REPORTABLE

CASE NO.: SCR 1/95 IN THE SUPREME COURT OF NAMIBIA In the matter between

THE STATE APPLICANT

and

MALANZABI FRANCIS BUSHEBI RESPONDENT

Coram: Mahomed, C.J.; Leon, A.J.A. et Silungwe, A.J.A.
Heard on: 1995/07/12 - 13 Delivered on: 1996/02/12

APPEAL JUDGMENT

LEON, A.J.A.: The respondent appeared before the magistrate at Katima Mulilo on two counts. The first count alleged a contravention of section 28(1) (a) of Ordinance 4 of 1975 it being alleged that he hunted on State land. The second count alleged a contravention of section 27(1) of that Ordinance it being alleged that, on 1 February 1994 he had unlawfully hunted protected game, namely one LECHWE without a permit. The respondent pleaded not guilty to both counts but was convicted on the second count and sentenced to a fine of N$600 or six months imprisonment.

The matter was then submitted on automatic review to FRANK J. The latter, not being a librarian but a most meticulous judge, inquired from the Prosecutor-General whether LECHWE, which is not referred to at all in Ordinance 4 of 1975 or in the relevant Schedule 4 thereof, had been introduced by way of an amendment to the Ordinance or the Schedule. He was

assured, after the matter had been considered i: . the Prosecutor-General's office, that it had not. Acting upon that assurance the learned Judge (Teek J concurring) set aside the conviction and sentence.

The assurance given by the Prosecutor-General to the learned Judge was ill-founded in view of the provisions of the official Gazette extraordinary no 5364 published on 14 May 1987. In that Gazette Government notice no. 75 of 1987 APPEARS in terms of which it is announced that in terms of section 25(2) of Ordinance 4 of 1975 the CABINET has:

a) ...

b) (i)

(ii) amended Schedule 4 to the Ordinance by the addition of the following names:

"Lechwe (Kobus Leche)"

It follows from what I have said that, through a mistake of law, the High Court wrongly set aside a conviction and sentence in a magistrate's Court. The Prosecutor-General, having been responsible for the error of the High Court, has brought the matter on review seeking an order from this Court setting aside the acquittal of the respondent.

Section 16(1) and 16(2) of the Supreme Court Act no. 15 of 1990 read:

> "16(1) In addition to any jurisdiction conferred upon it by this Act, the Supreme Court shall, subject to the provisions of this section and section 20, have the jurisdiction to review the proceedings of the High Court or any lower Court, or any administrative tribunal or authority established or instituted by or under any law.
>
> 16(2) The jurisdiction referred to in sub-section (1) may be exercised by the Supreme Court mero motu whenever it comes to the notice of the Supreme Court or any Judge of that Court that an irregularity has occurred in any proceedings referred to in that sub-section notwithstanding that such proceedings are not subject to an appeal or other proceedings before the Supreme Court: Provided that nothing in this section contained shall be construed as conferring upon any person any right to institute any such review proceedings in the Supreme Court as a Court of first instance."

It was contended on behalf of the State that the mistake of law made by the High Court amounted to an irregularity in the proceedings. In any event it was suggested that section 16(1) should be interpreted to give this Court the same inherent powers possessed by the Supreme Court of South Africa. For the reasons which follow I am of the opinion that neither of these contentions can be sustained.

The phrase "irregularity in the proceedings" as a ground for review relates to the conduct of the proceedings and not the result thereof. In Ellis v Morgan, Ellis v Dessai, 1909 TS 576 Mason J said this at 581:

> "But an irregularity in the proceedings does not mean an incorrect judgment; it refers not to the

> result but the method of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party, from having his case fully and fairly determined".

A mistake of law is not per se an' irregularity. Thus in Dovle v Shenker 1915 AD 233 the magistrate had misread the section with regard to contracts in settlement of claims. He gave judgment in favour of the employer holding that there was a settlement and did not enter into the other merits of the case. The Appellate Division held that this was not a ground for review. Nor is it a ground for review that a magistrate arrived at a wrong conclusion by a wrong process of reasoning by making an error with regard to onus (Enslin v Colonial Trust Corporation 1923 CPD 358 at 368) .

However, where the error is fundamental in the sense that the lower Court has declined to exercise the function entrusted to it by the statute the result of which is to deny a party the right to a fair hearing, the matter is reviewable (see Goldfields Investment Ltd and Another v City Council of Johannesburg and Another 1938 TPD 551 at 559-560; Bester v Easiqas (Pty) Ltd van Another 1993(1) SA 30 (C) at 42 I - J; Coetser v Henning and Another 19 2 6 TPD 4 01; S v Mwambazi 1991(2) SACR 149 (Nm at p 1551-3). The error which occurred in this case was an error of law per se. There is no question of the State not having the matter fairly dealt with. On the contrary the advice of the State was specially sought by a careful judge in order to ensure that there had been no material amendment to the Ordinance. He was given the wrong advice. The State, being solely and exclusively to

blame for the error which occurred, can hardly be heard to say that it did not receive a fair hearing. In my judgment no irregularity has occurred in the proceedings.

The remaining question is whether section 16(1) gives this Court the inherent jurisdiction of the Supreme Court of South Africa. It was suggested that section 16(1) confirms that Court's general inherent powers. The inherent powers of the Supreme Court of South Africa are exercised by the Provincial Divisions of those Courts over the inferior courts. The Appellate Division which is equivalent to this Court does not in general exercise such inherent jurisdiction although it has an inherent power to grant leave to appeal in circumstances not covered by statute and has done so in a number of criminal cases (see eg R v Didat 1913 AD at 299; R v Leo 1914 AD at 241; R v Rorke 1915 AD at 147; Herbstein & Van Winsten: The Law of Procedure and the Supreme Courts 8-9). The argument that Section 16(1) confirms the inherent powers of the Supreme Court of South Africa does not appear to me in the circumstances to rest upon any firm foundation. But the State is faced with a more fundamental difficulty. The jurisdiction referred to in section 16(1) is subject to the provisions of this section and section 20 (which is not relevant here). The provisions of this section to which section 16(1) is subject appear in section 16(2) which refers to an irregularity in the proceedings, and no such irregularity has occurred in these proceedings. I am therefore disposed to think that section 16(1) does not widen the jurisdiction expressly conferred by section 16(2).

But even if it is assumed in favour of the State that there may be cases where this Court can and should intervene on review in the absence of an irregularity, this is not such a case. Such a power, assuming it to exist, should be exercised sparingly and only in the most exceptional circumstances. The fact that a guilty man may have escaped punishment does not, in my view, in itself justify such interference. If it did it would follow that this Court would have the power to intervene whenever the High Court on automatic review wrongly set aside a conviction by taking a wrong view of the facts or of the law.

I am aware of only two cases in South Africa where the Supreme Court, in the exercise of its inherent power of review, set aside an acquittal. In the unreported case of Hubbard v Regional Magistrate. Cape Town (CPD 2 2 nd March 1984) Rose-Innes said this at page 11:

> "I venture to think that one would have to research the law reports at considerable length to find any case where the State or a private prosecutor has been allowed to come to the Supreme Court to review proceedings of a criminal nature in which the accused has been acquitted. The State is not aggrieved by the acquittal of an accused nor is a private prosecutor."

However, in that case the Court set aside an acquittal where the magistrate by wrongly ruling on a point in limine deprived the public prosecutor of any hearing whatsoever: he stopped the prosecution wrongly. The mistake of law was such as to have the consequence of depriving a party of the

proceedings themselves. The ratio of the judgment was that a gross irregularity had occurred because a party was deprived of the right to a fair trial. That is a far cry from what occurred in the present case but falls within the ambit of what was decided in the Goldfields Investment Ltd case (supra.) •

The other case is S v Lubisi 1980(1) M 187 (T). That was an extremely unusual case in which the facts briefly were as follows. The accused had stood trial in a magistrate's Court on a charge of stock theft. He pleaded not guilty and, at the end of the State's case, indicated that he wished to lead evidence and call a witness. The case was remanded, the accused disappeared and the record was mislaid. A new charge sheet was prepared and placed before another magistrate and another prosecutor. The charge sheet indicated that the accused had pleaded not guilty but both the second magistrate and the second prosecutor were unaware of the fact that evidence had been led and that the case was part heard. The second prosecutor requested that the charge be withdrawn as he had no witness available. The magistrate held that the accused was entitled to be acquitted as he had pleaded not guilty. When the true position came to light the second magistrate sent the matter to the Supreme Court on review requesting that the acquittal be set aside. The Court acceded to that request, holding that it was not in the interests of justice to allow the accused to escape the possible consequences of his conduct whether through guilt or ignorance.

Lubisi's case has not found favour in subsequent cases such as S v Makriel and Others. 1986(3) SA 932 (C) ; S v Makoou 1989 (2) SA 577 (E) and S v Ntswavi en 'n Ander 1991 (2) SACR 397 (C).

In Ntswavi's case it was held that the inherent jurisdiction of the Supreme Court is not to be used to rectify errors made by one of the parties. In Makopu' s case Jones J said this at 578 B - C:

> "While it is correct that the interests of justice include justice to the prosecution as well as the accused, there are a number of policy considerations which underline our criminal law which may be raised to support an argument that, even if the Court has the inherent power to make this kind of order (the setting aside of an acquittal) , it should not do so. I refer, for example, to the policy considerations which require certainty and finality in criminal cases or which preclude a second prosecutor when fresh evidence is found."

In his work The Inherent Jurisdiction of the Supreme Court, Professor Taitz refers to Lubisi's case (at 81) as "a unique situation" and at 83 adds: "Certainly S v Lubisi is an unusual case and one which some may consider a dangerous precedent". Even if it is assumed that Lubisi's case was correctly decided, the facts there were very special and bear no resemblance to what occurred in this case. I have already indicated my reservations in holding that this Court has an inherent jurisdiction to intervene on review where no irregularity has occurred. But even if it is assumed that this Court does have such power, I cannot see on what basis

it could be exercised in this case. All one has here is a mistake of law per se induced by the very party which claims to have the right to have the decision set aside because a guilty man has been acquitted. I am unable to find any basis in logic or in principle why this Court should accede to such a request. Indeed it is my view that were we to do so, we would open a Pandora's box of cases which the Legislature could never have contemplated would be part of the functions of this Court.

In my judgment the application by the State must be refused.

(signed) R.N. LEON
LEON, A.J.A.

I concur.

(signed I. MAHOMED
MAHOMED, C.J.

I concur.

(signed) A.M. SILUNGWE
SILUNGWE, A.J.A.

/mv

COUNSEL FOR THE APPLICANT: Adv. A. Lategan (OFFICE OF THE PROSECUTOR-GENRAL)

COUNSEL FOR THE RESPONDENT: (Adv. R. Heathcote) (PRO-AMICO)