CASE NO.: SA 9/2002

IN THE SUPREME COURT OF NAMIBIA

In the matter between

KHODJY AFSHANI **FIRST APPELLANT**

SOHEIL AFSHANI **SECOND APPELLANT**

And

KATRIN VAATZ **RESPONDENT**

CORAM: Strydom, C.J., O'Linn, A.J.A., Chomba, A.J.A.

HEARD ON: 03/10/2002

DELIVERED ON: 05/03/2003

APPEAL JUDGMENT

O'LINN, A.J.A.: The appeal before us purports to be against the whole of the review judgment and order of the Honourable Judge Silungwe (in chambers) handed down by him on the 18th March 2002 in case no. 334/2001 in the High Court of Namibia.

I deliberately use the words "purports to be" because the parties disagreed on whether or not a decision by a judge in chambers in terms of Rule 48 of the Rules of Court in a review of a ruling by the Taxing Master in regard to taxation,

is a judgment or order in terms of section 18 of the High Court Act No. 16 of 1990.

The taxation proceedings followed on an order of costs granted by Shivute, J. against the applicants who had applied for the postponement of a trial in which they, as plaintiffs, had instituted an action for damages for defamation against the defendant, Katrin Vaatz. Shivute, J. granted the postponement but ordered the plaintiffs to pay the wasted costs occasioned by the postponement.

Mr. Bloch appeared for the plaintiffs in the taxation proceedings and Mr. Andreas Vaatz for the defendant. In the appeal before us, Mr. Bloch still appeared for the plaintiffs, now appellants, but Mr. Cohrssen appeared for the defendant, now respondent.

Counsel for the respondent moved *in limine* for the "appeal" to be struck from the roll on the ground that: The decision of the judge in chambers on review was final and there was no right of appeal. Alternatively, even if there was a right of appeal, leave of the judge who decided the review in chambers, was required and such leave was not obtained.

Mr. Cohrssen however, conceded at the outset that an aggrieved party would have a right of review. Mr. Bloch on the other hand strongly contested the point in limine. In regard to the possibility of a review, he argued that a review was not an appropriate remedy because it would amount to a "review of a review" and it would require that consent of the Court had to be obtained

to *cite* the reviewing judge as a respondent and that should be avoided whenever possible.

Both counsel referred to the rules of Court and relied heavily on decisions of South African courts obviously because the Namibian courts have not to date made any authoritative pronouncement on the matter. There is great similarity between the rules of the Namibian High Court established by the High Court Act 16 of 1990, the Namibian Supreme Court established by the Supreme Court Act 15 of 1990 and their equivalents in South Africa, not only before the 1994 interim constitution was adopted in South Africa but also after the final constitution was adopted in 1996. It is however, necessary to note in order to avoid confusion that the High Court of Namibia is the equivalent in substance of the South African Provincial and Local Divisions of the Supreme Court of South Africa whereas the Namibian Supreme Court is the equivalent of the South African Supreme Court of Appeal and also fulfills the role of the South African Constitutional Court.

The following rules of the Namibian High Court are central to the dispute in this case. In rule 1, the term judge is defined as "a judge of the Court sitting otherwise than in open court." There is no difference between the Namibian definition and that in South Africa. In both countries it would e.g. cover any occasion when a judge sits at or in any other place, e.g. the Court library. It is not restricted to a judge sitting in the privacy of his chambers.

The Namibian Rule 48 deals with the Review of Taxation and reads as follows:

> "48. (1) Any party dissatisfied with the ruling of the taxing master as to any item or part of an item which was objected to or disallowed *mero motu* by the taxing master, may within 15 days after the *allocatur* require the taxing master to state a case for the decision of a judge, which case shall set out each item or part of an item together with the grounds of objection advanced at the taxation and shall embody any finding of facts by the taxing master: Provided that, save with the consent of the taxing master, no case shall be stated where the amount, or the total of the amounts, which the taxing master has disallowed or allowed, as the case may be, and which the party dissatisfied seeks to have allowed or disallowed respectively, is less than R250.
>
> (2) The taxing master shall supply a copy of the case to each of the parties, who may within 10 days after receipt thereof submit contentions in writing thereon, including grounds of objection not advanced at the taxation, in respect of any item or part of an item which was objected to before the taxing master or disallowed *mero motu* by the taxing master, and thereafter the taxing master shall frame his or her report and shall supply a copy thereof to each of the parties, who may within 10 days after receipt thereof submit contentions in writing thereon to the taxing master, who shall forthwith lay the case together with the contentions of the parties thereon, his or her report and any contentions thereon before a judge, who may then decide the matter upon the case and contentions so submitted, together with any further information which he or she may require from the taxing master, or may decide it after hearing, if he or she deems fit, the parties or their counsel_in his or her chambers, or he or she may refer the case for decision to the court and any further information to be supplied by the taxing master to the judge shall be supplied by him or her to the parties who may within 15 days after the receipt thereof submit contentions in writing thereon to the taxing master, who shall forthwith lay such further information together with any contentions of the parties thereon before the judge.
>
> (3) The judge or court so deciding may make such order as to the costs of the case as he or she or it may deem fit, including an order that the unsuccessful party shall pay to the opposing party a sum fixed by the judge or court as and for costs. "

Again there is no difference in substance between the Namibian Rules and the Uniform Rules of Court.

Rule 13 of the Rules of the Namibian Supreme Court deals with the taxation of costs in that Court. This rule is contradictory and confusing. In subrule (2) it

requires the taxing master to "state a case for a decision of a judge of the Supreme Court" but in subrule (4) it again requires his report and the stated case to be laid before the Supreme Court. In this rule there is no provision for a judge of the Supreme Court to sit other than in open Court and there is no distinction drawn between the abovestated "judge" and the abovestated "Supreme Court".

The Namibian Supreme Court Act merely defines the Supreme Court as the "Supreme Court of Namibia constituted under article 79(1) of the Namibian Constitution. Art. 79(1) again provides that the Supreme Court shall consist of a Chief Justice and such additional judges as the President, acting on the recommendation of the Judicial Service Commission, may determine.

The equivalent Rule of the Appellate Division of the South African Supreme Court is free from the aforesaid contradiction and ambiguity. There is no provision for the matter to be laid before a judge or a decision on review to be given by a judge of the Court – only for a review and decision by the Court – which is defined in its Rule 1 as: "The Appellate Division of the Supreme Court of South Africa".

The Namibian Supreme Court Rule 13 is in urgent need of amendment, preferably to follow the equivalent South African Rule 9, to avoid further unnecessary litigation.

Art. 12 of the Namibian Constitution provides *inter alia* that – "in the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an

independent, impartial and competent court or tribunal established by law: provided that such court or tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security as is necessary in a democratic society".

It seems therefore that when the Supreme Court Act and Rule 13, read with art. 12 is considered, the determination of the rights and obligations of the parties in regard to what amounts are payable in respect of the costs of particular litigation, the hearing by the Supreme Court shall be in open Court and by the Court sitting with its normal compliment of judges.

It also appears obvious that at least in the Supreme Court, reviews of taxation by the Court shall be the last word on the issue – there being no appeal or review possible and none contemplated by the Act or the Rules. In the High Court, the position is obviously more complicated. It is trite law that for a right of appeal to exist, provision must be made expressly in some applicable law. In South Africa, there was such provision before the enactment of the Supreme Court Act 59 of 1959. The said Act however, repealed all such provisions. In Namibia, the only provision for an appeal from the High Court is that contained in section 18 of the High Court Act 16 of 1990. There is no express provision for an appeal from any decision of a "judge in chambers".

Section 18 provides as follows:

> "18. (1) An appeal from a judgment or order of the High Court in any civil proceedings or against any judgment or order of the High

Court given on appeal shall, except in so far as this section otherwise provides, be heard by the Supreme Court.

(2) An appeal from any judgment or order of the High Court in civil proceedings shall lie –

(a) in the case of that court sitting as a court of first instance, whether the full court or otherwise, to the Supreme Court, as of right, and no leave to appeal shall be required;

(b) in the case of that court sitting as a court of appeal, whether the full court or otherwise, to the Supreme Court if leave to appeal is granted by the court which has given the judgment or has made the order or, in the event of such leave being refused, leave to appeal is granted by the Supreme Court.";

(3) No judgment or order where the judgment or order sought to be appealed from is an interlocutory order or an order as to costs only left by law to the discretion of the Court shall be subject to appeal save with the leave of the court which has given the judgment or has made the order, or in the event of such leave to appeal being refused, leave to appeal being granted by the Supreme Court.

(5) If leave to appeal to the Supreme Court is granted in terms of subsection (2)(b), the court granting the leave may order the applicant to find security for costs of the appeal in such amount as the registrar of the court concerned may determine, and may fix the time within which the security is to be found.

(7) Notwithstanding anything to the contrary in any law contained, no appeal shall lie from a judgment or order of the High Court in proceedings in connection with an application –

(a) by one spouse against the other for maintenance *pendente lite*;

(b) for contribution towards the costs of a pending matrimonial action;

(c) for the interim custody of a child when a matrimonial action between the parents is pending or is about to be instituted;

(d) by one parent against the other for interim access to a child when a matrimonial action between the parents is pending or is about to be instituted.

(8) The rules regulating the proceedings of the Supreme Court shall *mutatis mutandis* apply in respect of appeals to that court. “

The decisive question to be decided in the first place then is – whether or not the decision of the judge in chambers constitute “a judgment or order of the High Court” and not only whether or not the decision of the said judge can be regarded as a “judgment or order”.

Subrule (2) as well as (3) clearly contemplates that the judge deciding in chambers does not do so as the High Court subrule (2) provides that instead of deciding the review, the judge can “refer the decision to the Court”. Subrule (3) again distinguishes between the “judge” or “court” where it states: “The judge or court so deciding, may make such order as to the costs of the case as he or she may deem fit, including an order that the unsuccessful party shall pay to the opposing party a sum fixed by the judge or court as and for costs”.

Subrule (3) appears to provide for an almost arbitrary discretion for the judge or court in regard to the decision “as to costs of the case … including an order that the unsuccessful party shall pay to the opposing party a sum fixed by the judge or court as and for costs”.

Mr. Cohrssen also relies on this provision to strengthen his argument, but it is difficult to comprehend how he wished to use it and in what manner it supports his case. The problem with his subrule is that in so far as it provides for an order as to “the costs of the case”, it is uncertain whether such costs are merely meant to be the costs of the review proceedings or the costs of the case as taxed by the taxing master and now reviewed by the judge or court.

It is obvious that there is no provision for the taxation of the costs of the review proceedings and it is therefore probable that the costs of the case here referred to, would be costs of the review proceedings and not the costs of the case as taxed by the taxing master and the taxation of which was brought on review before the judge or the court.

Since the entering into force of the Namibian Constitution, art. 12 relating to a "fair trial" and article 18 relating to "administrative justice" would make unconstitutional any provision allowing a court or tribunal, to give decisions "as he or she or it may deem fit".

If subsection (3) intended this draconian part of subsection (3) to relate only to an order for costs in regard to the review proceedings, it would be less objectionable than if it was intended to apply to the type of discretion the judge or court must exercise when he, she or it reviews the decision of the taxing master. I will accept that it was the intention of the rule as a whole to demonstrate the finality and unappealability of the orders made on review by the judge or court. But in so far it gives the right to make an order "as he or she or it deems fit" it appears to me to be unconstitutional and should not be allowed to stand.

It is however, not necessary to make an order in this regard in this judgment, because the main issue can be decided without a final decision on this issue. Mr. Cohrssen relied heavily on the South African decision in Menzies, Birse & Chiddy v Hall, 1941 CPD 297 at 301, a decision of the full bench, whereas Mr.

Bloch again relied on the later decision in Vaaltyn v Goss & An., 1992(3) SA 549(E), which was a full bench decision of Eastern Cape.

The Cape decisions are very relevant because it seems that rule 48 of the Uniform Rules of Court enacted under the South African Supreme Court Act of 1959 was based on the Cape rule and the Namibian rule 48 was again based on rule 48 of the Uniform Rules. The passage in Menzies relied on by Mr. Cohrssen reads as follows:

> "The object of the rule was certainly to cheapen reviews of taxation. In any case, whatever the intention was, the effect has been to abolish appeals, save in that one case. That it was competent to take away that right of appeal by the new rule is, I think, clear from the fact that there is no inherent right to a litigant to review the taxation of the taxing master – which is in the nature of a ruling by an administrative official – save, naturally, for a gross irregularity or some other reason which makes it *per se* reviewable. Here, he is given a right of 'review', which is in reality a revision, on the merits, of that ruling, and is in no sense a proceeding of the Court. It was consequently competent, by this rule, to make such revision the last word on the subject."

Mr. Bloch went so far as submitting: "The essence of the judgment in the Vaaltyn case (on the basis of which this appeal was in fact lodged) has not been disapproved of or overturned in any subsequent case and until this is done the appellants' are entitled to rely on the decision that: "This Court can and should hear the present appeal".

It is necessary at this point to emphasize that the Namibian Supreme Court and High Court are since Namibia's independence, on 21 March 1990, not bound by any decision of any court other than that of the Namibian Supreme Court. Decisions of any other courts, including the South African

Constitutional Court and Court of Appeals, only have persuasive value. Section 17(2) of the Namibian Supreme Court Act No. 15 of 1990 provides that: "The Supreme Court shall not be bound by any judgment, ruling or order of any Court which exercised jurisdiction in Namibia prior to or after independence". The decisions of the Appellate Division of the Supreme Court of South Africa were binding on Namibian Courts prior to independence because it was also Namibia's highest appellate tribunal.

Nevertheless, decisions of South African courts are often relevant and instructive and have persuasive authority in Namibia because the legal system of South Africa always has been and still is similar to that in Namibia and in some cases even identical. It also follows that the decisions of courts in other democratic countries with similar legal systems and/or legal problems, also have persuasive authority for Namibian courts.

Another problem with the decision in the Vaaltyn case is that it clearly did not dissent from or even distinguish the Menzies case, but only criticized it. It also did not find that the Cape Provincial Division or Eastern Cape Division had inherent jurisdiction to hear an appeal from a decision of a judge in Chambers in a review of the taxing master's decision on taxation.

The learned judge Mullins, J. who wrote the judgment of the court, makes the statement that: "It is sufficient to say that in my view the Supreme Court does not preclude a litigant from appealing against a judgment or order from a judge in chambers." That is correct – but is it enough. Is it not trite that for a right of appeal to exist there must be an express statutory provision providing for an appeal?

The only such law available is section 20 of the South African Supreme Court Act which provides for an appeal against a judgment or order of the Court of a provincial or local division…". In this regard it is identical to section 18 of the Namibian High Court Act, except that in Namibia there is no provincial or local divisions but only a High Court and the appeal provided for is from a "judgment or order of the High Court."

Although Mullins, J. refers to rule 48(2) in various respects – he makes no mention of the fact that the subrule as well as subrule (3) clearly distinguishes between judge and court and did not contemplate the judge deciding in chambers as a court. But the judge had the choice and the jurisdiction to refer the matter to the court of the local or provincial division and in such an instance – the decision of such local or provincial decision on review, would be a judgment or order by the court as in the case of a similar decision by the court of the High Court of Namibia.

It is obvious that this would probably be the procedure followed in most cases of some complexity and probably also where one or more of the parties involved or their legal representatives, propose such a course to be followed.

The two discretionary courses are:

1. The course where the judge reviews the taxation in chambers in the form of a full revision of the taxing master's decision where the matter is not a complex one and the judge – after hearing the parties and/or their legal representatives – or considering their

written representations, decides that the matter is not a complicated one and/or it is desirable to expedite the process and save costs, if possible.

Alternatively

Where the cost issues to be reviewed are complicated and the judge – after hearing the parties or their legal representatives and/or considering their written representations, decides that an appeal may be desired by one or more of the parties after the decision on review and, that the better course consequently is to refer the review to the Court for decision.

I can see no absurdity in such a course.

Mullin, J. also said:

> "Erasmus, J. granted leave to appeal, obviously without knowledge of the Menzies case. Had he been aware, when the matter came before him in chambers in terms of rule 48(2), that his decision in chambers was not or might not be appealable, I have little doubt that he would have referred the case 'for decision to the court' in order to create the right to appeal should he grant leave."

The recognition that this course was open to Erasmus, J. when he decided to hear and decide the review of the taxation in chambers, detract from the argument that it is absurd not to allow an appeal from the review decision of the judge in chambers.

Mullins, J. also referred for support of his criticism of the Menzies case to the full bench decision of the Transvaal in Berg v Khanderia and Sons, 1924 TPD 560.

In the Berg's case an appeal was lodged from a review judgment of a judge in chambers, who had reviewed the taxation of costs by the clerk of the court. The judge refused leave to appeal but the full bench of the Transvaal Court found that the decision of the judge in chambers was not "final" and such judge was not the "sole tribunal" in the case. The full court held:

> "There was no express or implied exclusion of a judge's decision under s. 78 (of the Magistrates' Court Act 32 of 1917) from the appellate jurisdiction of this court contained in s 22 of Proc. 14 of 1902. The objection that a judge's decision under 78 is final is therefore untenable." (My emphasis added)

The decision in Berg is therefore clearly distinguishable because s 22 of Proc 14 of 1902 made specific provision for a right of appeal "from every final order granted or judgment pronounced by a single member "sitting in chambers". In Robinson v Rossi, 1996(2) All SA, at p. 361 g – h Stegman, J. distinguished the case of Berg from that in Menzies on the same ground.

Mullins, J. argued that the ratio in Berg's case as he understands it, is "however, that the Court regarded a decision of a judge in chambers under s. 78 of the Magistrate's Court Act as appealable despite, and not because of, the provisions of section 22 of the Proclamation." That may be the understanding of the learned judge, but I respectfully disagree.

Mullins, J. concluded his judgment and that in effect of the full bench as follows:

> "Despite my difficulty in dissenting from or even distinguishing the Menzies' case, I have come to the conclusion that this court can and should hear the present appeal. It involves, as I have said, a matter of importance not only to the parties *in casu*, but also to other litigants and their legal advisers."

The precise basis or grounds for arriving at this conclusion is not altogether clear. If it is that a review decision of a judge in chambers is a judgment or order of the court of the Provincial or Local Division, I find it entirely unconvincing. If it is an exercise of a purported inherent jurisdiction of that Court, I similarly am not convinced of its correctness.

The only remaining possibility on which a right of appeal can be based, is if the reviewing function of the judge in chambers can be regarded as a "lower court" in relation to the High Court. The High Court Act provides in art. 16 that it has jurisdiction to hear and decide appeals as well as reviews from all lower courts. Section 1 of the High Court Act defines a "Lower Court" as "a Court required to keep a record".

Although there is no express provision in any law or rule of court for the judge in chambers to keep a record, it is clearly a necessary implication from the provision that a judge is the functionary and from rule 48 itself, that a record must be kept of the proceedings in chambers. In such an event the appeal from the review decision of the judge in chambers will be to the High Court and not to the Supreme Court.

Unfortunately, none of the legal representatives raised this possibility and the Court did not hear any argument on the issue. Such an outcome would also

not change the fortunes of the appellant in the presented purported appeal. It would therefore not be appropriate to make a final ruling on this issue.

A judge sitting in chambers is at least a tribunal, exercising a judicial or at least *quasae* judicial discretion in exercising its administrative functions under rule 48. As such its review decision, which amount to a revision of the decision of the taxing master, must therefore be reviewable, notwithstanding the genuine concern as expressed by Mr. Bloch.

However, this course would probably only be followed in a small number of cases, particularly if the judges, dealing with a taxation review, refer the decision to the Court for decision – where an appeal procedure in terms of section 18 of the High Court Act will be available.

The "review of a review" as Mr. Bloch described it can also be avoided if rule 48 is amended to eliminate the procedure of a judge sitting in chambers – which at any event seems to militate against art. 12 of the Namibian Constitution, which provides for a public hearing. Alternatively, rule 48 must be amended to eliminate the distinction between a judge sitting in chambers – giving a judgment or making an order and a judge sitting in open court giving a judgment or making an order. If the decision in chambers is intended as a final judgment or order, the rule must say so and section 18 must be amended on the lines of its subsection (7), to provide that there is no appeal against the review judgment on taxation by a judge in chambers.

I conclude that the judge giving his decision in chambers in a taxation review, is not performing that function as the High Court of Namibia and consequently,

the appeal procedure provided in section 18 is not available for an appeal against that decision. There is no other law providing for such appeal. This is also not an appropriate case for the exercise of the Court's inherent jurisdiction. As a consequence it is not necessary to deal with the second point *in limine* or with the merits of the appeal.

In conclusion I wish to thank both counsel for their interesting and well-researched contributions.

In the result:

The appeal is struck from the roll with costs.

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O'LINN, A.J.A.

I agree.

_____
STRYDOM, C.J.

I agree.

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CHOMBA, A.J.A.

/mv

COUNSEL ON BEHALF OF THE APPELLANTS: MR. B. BLOCH
Instructed by: B. Bloch Legal Practioner

COUNSEL ON BEHALF OF THE RESPONDENT: MR. R.D. COHRSSEN
Instructed by: A. Vaatz & Part.