REPORTABLE

CASE NO.: SCA 1/2007

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

FREDRICH WILLY SCHROEDER FIRST APPLICANT
DEIDRE DAWN FAITH SCHROEDER SECOND APPLICANT

and

DR LENNON E. SOLOMON FIRST RESPONDENT
AND 48 OTHERS 2ND TO 49TH RESPONDENTS

Coram: MAINGA J.A, CHOMBA A.J.A *et* MTAMBANENGWE A.J.A.

Heard on 28/06/2010
Delivered on: 14/09/2010

APPEAL JUDGMENT

MAINGA JA.:

[1] This is an application *sui generis* (first of this kind) in that, notwithstanding the settled law, i.e. the decisions of this Court are final and the elucidatory directions in the judgment that brought about this application the applicants seek in terms of Article 81 of the Namibian Constitution, the rescission of a judgment of this Court delivered on 26 October 2007. This raises the question, whether it was competent for applicants to have brought this application in terms of Article 81 of the Constitution of the Republic of Namibia?

[2] The application and the accompanying founding affidavit are inelegantly drafted and I find it prudent to try to recast the whole application as follows.

"**APPLICATION IN TERMS OF ARTICLE 81 OF THE NAMIBIAN CONSTITUTION**

KINDLY TAKE NOTICE that 1st applicant/plaintiff herewith makes application to the Supreme Court for rescission of judgement delivered by this Honourable Court on 26th October 2007, on the grounds that:

1. The procedures followed in the hearing did not comply with the general practice entertained by the Honourable Court as well as that it did not comply with the observance of the rule of law.

The said judgement was granted as a result of a mistake common to the parties.

The Honourable court by virtue of Rule 5(4)(b) and Rule 11 should not have allowed the respondents/defendants except 29th respondents to participate in the hearing and the decision of the Honourable Court to the contrary was therefore unlawful.

Article 81 of the Namibian Constitution provides for a reversal of a decision of this Honourable Court by itself.

The applicant/plaintiff furthermore intends to apply for an order in the following terms:

5. That a special dossier to be compiled by a referee as stipulated in Section 23 of the Supreme Court Act, 1990.

KINDLY set down the matter to be heard accordingly.

DATED at WINDHOEK on this day 1 day of November 2007.

Signed

FREDRICH WILLY SCHROEDER"

"**AFFIDAVIT**

1. I the undersigned

Fredrich Willy Schroeder

hereby make an oath and say.

2. The contents of this affidavit are true and correct and to my personal knowledge unless it is otherwise stated or the context otherwise indicates.

I attach hereto a copy of a letter from the Registrar of the Supreme Court dated 22nd May 2007 to ourselves and copied to the rest of the parties and I marked it 'A'. **See also pages 225 to 228 of the record filed by respondents with the Honourable Supreme Court.**

The heading reads, "**Re: SUPREME COURT REVIEW:…**"

Paragraph 5 thereof refers ourselves to Rule 11(1) and 11(2) pertaining to appeals.

I attach hereto a copy of a letter from the Registrar of the Supreme Court dated 23rd July 2007 to ourselves and copied to the rest of the parties and I mark it 'B'. **See pages 247 to 231 of the record filed by respondents with the Honourable Supreme Court.**

The heading reads, **Re: SUPREME COURT APPEAL: FREDRICH WILLY SCHROEDER & ANOTHER v DR LENNON SOLOMON AND 47 OTHERS.**" (My underlining).

Paragraph 1 reads, "**The above-mentioned Supreme Court Appeal has been set down …"** (My underlining).

Paragraph 2 refers to ourselves and the parties Rules 11(1) and 11(2) of the Rules of the Supreme Court.

Before this letter I was of the intention to prepare myself against the argument of respondents that the application for review was not competent.

In fact, I already laid hold of legal works such as "**LAW OF CIVIL PROCEDURE"**, A J Visser, 2000, page 381 which contains the following statement: "**There is no procedure for review of a provincial or local division's proceedings by the Supreme Court of Appeal. In similar circumstances the matter must be taken on appeal from such provincial or local division."**

I attach hereto a copy of the said extract and mark it 'C'.

I further laid hold of literature which points out that it is internationally accepted that application for review is taken on appeal.

Notwithstanding, the Honourable Supreme Court put an end itself to any argument on the above question as it declared it an appeal by itself thus pre-empting my research on the issue.

Being an appeal, the respondents in the matter had to file power of attorney in terms of Rule 5(4) (b) which reads, "…, **a power of attorney to oppose an appeal shall be lodged with the registrar by the respondent's attorney when copies of respondent's main heads of argument are lodged under rule 11."**

Respondents' attorneys (except one respondent's attorney) did not lodge power of attorney.

However, the Honourable Court ruled at the hearing contrary to its written pronouncements in Annexure 'B' that it was not an appeal and struck it from the Roll with costs.

The said ruling came in the face of my presumption that the procedure was an appeal, a presumption substantiated in writing by the Honourable Court itself.

I was therefore taken aback when this issue was once again placed in dispute in the actual hearing. The situation was thus one of not only ambush but I was actually misled by the clear pronouncement that this matter was an appeal.

I believe that the patent error in the judgment might be due to human error by the Learned Judges and it is my submission that the judgement stand to be corrected in terms of *inter alia* Article 81 of the Namibian Constitution and Rule 44 of the rules of the High Court.

Lastly, I respectfully wish to point out that literature used in my written submission that the Court largely determines its own rules in review, **Constitutional and Administrative Law, Boulle, Harris, Hoexter, 1989, page 242,** was published in 1982 before Section 16 of the Supreme Court Act of 1990 was promulgated.

WHEREFORE, I respectfully ask the Honourable Court to correct or vary its Order in accordance with its own written pronouncements.

Signed at WINDHOEK on this day 1 day of November 2007.

Signed
FREDRICH WILLY SCHROEDER"

[3] The history of this application is briefly as follows: applicants had approached this Court seeking an order to review and set aside two orders of the High Court made in proceedings interlocutory to their main action against the respondents in that court. After hearing arguments from the applicants and the majority of the respondents represented by Ms Vivier and Ms Schimming-Chase, the Court struck the application from the roll with costs.

[4] The application was struck from the roll, *inter alia*, for inadmissibility of the application to this Court given the provisions of section 16 of the Supreme Court Act 1990[1] more so on

1Section 16 provides as follows:

(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 under any law

(2) The jurisdiction referred to in subsection (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 subsection, 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.

the two of the features the court found ascertainable from the provisions of the section, namely, that this Court may on its own accord exercise review jurisdiction whenever an irregularity in proceedings comes to its notice or to the notice of anyone of its Judges irrespective of whether the proceedings in question are subject to an appeal or are otherwise before the Court and that the section does not give any person the right to institute review proceedings in this Court as one of first instance[2].

[5] The Court went on to say, section 16 makes it beyond doubt that this court has jurisdiction to review proceedings of the High Court if they are tainted by an irregularity and that the jurisdiction to do so does not, without more, give the applicants cause to institute review proceedings under section 16 in this Court as of right[3].

[6] The Court further said:

The proviso to subsection (2) expressly precludes such an assumption, and for good reason: It would place an unbearable burden on the limited resources of the Court and severely compromise its ability to dispense justice in an equal, just and fair manner if everyone dissatisfied with the fairness or reasonableness of judicial, quasi-judicial and administrative judgements or decisions by courts, administrative tribunals and other public authorities on account of alleged irregularities could at will institute review-proceedings in this Court – in the process bypassing all existing judicial structures often better suited to deal with those matters in the first instance[4].

A procedural irregularity contemplated by the section becomes the subject of adjudication only if and when the Court, of its own accord, decides to exercise its jurisdiction to review it. In the absence of a decision to that effect, the proceedings cannot be reviewed by this

2 Para. 9 of the reasons for the order of 26/11/2007 delivered on 26/11/2008.
3 Para. 10
4 Ibid

Court under s. 16. In short, the decision of the Court to invoke its review jurisdiction is a threshold requirement for the admissibility of any application under the section to review and set aside or correct the impugned proceedings.[5]

[7] The Court went all out to elucidate the provisions of Article 79 of the Constitution which provides for the jurisdictional powers of this Court including constitutional matters which this Court may hear as of first instance i.e. referrals by the Attorney-General[6]. The Court found that the "review application" by applicants was not such application before Court[7] and struck the application from the roll.

[8] When the application was called, we drew the attention of the applicants to the provisions of section 17 of the Supreme Court Act; particularly the Court wanted to know how they understood the provisions of the said section. Section 17 provides:

> "**17 Finality of decisions of Supreme Court**
>
> (1) There shall be no appeal from, or review of, any judgment or order made by the Supreme Court.
>
> (2) 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."

[9] It appeared as if applicants were not aware of the provisions of section 17 above. That prompted the Court to allow them to file written supplementary heads of argument by 9 July 2010 on their understanding of that provision. We nevertheless allowed the applicants to address the Court on the heads of argument they had earlier on filed. After the first applicant had looked at the provisions of sub-article 1 he retorted to say that Article 81 was superior to the provisions of section 17 as if Article 81 and section 17 provided for the

5 Para. 11
6 Paras. 4-6
7 Ibid

same subject matter. He further read out from a piece of paper which the Court requested him to hand-up which document summarised the heads of argument filed. The document reads as follows:

"My Lords,

1. The first issue I wish to raise is that none of the respondents were before Court in the previous hearing and none of them are before Court today as I have shown in my heads of argument. I raise this issue as respondents have filed withdrawals as if they were before the Court. For me this issue is very important as the Court awarded costs to the respondents who were not before Court. I respectfully submit that the order was a nullity.

As far as the competence of this application under Article 81 of the Constitution is concerned, I submit that it is competent on the following grounds:

1. I at the beginning approached this Honourable Court on the basis that my right to a fair hearing in terms of Article 12 of the Constitution was violated in the High Court.

Article 25(2) guarantees myself the right to approach a competent Court if my fundamental rights had been denied.

When the Court refused to review the violation of my rights and dismissed my application it did not comply with the Constitution and I submit in that it made a mistake.

Article 81 empowers the Court to correct its own judgments. It does not tell us how to do it and I assume that one can bring it on application or the Court may do it on own opinion.

I submit that this Honourable Court is obligated to uphold fundamental rights.

I therefore submit that this application is competent to correct a wrong judgment in which I was denied to approach the Court to review the violation of my Constitution rights and to get costs against myself on behalf of persons who were not before the Court."

[10] In the supplementary written heads of argument on the provisions of section 17(1) it is argued that the section only refers to appeals and reviews and that, that is not related to their application for rescission of judgment in terms of Article 81 of the Constitution. It is further argued that the application in terms of Article 81 is exceptional in that this Court 'committed a patent error' when they were put under the impression that their review

application was an appeal, only to be confronted with review proceedings on the day the application was heard and that 'the rule of law will be vitally deficient if there is no remedy for an obvious patent error made by this Court' or 'this Court is evading the scrutiny of its own judgment, and ultimately if no sanction attaches to an obvious violation of litigant's fundamental right to a fair trial.' They further argue that the words 'unless it is reversed by the Supreme Court itself implies the existence of an authority (the Supreme Court) that will scrutinise its own judgment should the rule of law has been broken.'

[11] In the heads of argument by the second applicant it is argued that their application was a constitutional one in terms of Article 81 and the application is for determining the meaning of the said Article and that a statute (which I believe is section 17) cannot be used to interpret a constitutional provision and that it can be done the other way round.

[12] With all due respect to the applicants, had they properly read the judgment which struck their "review application" from the roll, they would not have brought this application to this Court. In that judgment the Court elaborates the jurisdictional powers of this Court and who may approach this Court as of first instance. There are only three categories of matters sanctioned by the Constitution that may be heard by this Court[8], namely, 1) appeals emanating from the High Court, which appeals include appeals which involve the interpretation, implementation and upholding of the Constitution, 2) matters referred by the Attorney-General under the Constitution, 3) other matters as may be authorised by Act of

8Article 79(2). It provides:

"The Supreme Court shall be presided over the Chief Justice and shall hear and adjudicate upon appeals emanating from the High Court, including appeals which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder. The Supreme Court shall also deal with matters referred to it for decision by the Attorney-General under this Constitution, and with such other matters as may be authorised by Act of Parliament."

Parliament. Article 79(4) further provides that, the jurisdiction of the Supreme Court with regard to appeals shall be determined by Act of Parliament. The Supreme Court Act[9] is such an Act. Section 16(1) and (2) of the said Act confers upon this Court the fourth jurisdictional power in respect of review proceedings of the High Court or any lower court or administrative tribunal or authority constituted or established by or under any law[10]. The section provides how such powers may be exercised and the proviso specifically prohibits any person instituting review proceedings in this Court as of first instance. Matters that may be referred to this Court by the Attorney-General under the Constitution are the only matters of original jurisdiction this Court may hear, the rest are of an appellate nature. The matters that maybe heard as of original jurisdiction are also provided for in section 15 of the Supreme Court[11], which is headed, "Jurisdiction of Supreme Court as Court of First

9 Supreme Court Act, Act No 15 of 1990

10 Section 16(1) and (2) provides:

"**16 REVIEW JURISDICTION OF SUPREME COURT**

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 or authority established or instituted by order or under any law.

The jurisdiction referred to in subsection (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 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."

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"**15 JURISDICTION OF SUPREME COURT as court of first instance**

1. Whenever any matter may be referred for a decision to the Supreme Court by the Attorney-General under the Namibian Constitution, the Attorney-General shall be entitled to approach the Supreme Court directly (without first instituting any proceedings in any other court), on application to it, to hear and determine the matter in question.

An application to the Supreme Court under subsection (1) shall be submitted by petition to the Chief Justice and shall further comply with the procedures prescribed for that purpose by the rules of court.

The Chief Justice or any other judge designated for that purpose by the Chief Justice shall decide whether such application is, by virtue of its urgency or otherwise, of such a nature as to justify the exercise of the court's jurisdiction in terms of this section.

Any decision referred to in subsection (3), by the Chief Justice or such other judge, as the case may be, shall be final.

Instance." The section prescribes how the Attorney-General may approach this Court. In sub-section 4 it provides that the decision "by the Chief Justice or such other judge, as the case may be" on such application by the Attorney-General is final. This application which was brought directly to this Court is not such application or matter contemplated in Article 79(2) and section 15 of the Supreme Court Act. Even if it was such an application it has to be in a form of a petition. For that reason alone the question to be determined ought to be answered in the negative.

[13] Section 17(1) which first applicant concedes speaks in peremptory tones, makes it clear without exceptions, 'that there shall be no appeal from, or review of, any judgment or order made by the Supreme Court.' In other words a judgment or an order of the Supreme Court is final, which means it is not appealable or reviewable. Section 17 is headed "Finality of the decisions of Supreme Court." If there were any exceptions to section 17 Parliament would have said so.

[14] Article 81 of the Constitution is headed "Binding Decisions of the Supreme Court." The provision in whole reads as follows:

> "A decision of the Supreme Court shall be binding on all other courts of Namibia and all persons in Namibia unless it is reversed by the Supreme Court itself, or is contradicted by an Act of Parliament lawfully enacted."

If the Chief Justice or such other judge, as the case may be, is of the opinion that the application is of a nature which justifies the exercise of the court's jurisdiction in terms of this section, any party affected or likely to be affected by the decision of the Chief Justice or such other judge, shall be informed of that decision by the registrar, and the matter shall, subject to the provisions of section 20, be further dealt with by the Supreme Court in accordance with the procedures prescribed by the rules of the court.

Nothing in subsection (4) contained shall be construed as precluding any party affected or likely to be affected by the decision that the application is not of such a nature as to justify the exercise of the court's jurisdiction as contemplated in that subsection, to institute proceedings in any other competent court."

[15] The Article requires no interpretation, it is precise and unambiguous, no more can be necessary than to understand the provision in its natural and ordinary sense. It provides for the binding nature of the decisions of the Supreme Court on all other courts, and all persons in Namibia, I may add including the Supreme Court itself, unless reversed by the Supreme Court itself or contradicted by an Act of Parliament. In *Bloemfontein Town Council v Richter*[12], Strafford JA stated that, 'the ordinary rule is that this Court is bound by its own decisions and, unless a decision "has been arrived at on some manifest oversight or misunderstanding, that is, there has been something in the nature of a palpable mistake," or its attention was not drawn in the previous decisions to relevant authorities.[13]

[16] In the *Bloemfontein Town Council* matter the court stressed the fact that the principle of *stare decisis* should be more rigidly applied in the highest court in the land, than in all others.[14]

[17] The reason therefore is better said by Schultz JA when he stated:

> "...I should state again that for good reason this Court is reluctant to depart from its own decisions *(Harris and Others v Minister of the Interior and Another* 1952 (2) SA 428 (A) at 454A) and that once the meaning of the words of a section in an Act of Parliament have been authoritatively determined by this Court, that meaning must be given to them, even by this Court, unless it is clear to it that it has erred (*Collet v Priest* 1931 AD 290 at 297). Particularly is it important to observe *stare decisis* when a decision has been acted on for a number of years in such a manner that rights have grown up under it (*Harris's* case, above, at 454A-B and *Horowitz v Brock and Others* 1988 (2) SA 160 (A) at 186H-187B). For 45 years businessmen and the

12 1938 AD 195 at 232
13 *John Bell Co Ltd v Essenlen* 1954 (1) SA 147 (AD) at 153
14 *Bloemfontein Town Council v Richter*, (Fn [12] above)

revenue have been ordering their affairs on the assumption that the *S A Bazaars* case laid down the law.[15]

[18] Where a judgment of this Court is arrived at by error (per incuriam), in subsequent appeals before it, when satisfied that the previous decision was wrong, it may depart from it. I must be quick to say in an appeal before this Court or in a constitutional application as contemplated in Article 79(2) and section 15 of the Supreme Court Act there would be nothing wrong for a litigant to argue that the Court should depart from any of its previous decisions, for example, should the issue of homosexuality resurface in this Court by way of an appeal or the issue of corporal punishment be repetitioned by the Attorney-General to this Court, it would be competent for the appellant or the Attorney-General or their counsel to argue that the matters of the *Chairperson of the Immigration Selection Board v Frank and Another* [16]*and Ex Parte Attorney* General: *In the Corporal Punishment by Organs of State*[17] were wrongly decided and urge the Court to depart therefrom.

[19] Article 81 has the purpose of reaffirming the operation of precedent within the hierarchy of our court structure. It reaffirms the locality of this Court at the apex of the judicial authority, and the binding nature of its decisions on all the other courts and all persons, right or wrong its decisions are absolutely binding unless reversed abandoned or departed from by this Court itself or contradicted by an Act of Parliament. The rule *stare decisis* e*t non quieta movere* (stand by the decisions and do not disturb settled law) was adopted from the English Law with the establishment of the Supreme Court at the Cape in

15 *Robin Consolidated Industries Ltd v Commissioner for Inland Revenue* 1997 (3) SA 654 (SCA) at 666F-I. See also *Minister of Safety and Security and Another v Hamilton* 2001 (3) SA 50 (SCA) at 53D-E.

16 2001 NR 107 (SC) which held that same-sex relationships were not recognized in Namibia.

17 1991 NR 178 (SC) which outlawed imposition of any sentence by any judicial or quasi-judicial authority, or directing any corporal punishment upon any person.

1828[18]. This country until independence ruled as an integral part of South Africa shares the Roman Dutch Law traditions with South Africa and the rule *stare decisis* is embedded in our legal system. In my view Article 81 and section 17 complement each other, section 17 providing for the finality of the decisions of this Court and Article 81 providing for their binding nature on inferior courts and all persons. It does not create another forum for litigants to litigate beyond the decisions of this Court. It is regrettable that applicants think that Article 81 empowers them to approach this Court to revisit its decisions; when it is settled law that the decisions of this Court are final. The decision striking their "review application" from the roll is final, it is not subject to review or appeal or be challenged in any way. The application is not competent and ought to be struck from the roll.

[20] For the reasons above I find it unnecessary to delve into the merits of their application. If we were to decide on the issues we would find that they are without substance.

[21] Briefly on the issue of costs. While heads of argument were filed on behalf of the 22nd - 26th, 28th, 30th – 43rd and 46th - 48th respondents, they were not in Court when the application was heard. No costs should be ordered.

[23] In the result we make the following orders:

1. The application purportedly in terms of Article 81 of the Constitution of Namibia is struck from the roll.

2. No order as to costs.

18 Hosten *et al*, Introduction to South African Law and Legal Theory, 2nd ed. Lexis Nexis, Durban 1995 at 386-387.

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MAINGA JA

I agree

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CHOMBA AJA

I agree

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MTAMBANENGWE AJA

For the First Applicant: In Person

For the Second Applicant In Person

For the Respondents: No appearance