



**REPORTABLE**

CASE NO: SCR 1/2016

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**BANK WINDHOEK LIMITED**

**Applicant**

and

**THEOPHILUS MOFUKA**

**First Respondent**

**DEPUTY SHERIFF OF THE HIGH COURT FOR  
THE**

**DISTRICT OF WINDHOEK**

**Second Respondent**

**Coram:** MAINGA JA, HOFF JA and FRANK AJA

**Heard:** 14 March 2018

**Delivered:** 03 April 2018

**Summary:** The first respondent lodged an urgent application in the court a quo to, amongst other things, stop a sale in execution of immovable property scheduled by the applicant for 9 June 2016. The matter became opposed, but due to time

constraints on the applicant in filing papers, the parties were restricted to arguing the issue of urgency only before the presiding judge.

After hearing arguments on the issue of urgency, the presiding judge ordered a stay in execution and granted the parties an opportunity to exchange pleadings and resume on 20 July 2016 for a case management conference. The reasons for the learned judge's order was premised on the principle of equity.

Aggrieved by the order of the court a quo, the applicant lodged an application to this court seeking to review and set aside the proceedings of the court a quo in terms of section 16 of the Supreme Court Act. The application remained unopposed and the grounds for review was mainly based on the fact that the presiding judge in the court a quo gave a ruling on the merits of the matter, while arguments before him was restricted to the issue of urgency only.

*Held*, that an irregularity was committed by the learned judge in the court a quo when he failed to make a decision whether the matter was urgent or not, and proceeded to grant relief on an equitable basis.

*Held*, that the learned judge departed from the basic principle of Rule 73(4) of the Rules of the High Court and pronounced himself on an issue that was not before him thereby rendering the proceedings reviewable.

*Held* further on the issue of costs, that due to no opposition, there is no order as to costs.

The order in the court a quo is reviewed and set aside.

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## REVIEW JUDGMENT

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MAINGA JA (HOFF JA and FRANK AJ concurring):

### Introduction

[1] This is an application for review and setting aside of the proceedings and the order made in the High Court of Namibia in terms of s 16 of the Supreme Court Act 15 of 1990 (the Act) in proceedings presided over by Ueitele J under case number A 180/2016 on 9 June 2016, on the basis that an irregularity had occurred in the said proceedings. The application is with the leave of this court.

### Background

[2] The first respondent (Mr Mofuka) launched an urgent application in the High Court. The application amongst other things, had the purpose of obtaining urgent interdictory relief to stop the sale in execution of immovable property scheduled by the applicant (Bank Windhoek Limited) for 12h00 on 9 June 2016. The application by the first respondent was served on the applicant's legal practitioner on the eve of 8 June 2016 and was set down for 09h00 on 9 June 2016. Due to the limited time afforded to the applicant between service and the set down of the urgent application, the applicant was unable to file an answering affidavit. Nevertheless, the applicant delivered a notice to oppose and appeared in court on 9 June 2016 at 09h00. Counsel appearing for the applicant, Ms C E Van der Westhuizen, indicated to the Presiding Judge that applicant was opposing the

relief sought and that she would argue the issue of urgency *ab initio* and thereafter, depending on the court's ruling, argue the merits of the interim relief sought based on the first respondent's papers.

[3] The presiding judge then proceeded to hear argument on the issue of urgency only and restricted the parties to that issue. The merits of the interdictory relief sought was not argued. After arguments were made, the court adjourned to consider the arguments. When the court resumed, the learned judge made the remarks and order *infra*:

'COURT: Yes, this is a matter over which I have pondered a lot and I am going to make a statement and the statement I am making is this. Law and equity are said to be two cousins but they appear not to be residing in the same room and the same house. I have read and I have listened to the arguments. Prima facie the law tells me something else, prima facie equity tells me something else. And as I have indicated at the beginning I would want to have this matter fully and properly ventilated before I pronounce myself and to that extent I have decided to make the following order.

#### ORDER

I will order a stay of execution, and order the 2<sup>nd</sup> Respondents they have an opportunity to file an answering Affidavit on or before the 29<sup>th</sup> of June 2016. The applicant if they want to respond they can respond on or before the 8<sup>th</sup> of July 2016. The matter is postponed for a case management conference to 20 July 2016 for purpose of setting a hearing date and I have provisionally the 2<sup>nd</sup> of August for hearing arguments.'

[4] Counsel for the applicant, on instruction, requested reasons for the above order and the court furnished the reasons for the order as follows:

'COURT: Yes, the reasons why I am staying execution, on the papers in this matter, summons were issued during September 2012. Default Judgment was granted in September 2012, the parties entered into settlement and the applicant has been paying the arrears and the debt to the respondents since 2012. The respondent has been accepting the payment for a period of four years from the applicant. I am of the view and that it is totally inequitable for the court when the applicant now comes to court and says, I am in the process, I accept, can I be granted an opportunity. And particularly now that the issue that has to be determined is the application of Rule 108 in circumstances of this matter, the court cannot turn its eye to it and allow execution to proceed. If I find that that Rule 108 is applicable to this matter, the applicants remedy would have been undone and it would serve an academic purpose to hear the matter. It is for that reason in equity that I say, I am not even going to grant the interim relief, I stay execution pending the hearing of arguments in the matter. Those are the reasons for making the orders that I have made.'

[5] The applicant's case in this court is summed up in para 3 of its heads of argument as follows:

'3. At the outset it is the applicant's submission that:

- 3.1 the order and the resultant relief granted has the effect of being so granted on an urgent basis while in the absence of a finding that the matter was indeed urgent and granting the requisite condonation for such urgent relief as is required by Rule 73(3) and (4) of the Rules of the High Court of Namibia (previously Rule 6(12));
- 3.2 the order amounts to a hearing of a matter and granting relief on an urgent basis without a finding that the matter was urgent;
- 3.3 amounts to finding on the merits while these were not addressed by the parties in argument as the parties were restricted by the Presiding Judge to arguing the issue of urgency only;

3.4 the order is contrary to the provisions of article 12 of the Constitution, in that Bank Whk was not aware that such an order would be considered, or would be determined, and while Bank Whk was not afforded any hearing at all on the merits;

3.5 the order was granted on a basis contrary to law, again in violation the provisions of article 12 of the Constitution.’

[6] Counsel further submitted that an irregularity in the proceedings occurred as envisaged in s 16 of the Act and that the applicant is prejudiced by an adverse judgment against it and an order in terms whereof all execution of a judgment in the applicant’s favour is stayed indefinitely based on relief granted, ostensibly on an urgent and equitable basis, in a matter for which no finding on urgency was made and that the order remains in operation indefinitely and the applicant is, given the nature of the order, unable to appeal the order without leave (if at all).

[7] The question which arises for determination is whether an irregularity occurred in the proceedings of 9 June 2016 in case number A180/2016 and whether the irregularity was proven.

[8] As recently as 15 November 2017, this court considered the same question(s) in Case No SCR 1/2017 in an unreported judgment delivered on 22 November 2017 by Shivute CJ, Mainga JA and Smuts JA concurring. <sup>1</sup>In that judgment, the learned Chief Justice illustrated, though briefly, the approach followed by this court to invoke its review jurisdiction in terms s 16 of the Act. I find it unnecessary to restate the same in this case. It suffices to say, an ‘irregularity in

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<sup>1</sup> *Cato Fishing Enterprises (Ltd) and another v Wista Construction and another* (SCR 1/2017 NASC 22 November 2017).

the proceedings' as a ground for review denotes the conduct of the proceedings and not the result thereof<sup>2</sup>.

The alleged irregularity

[9] The applicant's quarrel with the proceedings in the court a quo is that the learned judge drastically departed from the basic requirements of Rule 73(4) of the Rules of the High Court (previously Rule 6(12)) which provide that an applicant in urgent applications must set out explicitly, in the founding affidavit:

9.1 the circumstances which he or she avers renders the matter urgent;  
and

9.2 the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course.

[10] Counsel further made reference to *Mweb v Telecom* 2012 (1) NR 331 (HC) at 338D-339A<sup>3</sup> wherein the principle was reiterated and summed up the drastic departure by the learned judge from the principle in para 13 of the heads of argument as follows:

'13. In *casu* the, with respect, drastic departure from the rules involved, amongst others:

13.1 afterhours service and, quite impermissibly, not on the party to the proceedings, but on its legal practitioners;

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<sup>2</sup> *Ardea Investments (Proprietary) Limited v Namibia Ports Authority and others* (SCR 4/2013 2017 NASC (28 March 2017).

<sup>3</sup> 2012(1) NR 331 (HC) at 338D-339A.

- 13.2 less than 15 hours notice of the application;
- 13.3 hearing an application without affording an affected party, by any means, a reasonable and fair opportunity to deliver answering papers and to properly prepare for the anticipated application;
- 13.4 bypassing procedural rules and procedures relating to, inter alia, the time afforded to parties to deliver papers and heads of argument as well as case management and set down procedures;
- 13.5 skipping the case queue, so to speak, in setting down a matter on less than 15 hours notice.'

[11] This application is not opposed by the first respondent and/or the presiding judge in the court below, but having considered all the circumstances of the case, I hold the view that an irregularity was committed, as it was correctly argued, when the learned judge failed to exercise his discretion in favour of the condonation sought by the first respondent, but nevertheless proceeded to grant relief on an urgent basis.

[12] After the learned judge had given reasons for the order, the following exchange between the court and counsel for the applicant ensued:

MS VAN DER WESTHUIZEN: As the court pleases My Lord, may I just also ask, can I then accept implicit in Your Lordship's finding, is that Your Lordship's finding that it is indeed one of urgency? It is indeed an urgent matter?

COURT: What I have said, I have said it is on the grounds of equity that I have, I have not pronounce myself on the urgency or none urgency of the matter, I have not.



MS VAN DER WESTHUIZEN: My Lord (intervention)

COURT: All that I am saying is (intervention)

MS VAN DER WESTHUIZEN: Pardon my ignorance if I am ignorant but sir is Your Lordship not making a Ruling on urgency?

COURT: I have not made a Ruling, this is why I am saying I am making an Order staying the sale and grant the respondent an opportunity to file papers.

MS VAN DER WESTHUIZEN: I accept that My Lord.

COURT: Yes

MS VAN DER WESTHUIZEN: I am just trying to understand, so the parties argued urgency before Your Lordship, is Your Lordship not going to make a Ruling on that?

COURT: I am not making a Ruling on urgency but I am granting parties an opportunity to place matters properly before me for me to make an informed decision.

MS VAN DER WESTHUIZEN: As the court pleases.'

[13] Deciding the issue of urgency on equitable grounds against sound principles of law, the learned judge could not do. In *Kent v Transvaalsche Bank*,<sup>4</sup>Innes CJ had the following to say on the principle of equity:

'He also asked us to stay the proceedings on equitable grounds, urging that we had an equitable jurisdiction under the Insolvency Law. The Court has again and again had occasion to point out that it does not administer a system of equity, as distinct from a system of law. Using the word "equity" in its broad sense, we are always desirous to administer equity; but we can only do so in accordance with the

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<sup>4</sup> 1907 TS 765 at 774.

principles of the Roman-Dutch law. If we cannot do so in accordance with those principles, we cannot do so at all.’

[14] Kotze JA stated the principle of equity even more clearer in *Weinerlein v Goch Buildings Ltd* when he said:<sup>5</sup>

‘In *Saayman v Le Grange* (1879, Buch. 12) De Villiers, CJ, states that he has not met with the peculiar form of action to rectify an error in a title-deed in any Roman or Roman-Dutch authorities, which, he adds, is purely a matter of equity; and that in his opinion the court should, in a case of this nature, be guided by the decisions of the Courts of Equity in England. The court accordingly in *Saayman’s* case held that the error in the transfer deed must be rectified. In the earlier case of *Mills and Sons v Benjamin Bros* (1876, Buch at 121) the same learned judge observed: “Now it is quite true that this court is a Court of Equity only so far as it is consistent with the principles of the Roman-Dutch Law.” This qualification is of importance, for equity can not and does not override a clear provision of our law. Our common law, based to a great extent on the civil law, contains many an equitable principle; but equity, as distinct from and opposed to the law, does not prevail with us. Equitable principles are only of force in so far as they have become authoritatively incorporated and recognised as rules of positive law. It is true that the Roman jurist lays down *in omnibus sed valde maxime in jure aequitas spectanda sit* (Dig. 50.117.90); but, as Bronckhorst and other civilians, who have written special commentaries on this particular title, point out, where the law in a particular instance is clear it must be observed, although it may seem to be contrary to considerations of equity. Hence it is a maxim with the commentators that *non omne quod licitum honestum est*.’

[15] It follows necessarily that when the learned judge departed from the basic principle of Rule 73(4) of the Rules of the High Court and pronounced himself on an issue that was not before him, committed an irregularity and the proceedings are reviewable and stands to be set aside. With all due respect to the learned

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<sup>5</sup> 1925 AD 282 at 295.

judge, he should have followed what the law told him, namely to decide whether a case had been made for the matter to be dealt with on an urgent basis. If it was he could condone the first respondent's application for jumping the queue and if not, the first respondent should have waited at the end of the queue to be heard.

[16] The application for review as already stated is unopposed and there should be no order as to costs.

#### Order

[17] I make the following order:

1. The order of the High Court in Case No A180/2016 dated 9 June 2016, is reviewed and set aside.
2. The matter is remitted to the High Court to be placed under judicial case management, if the first respondent is so inclined to determine its further conduct.

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**MAINGA JA**

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HOFF JA

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FRANK AJA

APPEARANCES:

Appellant:

C E Van der Westhuizen

Instructed by Dr Weder, Kauta &

Hoveka Inc., Windhoek.