



**REPORTABLE**

CASE NO: SCR 4/2013

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**ARDEA INVESTMENTS (PROPRIETARY) LIMITED** **Applicant**

and

**NAMIBIAN PORTS AUTHORITY** **First Respondent**

**GOVERNMENT OF THE REPUBLIC OF NAMIBIA** **Second Respondent**

**ATTORNEY-GENERAL OF NAMIBIA** **Third Respondent**

**MINISTER OF JUSTICE** **Fourth Respondent**

**Coram:** SHIVUTE CJ, MARITZ JA and MAINGA JA

**Heard:** 14 April 2014

**Delivered:** 28 March 2017

**Summary:** In the High Court, the applicant (plaintiff) instituted action against the first respondent (defendant) based on a partly oral and partly written agreement dating back to June 2005. The first respondent defended the action but did not file its plea. It however elected to serve and file an exception against the applicant's

particulars of claim on the basis that the particulars did not disclose a cause of action, alternatively were vague and embarrassing. After hearing arguments on behalf of the parties, the court upheld the exception and afforded the applicant 14 (fourteen) days to remove the cause of complaint.

Disgruntled by this decision, the applicant brought an application in terms of section 16 of the Supreme Court Act 1990 to review the proceedings of the High Court and to correct or set aside that part of the judgment dealing with the cause of the complaint and the order made by the court on 19 April 2013. Section 16 gives this court powers to review proceedings of the lower court if they are tainted by an irregularity.

The applicant contended that the basis on which the presiding judge upheld the exception was not raised as a ground of exception by the first respondent. The first respondent, although not taking part in the proceedings of this court, admitted in its answering affidavit that the decision of the lower court was wrong as it considered and decided a matter not raised by the parties. The alleged irregularity is also acknowledged by the presiding judge in response to an invitation by the court.

The court is satisfied that an irregularity occurred in the High Court's proceedings necessitating the review of the proceedings of that court. The court holds that the lower court's judgment constitutes an irregularity in the proceedings as contemplated in s 16 of the Act. The order of the lower court made on 19 April 2013 is set aside and substituted with an order dismissing the first respondent's exception with costs. The

court remits the matter to the lower court to be placed under judicial case management process.

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## REVIEW JUDGMENT

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SHIVUTE CJ (MAINGA JA concurring):

[1] This appeal was heard on 14 April 2014 by me, Maritz JA (who has since retired) and Mainga JA. Maritz JA had the responsibility of preparing the court's judgment. Regrettably, he has not presented a draft judgment for consideration despite repeated undertakings to do so. I have since been advised that for medical reasons, Maritz JA has become unavailable to perform further judicial work. Due to this deeply regrettable circumstance, being one of the three Judges who had sat on the appeal, I have decided to write the judgment. In terms of s 13(4) of the Supreme Court Act 15 of 1990, two judges forming the majority, can still give a valid judgment provided that they agree on the outcome<sup>1</sup>. Provided that Mainga JA and I agree on the judgment in this matter, the appeal may validly be finalised. I now proceed to consider and decide the appeal.

### Background

[2] The applicant petitioned the Chief Justice requesting the Supreme Court to invoke the provisions of s 16 of the Supreme Court Act 15 of 1990 (the Act) to review the proceedings of the High Court in case no. I 553/2009 and to correct or set aside that part of the judgment dealing with the cause of complaint and the order made by

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<sup>1</sup> See, for example, *Wirtz v Orford & another* 2015 NR 175 (SC).

the High Court on 19 April 2013. In light of the information disclosed in the petition, the Chief Justice decided that an irregularity had occurred in those proceedings justifying the exercise of the Supreme Court's jurisdiction as contemplated in s 16 of the Act. Several directions regulating the conduct of the review proceedings were issued. The applicant was directed, amongst others things, to bring a review application on notice of motion informing the first respondent and the presiding judge of the review application and affording them an opportunity to oppose the application if so advised or minded.

[3] The review application stems from proceedings in the High Court in which the applicant is the plaintiff in an action instituted by it in that court. The first respondent is the defendant in the action. The second, third and fourth respondents are not party to the proceedings in the court *a quo* and appear to have been cited in this court simply to enable the applicant to seek a costs order against them. I will deal with this aspect later in the judgment.

[4] The applicant issued summons claiming payment for the sum of N\$5 346 000 from the first respondent as a result of an alleged breach of contract. The claim is founded on a partly oral and partly written agreement allegedly reached between the parties in June 2005. The claim on the oral agreement is based on a contract of deposit (*depositum*). Attached to the particulars of claim is the written agreement which allegedly evidences the written terms of the contractual relationship between the parties.

[5] After receiving the summons, the first respondent delivered a request for further particulars with a notice in terms of rule 23(1) of the old Rules of the High Court calling for the removal of the cause of complaint. The applicant sought to remove the cause of complaint by annexing what it says is the correct written agreement to its further particulars. The applicant explicitly stated that an incorrect written agreement had been initially annexed.

[6] The first respondent then excepted to the particulars of claim on four grounds. The first ground of exception related to the incorrect agreement initially attached. The second ground was that the applicant relied on a different agreement relating to different transactions and subject matters. The third ground concerned the provision in the 'correct agreement' which fixed the storage rates to be charged. The fourth ground was that the correct agreement had been impermissibly attached to the further particulars contrary to the provisions of rule 28.

[7] In relation to the first and fourth grounds, the court *a quo* held that the agreement initially attached to the particulars of claim did not support the applicant's claim as pleaded. However, the applicant sought to attach the correct written portion of the agreement. The court rejected the contention that the particulars of claim were vague and embarrassing, because the correct written portion of the agreement was impermissibly attached to the further particulars. The court reasoned that the contention was a purely procedural objection that should have been raised as an

irregular proceeding in terms of rule 30. In any event, the attachment of the correct agreement to the further particulars created no prejudice to the first respondent. The court stated that not every non-compliance with a rule of court automatically results in prejudice to the other party. On this reasoning the first and fourth grounds of exception were dismissed.

[8] The findings of the court below on the second ground of exception form the subject matter of the review. As for the second ground, bearing in mind that the court found that the correct agreement had permissibly been attached, the written portion of the agreement together with the particulars of claim did not create a different agreement or a different transaction. The court found that on the face of the pleadings, a partly oral and partly written agreement had been pleaded. It then concluded that there was sufficient correlation between the particulars of claim and the written portion that can be clarified in evidence.

[9] One of the main elements of a contract relates to the parties who concluded it. In this connection, the court found that the agreement attached to the further particulars was addressed to an entity different from the first respondent. In the opinion of the court, it was accordingly not clear with which entity the applicant concluded the agreement. The court then found that the pleadings were capable of more than one meaning and the first respondent was prejudiced as a result. Thus, according to the court, the second ground of exception succeeded on this aspect only and the applicant was directed to remove the cause of complaint within 14 days. The

applicant was also directed to pay the costs of the exception. The basis on which the presiding judge upheld the exception was not raised as a ground of exception by the first respondent. As earlier noted, the review thus concerns the court's upholding the second ground of exception and the resultant costs order. It is not necessary to deal with the findings of the court on the third ground, except to mention that that ground too was ultimately dismissed.

[10] None of the respondents opposed the prayer to have that part of the judgment dealing with the cause of complaint and order reviewed and set aside, except that the first respondent has reserved its rights to seek leave to appeal against the order of the court below in the exception on the grounds raised by the applicant should the order sought by the applicant in the review proceedings be granted. The second, third and fourth respondents only opposed the relief for a costs order now being sought against them. Before I consider the irregularity complained of in detail, it is necessary to restate the context in which s 16 may be invoked.

#### The applicable statutory framework

[11] This matter is being reviewed in accordance with the provisions of s 16 of the Act. Section 16(1) 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 an applicant a cause to institute review proceedings under s 16 in this court as of right.<sup>2</sup>

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<sup>2</sup> *Schroeder & another v Solomon & 48 others* 2009 (1) NR 1 (SC).

[12] This court in *S v Bushebi*<sup>3</sup> decided that 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 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.

[13] In exercising the discretion whether or not to invoke its s 16 review powers, the court will have regard to a number of factors, and its jurisdiction will only be invoked when it is required in the interests of justice. Whether it is so required must be decided on the facts and the circumstances of each case. Considerations to be taken into account by the court include, but not limited to whether or not:

- (a) the irregularities complained of are also reviewable by other competent courts or may be corrected in other proceedings;
- (b) the irregularities relate to completed, uncompleted, interlocutory or ancillary proceedings;
- (c) considerations of urgency attached to the adjudication of the issue in question;

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<sup>3</sup> 1998 NR 239 (SC).



(d) the issues are important;

(e) a public interest is at stake; and

(f) only an individual or a class of persons or a section of the community has been affected by the irregularity and the like.<sup>4</sup>

[14] In *Schroeder & another v Solomon & 48 others*, this court characterised the assumption of review jurisdiction under s 16, as an 'extraordinary procedure'. In essence this was summarised in para [20] of that decision where the court said:

'Being a court of ultimate resort in all cases adjudicated by it, reasons of practice and prudence must curtail the invocation of its jurisdiction to entertain review proceedings as a court of both first and final instance. In the view I take, this court should do so only when it is required in the interests of justice. Whether it is so required or not, must be decided on the facts and the circumstances of each case.'

[15] Whether this court should review the proceedings of the High Court is a matter to be decided on case by case basis. On this note, I am mindful of what was stated in *Schroeder* that alleged irregularities in the proceedings before the High Court may be corrected in appeal proceedings.<sup>5</sup> Indeed, appeal proceedings should be the primary means to address and correct irregularities in the proceedings of the High Court

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<sup>4</sup> For a useful exposition of how the section is applied in practice see: Heathcote, R. 2009. 'Section 16 of the Supreme Court Act', *Namibia Law Journal*, Volume 1, Issue 1, 2009 wherein the author discusses *Christian v Metropolitan Life Namibia Retirement Annuity Fund & others* 2008 (2) NR 753 (SC) and *Schroeder & another v Solomon & others* above.

<sup>5</sup> *Schroeder v Solomon*, para 24.

particularly when the irregularity is apparent from the record and no evidence falling outside the ambit of the record is required to substantiate it.

[16] It is thus clear that only exceptional circumstances would justify the application of s 16, including but not limited to fraud, patent error, bias, new facts, significant injustice or the absence of an alternative remedy. The jurisdiction of this court under s 16 is exceptional, and is to be invoked not to allow a litigant a second bite at the cherry - in the sense of another opportunity of appeal or hearing at court of last resort - but to address only a situation of manifest injustice irremediable by normal court process.

#### The alleged irregularity

[17] In the *Bushebi* matter the court held that the phrase 'irregularity in the proceedings' as a ground for review relates to the conduct of the proceedings and not the result thereof. The court referred with approval to the decision in *Ellis v Morgan*, *Ellis v Dessai*<sup>6</sup> and stated that:

'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.'

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<sup>6</sup> 1909 TS 576.

[18] Therefore a mistake of law will not necessarily be treated as a ground of review. Nor is it a ground for review that a presiding officer arrived at a wrong conclusion. However, where the error is fundamental in the sense that the court *a quo* 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 may be reviewable.

[19] Once it is alleged that an irregularity had occurred in the proceedings, the onus rests upon the applicant for review to satisfy the court that good grounds exist to review the conduct complained of. Precisely what would constitute 'good grounds' in any given case must, by necessity, depend on the facts and the circumstances of the case.

[20] In the present matter, the alleged error is based on a procedural misdirection, which has been acknowledged by the parties and the presiding judge. In addition, I consider that the prospects of the irregularity being corrected in other proceedings were not that good. It is against this background that this court accepted the request to exercise its review jurisdiction. As indicated above, the respondents do not dispute the irregularity complained of. The absence of opposition, however, does not by itself entitle the applicant to judgment, as if by default.<sup>7</sup> The applicant is still required to satisfy this court that good grounds exist to review the conduct complained of.

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<sup>7</sup> *Christian v Metropolitan Life Namibia Retirement Annuity Fund* cited in note 4 above, para 15.

[21] As already noted, the decision to invoke s 16 of the Act was informed by the fact that both the applicant and first respondent agree that the court *a quo* was wrong for it to consider and decide a matter not raised by the parties or put to them. This is further buttressed by the presiding judge's candid admission that indeed a ground of exception not raised or argued by the parties formed the basis for the court's decision.

[22] Both the applicant and the first respondent<sup>8</sup> have referred to recent decisions of this court on the matter and identified some of the guiding principles. These principles are well established and I do not intend repeating them in detail save to highlight the necessary parts that guide us to a resolution of the matter.

[23] The presiding judge's admission noted under para [21] above is recorded in the letter dated 12 September 2013. The letter in part reads as follows:

'After consideration of the grounds of review, I accept, as presiding judge, that I dealt with a ground of exception in terms of rule 23(1) that was not raised in the heads of argument and further that this aspect was not raised by me as presiding judge with the parties appearing before me at any stage during the hearing of this application.

I prefaced my finding on this particular aspect that was not raised on the submission by Mr. Töttemeyer SC on behalf of the excipient that there were now different parties to the agreement. This is dealt with in paragraph 18 of my judgment.

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<sup>8</sup> In the applicant's request to the Chief Justice to invoke s 16 of the Act and the first respondent's reply thereto.

I further accept that I did not follow the principles set out in *Kauesa v Minister of Home Affairs & others* 1995 NR 175 (SC) at 182H-183I to the effect that I made a decision on a matter not put before me by the litigants either in evidence or in oral submissions.

I hold myself available for any further clarification or information that might be requested in this matter.'

[24] Paragraph 18 of the judgment referred to by the learned judge in the above-quoted letter deals with the second ground of exception and reads as follows:

'I deal with the second ground of exception on the basis of the particulars of claim read with annexure "A1" to the further particulars. It was argued by Mr Töttemeyer SC appearing for the defendant that annexure "A1" to the further particulars read with the particulars of claim amounts to a different agreement resulting in a material change in the Applicant's cause of action. Mr Töttemeyer SC argued that this material change rendered the particulars vague and embarrassing. He also argued that there were now different parties to the agreement. In my opinion the particulars of claim read with annexure "A1" do not amount to a different agreement or create a material change to the terms as pleaded. The contract is alleged to be partly oral and partly written and there appears to be sufficient correlation between the terms as pleaded in paragraph 4 of the particulars of claim and annexure "A1" that can be clarified, if necessary by the leading of evidence. The oral portion of the contract was set out in the particulars of claim. Annexure "A1" comprises only one page. It does not include the terms pleaded in the particulars of claim, but the written document shows a rate for storage.'

[25] Having reached the above conclusion and also having found that the complexity of the matter warranted the employment of two instructed counsel, it would appear that all that remained was for the court *a quo* to have made a finding that the second ground of exception had failed and an order that the first respondent's

exception had been dismissed with costs, such costs to include the costs of one instructing and two instructed counsel.

[26] However, without the issue having been raised by either of the parties or the presiding judge during the hearing of the exception, the presiding judge in the last three paragraphs of the judgment (paras [19], [20] and [21]) dealt with what the court characterised as an 'aspect of concern' relating to annexure 'A1'. Annexure 'A1' was a letter addressed by the first respondent to the deponent of the applicant's founding affidavit. The court found that annexure 'A1' was addressed to the deponent as managing director of 'CP Whalerock Cement' and not to the deponent as a representative of the applicant. Without affording the applicant an opportunity to be heard on this aspect, the presiding judge reasoned that there was 'clear ambiguity as regards the entity with which the contract of deposit had been concluded, namely whether it was the applicant or CP Whalerock Cement'. The court proceeded to find that 'the defendant . . . is embarrassed by this vagueness and lack of particularity and the particulars of claim are thus vague and embarrassing on this basis'. The presiding judge then concluded that the first respondent 'succeeds on this aspect of the second ground of exception only, and having been successful on one of the grounds raised is entitled to costs'. The applicant was directed to remove the cause of complaint within 14 days and ordered to pay the costs of the exception, including the costs of one instructing and two instructed counsel.

[27] In *Kauesa v Minister of Home Affairs & others* referred to in the letter by the presiding judge, this court held that it would be wrong for judicial officers to rely for their decisions on matters not put before them by litigants neither in evidence nor in oral or written submissions.

[28] It is necessary to restate the principle that in a civil case a presiding judge cannot go on a frolic of his or her own and decide issues which were not put or fully argued before him or her. The cases cited by the parties to the present matter clearly establish that when at some stage of the proceedings, parties are limited to particular issues either by agreement or a ruling of the court, the same principles would generally apply. The cases furthermore demonstrate that relaxation of these principles is normally only possible with the consent or agreement of the parties.<sup>9</sup> There is no question of the parties in this case agreeing to the relaxation of these principles.

[29] In this case the presiding judge admittedly decided the matter on a ground for exception not put before the court or argued by litigants. The applicant was not afforded the right to be heard with regard to the cause of complaint. Had that been done, the applicant in all probabilities would have argued that the cause of complaint was not raised by the first respondent and that the applicant was not afforded its procedural right, pursuant to rule 23(1) of the old Rules of the High Court, to consider whether or not to address the cause of complaint before the initiation of the exception.

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<sup>9</sup> See *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd & others* 2011 (2) NR 469 (SC).

Self-evidently, the presiding judge committed an irregularity by *mero motu* raising in the judgment a cause of complaint and upholding a ground of exception not raised by the first respondent in its exception or at all. This was compounded by the presiding judge making an adverse costs order against the applicant in circumstances where the applicant appeared to have had otherwise successfully resisted all the grounds of exception raised by the first respondent. It follows that this court finds that an irregularity occurred in the High Court's proceedings necessitating the review of the proceedings of that court. The findings made on the matter raised *mero motu* by the High Court in paras [19], [20] and [21] of that court's judgment constitute an irregularity in the proceedings as contemplated in s 16 of the Act and the order based on those findings stand to be set aside. What remains to be decided is the prayer for a costs order sought principally against the second respondent.

#### Costs

[30] The issue of costs turns on a narrow compass. The petition to the Chief Justice to invoke s 16 of the Act is dated 25 June 2013. In terms of rule 7(a) of the Rules of the Supreme Court, whenever the Chief Justice decides to invoke the review jurisdiction of the Supreme Court contemplated in s 16, the registrar of the court is required to communicate such a decision to the affected parties and the court or tribunal or authority.

[31] By letter dated 26 November 2013, the registrar conveyed to the affected parties (ie the applicant, first respondent and the presiding judge) the decision of the



Chief Justice to invoke s 16. This letter, as noted already, contains several directions including the direction that the applicant should bring a review application by way of a notice of motion.

[32] It is apparent from both the petition and the letter of 26 November, that the second, third and fourth respondents were not mentioned in these documents. It is also clear that these respondents were not forewarned that a costs order would be sought against them. The second to fourth respondents were cited for the first time in the review application dated 24 February 2014. In prayer 2 of the notice of motion the applicant asked this court to order the second respondent and any other respondent electing to oppose the application to pay the costs of the application including the costs for the preparation and submission of the petition. It emerged from the founding affidavit filed in support of the notice of motion that the applicant relies on Art 25(4) of the Namibian Constitution to recover costs as constitutional damages.

[33] The directions issued by the Chief Justice in terms of which the application for review had been brought were based on the applicant's request for the court to exercise its review jurisdiction, but such request did not include a suggestion or intention to claim constitutional damages from anyone. It is thus clear that the applicant has impermissibly expanded the relief sought in the application for review beyond what it asked for in its request for the court to exercise its review powers and the directions issued by the Chief Justice. It seems to me also inappropriate to decide such a novel point of law of constitutional damages on review, thereby effectively

rendering this court a court of first and last instance on that issue. It is for all these reasons that I am of the view that the prayer for a costs order against the respondents is not justified and as such this court should decline to make a costs order against anyone of them. I would thus propose such an order.

### Order

[34] In the result, the following order is made:

1. The order of the High Court in case no. I 553/2009, dated 19 April 2009, is set aside and substituted for the following order:  
  
‘The defendant’s exception is dismissed with costs, such costs to include the costs of one instructing and two instructed counsel.’
2. The matter is remitted to the High Court to be placed under judicial case management to determine the further conduct of the matter.
3. No order as to costs is made in relation to the review application.

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**SHIVUTE CJ**

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**MAINGA JA**

## APPEARANCES

APPLICANT:

R Heathcote (with him D Obbes)

Instructed by Fisher, Quarmby &amp;

Pfeifer

FIRST RESPONDENT:

No appearance

SECOND TO FOURTH RESPONDENTS:

G Coleman

Instructed by Government Attorney