



NOT REPORTABLE

CASE NO: SA 15/2005

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

HEWAT BEUKES

Appellant

and

JOHN BENADE

First Respondent

**THE MUNICIPAL COUNCIL FOR THE
MUNICIPALITY OF WINDHOEK**

Second Respondent

Coram: SHIVUTE CJ, MARITZ JA and CHOMBA AJA

Heard: 9 November 2009 and 9 April 2010

Delivered: 13 April 2018

Summary: The appellant brought an urgent application in the High Court seeking, amongst others, the reconnection of water supply to an immovable property

belonging to the first respondent which the appellant and his family continued to occupy despite the fact that it had been sold to the first respondent. This relief was directed at the second respondent as the responsible service provider of water supply in the city. The court heard and dismissed the application on the basis of an earlier order made by the court barring the appellant's spouse, to whom the appellant is married to in community of property, from bringing any further legal proceedings against the second respondent pending the discharge of a costs order granted against her. In dismissing the application, the High Court held that the earlier order remained in force and as the appellant had not complied with it, the urgent application could not be heard.

On appeal, the parties were in agreement that the order appealed against was interlocutory in nature and that in terms of section 18(3) of the High Court Act 16 of 1990, the appellant required leave from the court *a quo* to appeal the order and if leave was refused by that court, this court should have been approached by way of a petition for leave to appeal. There was a further concession on the part of the appellant that the satisfaction of the costs order granted against his wife would have been borne out of the joint estate, and that an appeal against such a costs order would require leave in terms of s 18(3) of the High Court Act. The court on appeal endorsed the concessions made by the appellant.

The appellant's second part of the appeal is a purported 'review', imploring the Supreme Court to exercise its review jurisdiction in terms of s 16 of the Supreme Court Act 15 of 1990. The appellant alleges that the court *a quo* committed an irregularity in dismissing his application without affording him an opportunity to ventilate his case. The appellant further alleges that the decision of the court *a quo* constituted an irregularity in the proceedings in that it merely extended the operation of the order granted against his wife to him in the absence of an enquiry to determine whether the costs were paid or not.

On appeal *held* that interlocutory orders and orders as to costs are not appealable as of right and that leave to appeal against such orders must first be obtained from the court *a quo* and if that court refuses to grant leave, then leave should be obtained from this court. As no leave had been obtained, the appeal stands to be struck from the roll.

Held, further that it is settled that the review jurisdiction of this court would be invoked *mero motu* if it comes to the court's attention that an irregularity had occurred in the proceedings of the court *a quo*. *Held*, that on the facts of the case, the appeal court was not persuaded that the High Court committed an irregularity and thus the request for the appeal court to invoke its review powers was declined.

Appeal accordingly struck from the roll.

APPEAL JUDGMENT

SHIVUTE CJ (CHOMBA AJA concurring):

[1] This appeal was heard on 9 November 2009 and 9 April 2010 by me, Maritz JA (who has since retired) and Chomba AJA. The responsibility of preparing the court's judgment was assigned to Maritz JA. Regrettably, he has not presented a draft judgment for consideration. 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 assumed the responsibility of writing 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 outcome¹. Provided that Chomba AJA and I agree on the judgment in this matter, the appeal may validly be finalised. I now proceed to consider and decide the appeal.

[2] The appeal is against the order of the High Court dismissing an urgent application because of an earlier order made by a different judge barring the appellant's spouse, whom the appellant is married to in community of property, from instituting further legal proceedings against the second respondent until she had paid the second respondent's legal costs in an unrelated matter. It is not in dispute that the order granted against the appellant's spouse has not been discharged nor has it been appealed against.

Context

[3] The appellant is married in community of property to Mrs Erica Beukes (Mrs Beukes) and together they owned an immovable property situated in the Khomasdal suburb of the City of Windhoek (the property). It was alleged that the appellant and his wife failed to pay the monthly instalments on the bond registered over the property. Consequently, the first respondent purchased the property at a public sale in execution pursuant to a default judgment. The property was registered on 30 June 2005 in the names of the first respondent and his wife who held title to it until it was 'given back to the bank'.

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

[4] As of 30 June 2005, the appellant and his family were still in occupation of the property and refused to vacate the premises. For the purposes of obtaining transfer, the first respondent had to clear the outstanding municipal account with the second respondent in respect of rates and taxes, water and electricity. The court record reveals that the first respondent effected payment of all arrear rates and taxes on the property amounting to N\$20 000, leaving the municipal account with a credit of approximately N\$1600. The first respondent thereafter applied to the second respondent to disconnect the water supply to the property.

[5] The first respondent on 4 August 2005 sought an order of eviction against the appellant and all persons occupying the premises. It is this notice that triggered an urgent application that the appellant brought in the High Court on 8 August 2005. In the application, the appellant sought an order interdicting the first respondent from coming within 100 metres of the property. The appellant also sought an order directing the second respondent to reconnect water supply to the premises. The founding affidavit filed in support of the application was deposed to by Mrs Beukes, despite the fact that she was not cited as a party to the proceedings. The ground advanced in the urgent application was that the lack of clean running water had caused a health hazard to the persons living on the premises who included children and a person with special needs.

[6] The appeal papers further reveal that Mrs Beukes was the patron for an entity called Tokyo Housing Cooperative (also known as the Housing Committee for the

Homeless) which allegedly had an arrangement with the government to build 43 houses with a loan from the Built-Together Programme in the Otjomuise area of Windhoek. The loan was allegedly advanced to the patron by the then building society known as SWABOU. The second respondent was said to have been the administrator of the housing loan. At a later stage, the second respondent laid a charge of theft of N\$1.1 million of the housing loan against the patron.

[7] Aggrieved by the charge of theft, Mrs Beukes brought an urgent application in the court *a quo* seeking an order that an apology be extended to her and that certain retractions be published for what she felt were defamatory statements made about her. The allegation of theft was considered to have been nothing but 'a calculated scam to humiliate the patron and to stop the housing project'. It is this urgent application that was dismissed by the High Court on 9 October 2002, resulting in the order directing Mrs Beukes to pay the legal costs of the second respondent before she could institute any further legal proceedings 'of whatsoever nature' against the second respondent. By the date of the hearing of the appeal, the costs in excess of N\$60 000, had not been paid.

[8] It was the second respondent's case in the High Court that although the order of 9 October 2002 was given in a different matter which only involved Mrs Beukes, the costs were to be borne by the joint estate by virtue of the couple's marriage in community of property. The second respondent further contended that there were various proceedings instituted by the appellant and his wife against the second

respondent despite the existence of the order of 9 October 2002 and that the second respondent was mulcted in costs in those proceedings. It was further argued that it would be fair that the costs be settled first before the court could entertain any further proceedings between the parties. The second respondent also contended that it was a deliberate act on the part of the appellant for not citing his wife in light of the order of 9 October 2002. As regards the merits, the second respondent submitted that the appellant was not the legal owner of the property in question and that in the absence of an authorisation by the lawful owner to reconnect the water, no such service could be extended to the appellant or any other person occupying the premises.

[9] Without going into the merits of the matter, the High Court dismissed the urgent application on the basis that an earlier order granted against the appellant's wife had not been discharged. The court reasoned that it was bound by the earlier order because that order had not been discharged or appealed against. The dismissal of the appellant's application culminated in the present matter.

The purported appeal

[10] Mr Maasdorp argued the appeal on behalf of the appellant on the instructions of the Director of Legal Aid. The second respondent was represented by Mr Narib. The first respondent withdrew his notice of opposition during the hearing of the appeal and so did not take further part in the proceedings.

[11] The appellant on 8 August 2005 filed a notice of appeal challenging the High Court's refusal to decide his urgent application on the merits. The notice of appeal sets out some 15 grounds on which the court *a quo* allegedly erred in law and/or in fact. It is not necessary to recite the grounds of appeal, except to say that they were rightly criticised by counsel for the second respondent as raising argumentative matters not dealt with by the High Court.

[12] Three days before the hearing of the appeal, counsel for the appellant requested in his heads of argument, that this court should exercise its review jurisdiction in terms s 16 of the Supreme Court Act 15 of 1990. Counsel cited certain instances of alleged irregularities in the proceedings of the High Court to motivate the request. It is worth noting that the hearing of the appeal was postponed several times principally due to the lack of legal representation on the part of the appellant and the first respondent. As mentioned above, the matter was eventually heard 9 November 2009 and again on 9 April 2010 after the first respondent requested an unexpected postponement.

Issues for determination

Preliminary points

[13] The second respondent raised several preliminary points in addition to the contention that the appeal is not properly before this court. It was argued on behalf of the second respondent that the notice of appeal was defective in various respects: firstly, the notice of appeal was said to contain a wrong reference to the 'Appeal Laws

Amendment Act 10 of 2001' instead of the Supreme Court Act 15 of 1990 which deals with the jurisdiction of the Supreme Court. Secondly, the notice indicated that the appeal was against a judgment of the court *a quo* when that court only made an order and that the 'judgment' mentioned was not identified in the notice of appeal. Furthermore, as noted above the second respondent contended that the grounds of appeal raised issues not decided by the High Court.

[14] The appellant conceded the preliminary points raised by the second respondent but argued that the notice and the grounds of appeal were drafted by the appellant in person without legal assistance and therefore he could not be expected to display the same level of proficiency in drafting and precision of language normally expected from a legal practitioner. Counsel for the appellant submitted that as the defects in the notice and the grounds of appeal did not cause prejudice to the second respondent, it was not necessary for the second respondent to have persisted with those points.

[15] I note that counsel for the appellant was instructed to argue the appeal at a late stage and played no part in the drafting of the appeal papers in this matter. It is in this context that I associate myself with the views expressed in *Schroeder & another v Solomon & 48 others* 2009 (1) NR 1 (SC) para 3 that lay litigants could not be expected to display the same ability of draftsman and precision of language expected of a legally trained and experienced pleader. Moreover, as no prejudice has been suffered by the second respondent, I am persuaded that on the facts of this case the

defects in the notice and grounds of appeal should be condoned. I therefore turn to consider and decide the remaining substantive legal points raised by counsel for the parties.

[16] The remaining two questions that call for determination by this court are:

- (a) Whether the appellant was entitled to appeal without the leave of the court *a quo*, or in the event leave being refused by that court, without special leave from the Chief Justice; and
- (b) Whether this court should exercise its jurisdiction in terms of s 16 of the Supreme Court Act, 1990 and review the proceedings of the High Court.

[17] The first issue on appeal is resolved by the ultimate concession made by counsel for the appellant that the order of the court *a quo* is not appealable as of right as it is interlocutory in nature. Accordingly, leave to appeal was required in terms of s 18(3) of the High Court Act 16 1990 which provides that interlocutory orders or an order as to costs are not appealable as of right. Counsel for the appellant was correct in his concession that the interlocutory matter of whether the order of costs made by another judge of the High Court in relation to the appellant's spouse should be extended to the appellant could not have been regarded as having been finally dealt with by the High Court. Furthermore, it is trite that the order of costs made against the appellant in the proceedings being appealed against is not appealable without leave. I

therefore agree with counsel that the appellant required leave to appeal from the court *a quo* and if leave was refused by that court, the appellant should have approached this court by way of a petition for leave to appeal.

Should this court review the proceedings of the High Court?

[18] Counsel for the appellant submitted that although the appeal is not properly before this court, the court should nonetheless review the proceedings of the High Court as that court committed an irregularity when it allegedly deprived the appellant of an opportunity to address it on the case against the first respondent. Counsel for the appellant contended that the extension of the order of costs granted against the appellant's spouse to the appellant constitutes an irregularity in the proceedings as the order only pertained to the appellant's wife. The court merely extended the costs order to the appellant without affording him the opportunity to canvass the scope of the order granted on 9 October 2002. The appellant contended that the court *a quo* violated his right to lead evidence as that court failed to enquire into the question whether or not the costs granted against his wife were demanded or whether the proceedings before it covered the same or substantially the same grounds as those in the proceedings that culminating in the making of a costs order against the appellant's wife.

[19] Counsel further argued that the court *a quo* ought to have inquired whether permission for the institution of proceedings by the appellant was granted by the spouse in light of s 9(1)(c) of the Married Persons Equality Act 1 of 1996 which allows spouses married in community of property to institute legal proceedings relating to their business or trade without the consent of the other spouse.

[20] Counsel for the second respondent, on the other hand, submitted that the Supreme Court exercises its review jurisdiction *mero motu* and not upon application. Counsel argued that assuming that there was an irregularity in the proceedings of the High Court, this court should not invoke its review jurisdiction unless the issues affected a large number of persons or society at large and not just the appellant. Counsel argued that given that the appellant is married to Mrs Beukes in community of property and granted further that the founding affidavit filed in support of the urgent application was deposed to by the appellant's wife - the person against whom the order of costs had been granted - the appellant was precluded from bringing any legal proceedings of any nature, including a review application. Counsel, therefore, argued that as the appellant's wife is the deponent to the founding affidavit, she is in fact the person who lodged the application. The appellant did not make any statement under oath in relation to the application, meaning that his name was simply used as front by his wife to avoid the effect of the costs order.

[21] Counsel for the second respondent conceded that the appellant's spouse was entitled to independently institute legal proceedings relating to her profession, trade,

occupation or business as provided for by s 9(1)(c) of the Married Persons Equality Act. He, however, argued that the stratagem of citing the appellant as party to the application while not deposing to any affidavit technically makes the appellant's spouse the litigant before this court and by virtue of his marriage in community to her, the appellant is precluded from instituting proceedings against the second respondent.

The statutory framework

[22] Section 16 reads:

'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 tribunal or authority established or instituted by or 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.'

[23] The ambit and scope of s 16 were comprehensively dealt with by this court in the *Schroeder* case and in *Christian v Metropolitan Life Namibia Retirement Annuity Fund & others* 2008 (2) NR 753 (SC). It is, therefore, not necessary to rehash them

here. Suffices it to mention that in the *Christian* matter, at 758G the court pointed out that an applicant could not as of right seek of this court to review the High Court's proceedings as a court of first instance. In *Schroeder* para 9, the court pointed out that although s 16 indicates that the Supreme Court has jurisdiction to review the proceedings of all other courts, administrative tribunals and authorities, it may, of its own accord, exercise this review jurisdiction whenever an irregularity in those proceedings comes to its notice or to the notice of one of its judges irrespective of whether the proceedings in question were subject to appeal or were otherwise before the court.

[24] However, it is trite that s 16 does not give any person the right to institute review proceedings in the Supreme Court as a court of first instance. This is so because, as was held in *Schroeder*, if every litigant dissatisfied with the fairness or reasonableness of judicial or other judgment or decision were to be allowed to institute review proceedings in this court, it would place an unbearable burden on the limited resources of the court and severely compromise its ability to dispense justice.

[25] The court further pointed out that a procedural irregularity contemplated by s 16 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.

Analysis

[26] It is apparent from the authorities stated under para [23] above, that the appellant does not have the right to bring a review application in terms of s 16. To apply the approach adopted by this court in the *Schroeder* matter, the effect would be that irrespective of the form in which an application purporting to be for review under s 16 was couched, it would not be considered as such unless and until this court has made a decision to invoke its jurisdiction to review the impugned proceedings.

[27] A further ground on which this court should not exercise its review jurisdiction is that the alleged irregularities are not founded. The appellant alleges that he was denied the opportunity to address the court *a quo* on whether the costs order barring his wife from approaching a court should be extended to him. Counsel for the appellant argued that public interests dictate that such a matter be fully argued and a definitive judgment on the issue be granted before an order may be made and that the court *a quo* should have made further enquiries apart from merely considering whether the costs order was discharged or not.

[28] Counsel for the second respondent refuted the assertion that the appellant was not given an opportunity to address the court on the costs issue. Counsel submitted, correctly, that the appellant was in fact given an opportunity to advance arguments on why the costs order should not be extended to him. Accordingly, as the appellant was evidently aggrieved by the order, the correct procedure would have been to seek leave to appeal against the decision or to challenge the constitutionality of the order in the High Court.

[29] As to the request for review, I agree with the submissions made on behalf of the second respondent in this regard and I am of the view that this court should not assume its review jurisdiction in the circumstances where there were alternative procedural avenues open to the appellant to bring the alleged irregularities to the attention of the court as opposed to an attempt to, in effect, bring an application in the heads of argument. As the appeal is not properly before us and in light of the decision not to assume the review jurisdiction, the appeal ought to be struck from the roll.

Costs

[30] As the appellant is legally aided, no order as to costs will be made as provided for under s 18 of the Legal Aid Act 29 of 1990.

Order

[31] In the circumstances, the following order is made:

(a) The appeal is struck from the roll.

(b) No order as to costs is made.

SHIVUTE CJ

I agree

CHOMBA AJA

APPEARANCES:

APPELLANT

R L Maasdorp

Instructed by Directorate of Legal Aid,
Windhoek

SECOND RESPONDENT

G Narib

Instructed by Dr Weder, Kauta &
Hoveka Inc, Windhoek