present matter does not fit into the category of, a peculiar and exceptional case as envisaged in the case of the Director *of Public Prosecutions v The Senior Magistrate, Nhlangano and Another*. I say so because the applicant did not level any allegations of partiality, bias and possibly untoward conduct on the part of the second respondent. Secondly the Magistrate has in her affidavit raised points *in limine* and added a prayer that this review application be dismissed. Although the Magistrate is cited as a party to the proceedings herein, it is undesirable in my judgment, to include such a prayer in her affidavit she is not a party to the dispute and has no interest as to who succeeds or fail in the litigation. To do so may tend to suggest an element of bias on the part of the judicial officer concerned and this must be avoided, always.

The basis of the review

[9] The applicant basis its review application on s 20(1) of the High Court Act, 1990[3], that section provides as follows:

'20 **Grounds of review of proceedings of lower court**

(1) The grounds upon which the proceedings of any lower court may be brought under review before the High Court are-

(a) absence of jurisdiction on the part of the court;

(b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;

(c) gross irregularity in the proceedings;

(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.'

[3] Act 16 of 1990.

[10] The notice of motion is supported by an affidavit signed by one Ms Van Zyl, who states in that affidavit that she is employed by the applicant as its financial manager and that she is duly authorised by the applicant to bring these proceedings and to sign the affidavit in support thereof. I will, in this judgment, and for convenience refer to Van Zyl's affidavit as applicant's affidavit. The applicant alleges in its founding affidavit that during the trial the magistrate allowed and accepted inadmissible and irrelevant opinion evidence by the first respondent and the first respondent's witnesses.

[11] The applicant furthermore states that the second respondent accepted and in fact based her judgment, irregularly and unfairly so, on the inadmissible, incompetent and irrelevant opinion evidence of the first respondent, Mr. Shisande and Mr. Hainyanyula in respect of that the compressors were damaged by "the power lines" where they were installed, and not due to the first respondent's poor work.

The second respondent's opposition

[12] As I have indicated above the second respondent is the only party opposing the review application. In her opposition the second respondent raises three points *in limine.* The first point *in limine* relates to Ms Van Zyl's authority to institute the proceedings. The applicant alleges that Ms Van Zyl did not produce a resolution which authorizes her to launch the proceedings. The second point *in limine* relates to the alleged failure by the applicant to comply with rule 76 and the third point *in limine* is the alleged delay by the applicant to institute the review proceedings. I will now proceed to consider these points *in limine* raised by the second respondent.

*The first point in limine –alleged lack of authority*

[13] The second respondent challenges Ms Van Zyl's authority to bring the application and the challenge is based on the failure by Ms Van Zyl to produce a resolution by the applicant, a corporate body, authorizing her to bring these proceedings. In the opposing affidavit the issue was raised in the following terms:

'I am advised which advise I believe to be true that the deponent must produce the authority to depose to an affidavit or launch this application on behalf of the applicant which is a close corporation.'

[14] In the founding affidavit Ms Van Zyl had stated:

'I am...employed by the applicant in the position of financial manager … and duly authorised, to depose to this affidavit and launch these proceedings on behalf of applicant herein. I refer to annexure "A 1" hereto.'

[15] In reply Ms Van Zyl produced a resolution and stated as follows:

'I am ... duly authorised, to depose to this affidavit annexure "A 1" hereto. Annexure A1 was not annexed to the founding papers due to an oversight.'

[16] In his heads of arguments Mr. Ncube who appeared for the second respondent argued that although Ms Van Zyl produced a resolution that resolution states that the Close Corporation *ratifies* the actions of Magdalena Van Zyl in bringing the review application and appeal and to sign any affidavits as well as all other documents giving effect to this resolution. During oral submissions, after I referred Mr. Ncube to the decision of *Purity Manganese (Pty) Ltd* v *Otjozondu Mining (Pty) Ltd*[4] where Damaseb JP said;

'It is now trite that the applicant need do no more in the founding papers than allege that authorisation has been duly granted. Where that is alleged, it is open to the respondent to challenge the averments regarding authorisation. When the challenge to the authority is a weak one, a minimum of evidence will suffice to establish such authority: *Tattersall and Another v Nedcor Bank Ltd* 1995 (3) SA 222 (A) at 228J – 229A.'

He (Mr. Ncube), in my view, correctly conceded that the second appellants challenge is weak and stands to be dismissed. In the matter of *Otjozondjupa Regional Council v Dr Ndahafa Aino-Cecilia Nghifindaka & Two Others*[5] Muller J after reviewing the authorities on the subject said:

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[4] 2011 (1) NR 298 (HC).

[5] An unreported judgment of the Labour Court of Namibia C*ase No (LC) 1/2009,* delivered on 22 July *2009.*

'[21] Consequently, the position is mainly as follows:

(a) The deponent of an affidavit on behalf of an artificial person has to state that he or she was duly authorised to bring the application and this will constitute that some evidence in respect of the authorisation has been placed before the Court;

(b) If there is any objection to the authority to bring the application, such authorisation can be provided in the replying affidavit;

(c) Even if there was no proper resolution in respect of authority, it can be taken and provided at a later stage and operates retrospectively…;'

It is therefore immaterial whether the resolution authorizes Ms Van Zyl to launch the application or ratifies her action of launching the application. In the matter of *Ganes and Another v Telecom Namibia Ltd*[6] Streicher JA held that the deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. The first point *in limine* accordingly fails.

*The second point in limine –the alleged applicant's noncompliance with rule 76*

[17] The second point *in limine* raised by the second respondent is the alleged noncompliance by the applicant with rule 76 of this court's Rules. Both the second respondent (in her opposing affidavit) and her legal representative (in his heads of arguments) argued that because the applicant in paragraph 3 of its founding affidavit states that the review application is envisaged by the provisions of s 20(1) of the High Court Act, 1990 as amended ("The High Court Act") the applicant failed to comply with rule 76 of the High Court rules which is the rule governing the institution of proceedings in which a party seeks to review the decision of a lower court.

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[6] 2004 (3) SA 615 (SCA).

[18] The fallacy in the second respondent's argument is too obvious to be stated. Section 20(1) of the High Court Act simply provides the substantive basis upon which the proceedings of any Lower Court may be brought under review before the High Court whereas rule of court 76 is the rule which prescribes the procedure for bringing proceedings of any Lower Court on review. That rule in material terms reads as follows:

> '**76 Review application**
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> (1) All proceedings to bring under review the decision or proceedings of an inferior court, a tribunal, an administrative body or administrative official are, unless a law otherwise provides, by way of application directed and delivered by the party seeking to review such decision or proceedings to the magistrate or presiding officer of the court, the chairperson of the tribunal, the chairperson of the administrative body or the administrative official and to all other parties affected.
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> (2) An application referred to in subrule (1) must call on the person referred to in that subrule to-
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> (a) show cause why such decision or proceedings should not be reviewed and corrected or set aside; and
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> (b) within 15 days after receipt of the application, serve on the applicant a copy of the complete record and file with the registrar the original record of such proceedings sought to be corrected or set aside together with reasons for the decision and to notify the applicant that he or she has done so.'

[19] The procedure which the applicant followed to bring under review the proceedings in the Magistrates' Court is the procedure contemplated in rule 76. The applicant issued a notice of motion directed at the relevant authorities and calling upon them to show cause why the proceedings conducted by the second respondent in the Civil Magistrates' Court for the District of Windhoek held at Katutura, in the action instituted by the first respondent against the applicant during 2013 ("the proceedings") and the judgment delivered by the second respondent on 8 January 2015, should not be reviewed and set aside. The notice of motion furthermore called upon the second respondent to file with the registrar of this court the original record of the proceedings sought to be corrected or set aside together

with reasons for the decision. I therefore find that the second point *in limine* is meritless and must fail.

*The third point in limine –the alleged delay launching the review application.*

[20] The second respondent argued that review application was brought on the 7th of April 2015, which is three months after the judgment was delivered on the 8th of January 2015. Mr. Ncube referred me to the matters of: *Disposable Medical Products*[7] which involved the awarding of tenders, the court refused to condone the delay of 3 months before instituting review proceedings in respect of one of the tenderers. In *Kruger v Transnamib*[8] a lapse of two and a half years was held to be unreasonable. In the *Christophine Paulus*[9] a lapse of 9 months was held to be unreasonable. In the *Purity Manganese* case,[10] the delay was between 5 months and 10 months respectively for different decisions was also held to be unreasonable delays, and the matter of *Orgbokor and Another v The Immigration Selection Board & others*[11], where the court refused to condone a 7 month delay in launching a review application.

[21] What Mr. Ncube fails to appreciate is that the length of time that has lapsed between the cause of action arising and the launching of the review is not by itself an indication of unreasonable delay. Whilst an appeal has to be noted and prosecuted within specified time limits, no such limits have been specified for the institution of review proceedings. In the absence of a statutory limit the courts have, however, in terms of their inherent powers to regulate procedure, laid down that review proceedings have to be instituted within a reasonable time[12]. There are two principal reasons for the rule that the court should have the power to refuse to entertain a review at the instance of an aggrieved party who has been guilty of unreasonable delay. The first is that unreasonable delay may cause prejudice to other parties[13]. The second reason is that it is both desirable and

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[7] *Disposal Medical Products (Pty) Ltd v Tender Board of Namibia and others* 1997 NR 174 (HC).

[8] 1995 NR 84 (HC).

[9] *Christophine Paulus and 3 Others v Swapo Party and 7 others* unreported Judgment per Swanepoel AJ A144/2007 delivered on 13 November 2008.

[10] *Purity Manganese (Pty) Ltd v Minister of Mines and Energy and Others* 2009 (1) NR 217 (HC).

[11] Unreported Judgment of 2012.

[12] *Radebe v Government of the Republic of South Africa and Others* 1995 (3) SA 787 (N); *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* 2011 (2) NR 437 (HC).

[13] *Harnaker v Minister of the Interior* 1965 (1) SA 372 (C) at 380D; *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 4.

important that finality should be reached within a reasonable time in respect of judicial and administrative decisions[14].

[22] It follows that when the question arises, whether an applicant has unreasonably delayed in instituting review proceedings, the court has first to determine whether a reasonable time has elapsed prior to the institution of the proceedings, or, to put it differently, whether there has been an unreasonable delay on the part of the applicant. The determination whether or not the delay is unreasonable or not is done in the light of all the relevant circumstances, it is not simply an exercise where the court looks at prior decisions and decide on the basis of those decisions whether the delay is reasonable or not, each case must always be determined on the basis of its own facts. The facts of all the cases to which Mr. Ncube referred me are different from the facts of this matter.

[23] The facts of this matter are that the written judgment was delivered on 8 January 2015; the notice to appeal against the judgment was delivered on 6 February 2015. It follows that from the day that the appeal was noted the decision of the second respondent was stayed pending the outcome of the appeal hearing. The review application was launched on 9 April 2015, by that time no date had been set for the hearing of the appeal. I am therefore of the view that the launch of the review application on 9 April 2015 would not have prejudice any of the respondents nor did it have a negative impact on the finalization of the matter. I am accordingly of the view that the delay of approximately three months in launching this review application is in the circumstances of this matter not unreasonable and the third point *in limine* also fails.

The merits

[24] As I have indicated above the applicant before me, who was the defendant in the proceedings in the magistrate's court, avers in its founding affidavit, amongst other things, that (I quote verbatim from the applicant’s supporting affidavit):

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14 *Kanime v The Ministry of Justice* (A 166/2011) [2013] NAHCMD 73 (19 March 2013).

‘11 The applicant disputed the claims of the first respondent and I am advised, from the plea filed on the applicant’s behalf, the applicant specifically disputed whether the services rendered were done in a workmanlike and efficient manner. The applicant specifically pleaded that the compressors only properly functioned after they had been repaired and rewired in South Africa. This is a reference to the when, after repeated unsuccessful attempts by the first respondent to repair and rewire three compressors properly, the applicant sent the three compressors to South Africa to be repaired and rewired by a third party. After such repairs and rewiring the compressors were functioning properly. The first respondent’s other claims were duplications.

12 None of the parties during the leading of evidence called any expert witnesses. Mr. Graham, Mr. Brendel, Ms van Zyl and Mr. Schiebler testified on the applicant’s behalf. On the first respondent’s behalf testified the first respondent personally, Mr. Shisande and Mr. Hainyanyula, the latter a former employee of the applicant. None of the witnesses were experts or testified as experts. Further, no notice and/or summary as envisaged by the provisions of Rule 24 of the Magistrates’ Court Regulations were delivered by the first respondent (i.e. the plaintiff in the magistrate’s court proceedings) in the action or during the proceedings.

**13** During the trial and while evidence was being led I am advised, the second respondent, with respect, allowed and accepted inadmissible and irrelevant opinion evidence by the first respondent and the first respondent’s witnesses. Such evidence related to whether the repairs and rewiring was done by the first respondent in a workmanlike manner. Most importantly the second respondent accepted and in fact based her judgment, irregularly and unfairly so, on the inadmissible, incompetent and irrelevant opinion evidence of the first respondent, Mr. Shisande and Mr. Hainyanyula in respect of that the compressors were damaged by “the power lines” where they were installed, and not due to the first respondent’s poor work. I refer to paragraphs, 17, 18 and 19 of the judgment …

14 I respectfully submit that it is apparent quotations from the judgment that the second respondent’s finding in favour of the first respondent is based exclusively on inadmissible incompetent and irrelevant opinion evidence that the second respondent was never allowed to take , and should not have taken into consideration. No expert testified during the trial. I point out that the legal representative for the applicant in the court had indeed objected to the inadmissible irrelevant opinion evidence tendered. This notwithstanding, the second

respondent irregularly evidence, it is respectfully submitted, relied upon such evidence and did not uphold the said objections. This was and remains to the prejudice of the applicant. Further it is respectfully submitted, on a reading of the record admissible evidence which was properly admitted would be insufficient to justify the relevant findings in the judgment.'

[25] In her answering affidavit the second respondent denied that she admitted inadmissible opinion evidence. She avers that the extracts and references made to her judgment are a piecemeal assessment of the evidence which clearly favoured the first respondent during the trial. She states that in assessing the evidence she used the following criteria: *'(a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.'*

[26] I am of the view that in order to decide whether the second respondent did or did not admit 'opinion evidence' an understanding of the concept and principles governing the admissibility of opinion evidence is necessary. The case of *Colgate-Palmolive (Pty) Ltd v Elida-Gibbs (Pty) Ltd*[15] exemplifies the difficulties associated with distinguishing between fact and opinion. The plaintiff, in an action in which it was in issue whether the advertising of defendant's product (sold in competition with plaintiff's product) was calculated to deceive users of the product, sought to lead the evidence of a witness, who was not an expert witness, to the effect that he had been deceived by the advertisement. The plaintiff contended that the purpose of the evidence was to prove the deception. The defendant objected to the leading of the evidence, contending that it was nothing more than the opinion of a layman on a question upon which the court itself was able to make a determination, namely the interpretation of the advertisement. The court held that it would refuse to hear evidence only in circumstances where a witness, unqualified as an expert, sought to give evidence which in its essence did no more than that which the court was itself called upon to do: where the court's function was to interpret, the witness might not interpret, but he could give evidence of a factual nature to act as an aid to interpretation; but then only when the inquiry involved something more than the mere construction of words. The court further more held that, although the proposed evidence of the witness contained opinions that did not preclude the evidence if its purpose was to show that, as a result of his interpretation of the advertisement, he was misled. Van Schalkwyk J after a survey of the authorities said:

[15] 1989 (3) SA 759 (W).

> 'From these cases this principle may be extracted: the Court will refuse to hear evidence only in circumstances where a witness, unqualified as an expert, seeks to give evidence which in its essence does no more than that which the Court is itself called upon to do. Where the Court's function is to interpret, the witness may not interpret but he may give evidence of a factual nature to act as an aid to interpretation; but then when the inquiry involved something more than the mere construction of words.'

[27] An article by Nicholas[16] titled *"Some Aspects of Opinion Evidence"* provides a useful analysis, and in my view, an accurate meaning of 'opinion evidence'. He said:

> 'The word opinion can be used in various senses. When one says, to take one meaning, 'That is a matter of opinion', one is saying that the point is open to question: it is a matter on which doubt can reasonably exist. When one prefaces an assertion with, 'In my opinion', one is indicating that it is a personal belief. Used in this sense, opinion is contrasted with fact – facts simply are, opinions are variable in that differing opinions on the same matter may without absurdity be held by different people. *Quot homines tot sententiae*. Opinions, in this sense, is inadmissible in evidence, not because of any exclusionary rule, but because it is irrelevant. Legal Proceedings are concerned with facts, not with beliefs of witnesses as to the facts … In the opinion rule 'opinion' carries another special meaning. A fact in issue may be proved by the direct evidence of a witness with personal knowledge, or it may be proved by way of inference from the other facts which tend logically to prove the fact in issue. *As used in law of evidence 'opinion' has the meaning of an inference or conclusion of fact drawn from other facts*.'[17]

[28] The issue which the second respondent was required to decide was whether the first respondent had, when he repaired the compressor, performed his repairs in a workman like manner. The fact of whether or not the repairs were done in a workmanlike manner could be proven by the direct evidence of a witness who had personal knowledge, or it may be proven by way of inference from the other facts. The first respondent and his witnesses testified that the reason why the compressors kept on burning and being returned to the first respondent for rewiring was because the three compressors were placed on the same 'power line' which had insufficient power/electricity supply. They

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[16] In Kahn E (ed) *Fiat Justitia : Essays in Memory of Oliver Deneys Schreiner* (1983) 225.

[17] Quoted by Schwikkard *et al Principles of Evidence* 2nd ed; 2002 at 83.

testified that the other compressor which was placed on a different line did not experience the same problems.

[29] In my view these evidence on which the second respondent relied to find that the repairs of the compressors were done in a professional and workmanlike manner is not direct evidence based on the witnesses personal knowledge but were inferences drawn by the witnesses from other facts and was thus opinion evidence. That opinion evidence was in my view irrelevant and therefore inadmissible, it did not matter how credible or reliable the witnesses were. The evidence on which the second respondent relied is thus the type of evidence contemplated in s 20(1) (d) of the High Court Act, 1990 rendering the proceedings before the second respondent reviewable and correctable. I will thus set aside those proceedings and the resultant judgment.

The costs

[30] The basic rule is that, except in certain instance where legislation otherwise provides, all awards of costs are in the discretion of the court. *Hailulu v Anti-Corruption Commission and Others*[18] and *China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC*[19]**.** It is trite that the discretion must be exercised judiciously with due regard to all relevant considerations. The court's discretion is a wide, unfettered and equitable one[20].There is also, of course, the general rule, namely that costs follow the event, that is, the successful party should be awarded his or her costs. This general rule applies unless there are special circumstances present[21].

[31] Mr. Ncube urged me to exercise my discretion and not award costs against the second respondent. He based his argument on the matter of *Ntuli v Zulu and Others*[22] where the court dealt with the argument advanced on behalf of a judicial officer in the context of a procedural irregularity, as follows:

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[18] 2011 (1) NR 363 (HC).
[19] 2007 (2) NR 674 (HC).
[20] See *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045.
[21] See *China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC* 2007 (2) NR 674.
[22] 2005 (3) SA 49 (N).

> 'The argument advanced on behalf of the second respondent is as follows: It is not competent to award costs against a judicial officer in his/her official capacity, as such an award is in effect an award against the State or the relevant government department which employs the judicial officer concerned. The State and/or the department concerned is not a party to the review proceedings and has, therefore, no interest whatsoever in the outcome of these proceedings. Moreover the State and/or the relevant department have not made itself a party to the proceedings by opposing the proceedings for review. It was further submitted that, unlike the position of officials performing administrative functions, the State has no power of control or supervision over a judicial officer in the conduct of judicial proceedings. The judicial officer exercises a purely personal discretion and is not a servant of the State.'

[32] Mr. Van Vuuren on behalf of the applicant argued that the second responded choose to make herself a party to the merits of the proceedings instituted in order to correct his action and because her opposition to the to the review proceedings failed the court must exercise it discretion and apply the general rule namely that cost must follow the course. He referred me to the case of *Katjivikua v Magistrate: Magisterial District of Gobabis and Another* [23] where Corbett AJ quoting with approval from the matter of *Regional Magistrate Du Preez v Walker*[24] said:

> 'It is a well-recognized general rule that the courts do not grant costs against a judicial officer in relation to the performance by him of such functions solely on the ground that he has acted incorrectly. To do otherwise could unduly hamper him in the proper exercise of his judicial functions. . . .
>
> There are, however, exceptions to this rule. Thus if the judicial officer chooses to make himself a party to the merits of the proceedings instituted in order to correct his action and should his opposition to such proceedings fail, the court may, in its discretion, grant an order for costs against him…'

[33] Both Messrs Ncube and Van Vuuren agree with the legal principles enunciated in the cases quoted to me, they only differ on the way I should exercise my discretion. I take note of the fact that the second respondent acted in good faith both in the proceedings in

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[23] 2012 (1) NR 150 (HC).
[24] 1976 (4) SA 849 (A).

the court *a quo*, and in these proceedings. I have expressed the opinion that it is undesirable for judicial officer to descend into the arena of litigation. By opposing these proceedings the second respondent has caused the applicant to expend resources. No reason has been placed before me why the applicant should be out of pocket for enforcing his constitutional rights. The applicant has succeeded in establishing an important principle relating to his right to a fair trial. I am therefore disposed, in the exercise my discretion, to award the applicant his costs. I accordingly make the following order

The second respondent must pay the applicant's costs which costs include the costs of one instructing and one instructed counsel

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SFI Ueitele
Judge

**APPEARANCES:**

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|---|---|
| **APPLICANT:** | MR. A VAN VUUREN<br>Instructed by MB De Klerk & Associates |
| **2ND TO 4TH RESPONDENTS:** | MR J NCUBE<br>Government Attorney |