REPORTABLE

CASE NO: SA 60/2018

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

OMUKWANIILWA TATE IMMANUEL KAULUMA ELIFAS	**First Appellant**
ERASTUS MVULA	**Second Appellant**
PAAVO AMWELE	**Third Appellant**
RAINHOLD NEPOLO	**Fourth Appellant**
NAEMAN FILLEMON KAMBALA	**Fifth Appellant**
NEPANDO AMUPANDA	**Sixth Appellant**
ONDONGA TRADITIONAL AUTHORITY (OTA)	**Seventh Appellant**

and

JOSEPH SIMANEKA ASINO	**First Respondent**
SHEETHENI VILHO ELIFAS KAMANJA	**Second Respondent**
PETER KAULUMA	**Third Respondent**
KASHONA MALULU	**Fourth Respondent**
FILLEMON AMUTENYA NAMBILI	**Fifth Respondent**
JOHN WALENGA	**Sixth Respondent**
MINISTRY OF URBAN AND RURAL DEVELOPMENT	**Seventh Respondent**

Coram: DAMASEB DCJ, HOFF JA and FRANK AJA

Heard: **7 October 2020**

Delivered: 29 October 2020

Summary: This appeal arises from a ruling of the court *a quo* in favour of the respondents, directing that the first appellant appear at court to give oral evidence on some disputed matters. Dissatisfied with the order, the appellants applied for and were granted leave to appeal against the ruling.

On appeal to the Supreme Court:
The question arises, regardless of leave being granted by the High Court, whether the order granted by the court *a quo* is appealable?

Held that the High Court's ruling was not an appealable judgment or order as contemplated in s 18(3) of the High Court Act 16 of 1990. It was therefore incompetent for the High Court to grant leave to appeal and the appeal is accordingly struck from the roll, with costs.

APPEAL JUDGMENT

DAMASEB DCJ (HOFF JA and FRANK AJA concurring):

Introduction

[1] The appellants come to this court with leave of the High Court (Northern Local Division) to appeal against a ruling of that court directing that, in terms of High Court rule 67(1)*(a),* a deponent to an affidavit in pending motion proceedings appear before it to give oral evidence on some disputed matters. Rule 67(1) states:

> 'Where an application cannot properly be decided on the affidavits the court may dismiss the application or make any order the court considers suitable or proper with

the view to ensuring a just and expeditious decision and in particular, but without affecting the generality of the foregoing, it may-

(a) direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or her or any person to be subpoenaed to appear and be examined and cross-examined as a witness…'

[2] The matter concerns a dispute within the Ondonga community under the leadership of the first appellant who has since passed away (the late King) and the respondents. The litigation is a sequel to a prolonged hostility brewing within the Ondonga Traditional Authority (OTA) ultimately resulting in the dismissal of the first to sixth respondents and replacing them with second to sixth appellants.

[3] In the wake of the above decision-making, the respondents approached the High Court seeking the following relief:

'1. Interdicting respondents pending the outcome of this application, from taking any further steps in pursuance of the suspension and dismissals of applicants and the appointments of second to sixth respondents as Secretary, Senior Traditional Councillors and Traditional Councillors of eighth respondent and in particular interdicting seventh respondent from Gazetting the said appointments in terms of section 10(5) of the Traditional Authorities Act 25 of 2000.

2. Reviewing and setting aside the decisions by first respondent to suspend first to sixth applicants and to conduct disciplinary hearings in respect of the first to sixth applicants in their absence.

3. Reviewing and setting aside the decisions by first respondent to dismiss the first to sixth applicants as Secretary, Senior Traditional Councillors and Traditional Councillors of the Ondonga Traditional Authority.

4. Reviewing and setting aside the decisions to appoint the second to eighth respondents as Ondonga Traditional Authority Secretary, Senior Traditional Councillors and Traditional councillors as replacements for the applicants.

5. Declaring that the first to sixth applicants are entitled to resume their positions as Secretary and Traditional Councillors, as the case may be, of the Ondonga Traditional Authority immediately.

6. Directing the first and eighth respondent, if they so elect to continue or restart disciplinary proceedings against the applicants after the original in absentia hearings and decisions to dismiss have been set aside, to:

    6.1. Afford the applicants so charged at least 7 business days to request further particulars to the charges against them;

    6.2. Afford the applicants so charged at least 7 business days' notice of hearing, calculated from the date on which the further particulars are supplied.

7. Further and/or alternative relief.

8. Costs of suit.'

[4] In essence, the respondents averred that the disciplinary hearings that led to their suspension and subsequent dismissal were conducted in their absence and that their replacement with the second to sixth appellants was unlawful. They alleged further that they had reason to believe that the late King did not personally take the decisions to suspend, investigate and dismiss them from their positions as he was afflicted by old

age and acted incoherently at the relevant time. According to the respondents, the late King's frailty made it unlikely that he fully appreciated the import and consequences of the official actions adverse to them and attributed to him.

[5] The respondents foreshadowed in their affidavits that they foresaw a dispute of fact on their allegations concerning the late King and that they would bring an application in terms of rule 67(1)*(a)* for the leading of oral evidence and require the late King to testify. The application was duly moved and was opposed by the appellants. After entertaining oral argument, the court *a quo* made an order in favour of the respondents in the following terms:

> '1. The application for first respondent to give oral evidence on the issue of his decisions regarding suspension, dismissal of applicants and their replacements as Traditional Authority Councillors of Ondonga Traditional Authority is granted;
>
> 2. This matter must be set down within 14 days of this order;
>
> 3. First to sixth respondents must pay costs of this application jointly and severally one paying the others to be absolved; and
>
> 4. The said costs should be for one instructing and one instructed counsel.'

[6] Dissatisfied with the High Court's judgment and order, the appellants noted an appeal to this court maintaining that it was incompetent for the High Court to order the late King to give oral evidence.

Points *in limine*

[7] The respondents raised several points *in limine* in the appeal, including that after the death of the late King the appeal became moot as the referral order can no longer be enforced. In the view that I take on the more important *in limine* objection, I do not find it necessary to repeat that and the rest of the *in limine* objections here or deal with them. The decisive one is that the ruling of the court under rule 67(1)*(a)* is not appealable.

Appellant's reply to the point *in limine*

[8] On appeal Mrs. Miller for the appellants, acting on the instructions of the Government Attorney, commenced her address by conceding that in the wake of the late King's death, the appeal had become moot as the ruling of referral can no longer be enforced. She submitted that notwithstanding, the appellants are pursuing the appeal against the order of costs since leave to appeal was granted against the whole of the judgment and order of the High Court. In her view, costs should not have been awarded and should rather have been in the course.

[9] Counsel submitted that the appellants do not concede that the ruling is not appealable. According to Mrs. Miller, the ruling is final in effect and therefore appealable because it had the effect of requiring the late King to prove the respondents' case. Counsel submitted that the manner in which the judge *a quo* approached the matter rode roughshod through the discipline of motion proceedings as the court improperly applied the test for referral.

[10] According to Mrs. Miller, the court could only refer the matter to oral evidence if there were genuine disputes of fact, which there were not. In so holding, counsel submitted, the court infringed the rights of the appellants. The appellants had the right for the matter to be determined according to the well-established test for resolution of disputes in motion proceedings and that for that reason the referral ruling was appealable.

[11] It is common cause that the High Court granted leave to appeal against its whole judgment and order, including costs. This court is however not bound by an order of the High Court granting leave. As O'Regan AJA recognised in *Shetu Trading CC v Chair, Tender Board of Namibia & others*,[1] where the High Court grants leave to appeal against a decision that did not constitute a 'judgment or order' within the meaning of s 18(1), the Supreme Court is not bound to decide the appeal, adding:

> 'The court must always first consider whether the decision is appealable. If the decision against which leave to appeal has been granted does not fall within the class of 'judgments or orders' contemplated by s 18(1), then it is not appealable at all.'

Is the order appealable?

[12] According to s 18(3) of the High Court Act 16 of 1990:

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

[1] 2012 (1) NR 162 (SC), para 38.

In *Di Savino v Nedbank Namibia Ltd* Shivute CJ held that:[2]

> 'It would appear to me therefore that the spirit of s 18(3) is that before a party can pursue an appeal against a judgment or order of the High Court, two requirements must be met. Firstly, the judgment or order must be appealable. Secondly, if the judgment or order is interlocutory, leave to appeal against such judgment or order must first be obtained even if the nature of the order or judgment satisfies the first requirement. The test whether a judgment or order satisfies the first requirement is as set out in many judgments of our courts as noted above and it is not necessary to repeat it here.'

[13] In *Knouwds NO (in his capacity as provisional liquidator of Avid Investment Corporation (Pty) Ltd) v Josea & another*[3] Strydom AJA set out the following attributes of an appealable order: (a) the decision must be final; (b) be definitive of the parties' rights; (c) and have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. These are the triad of factors articulated in *Zweni v Minister of Law and Order.*[4]

[14] The position was confirmed in *Shetu* at para 18. According to O'Regan AJA:

> 'This Court has considered the appealability of judgments or orders of the High Court on several occasions. In *Vaatz v Klotsch and Others* this Court referred with approval to the meaning of "judgment or order" in the equivalent provision in the South African High Court Rules given by Erasmus in Superior Court Practice. Relying on the jurisprudence of the South African Supreme Court of Appeal, Erasmus concluded that an appealable "judgment or order" has three attributes: it must be final in effect and not susceptible to alteration by the Court of first instance; it must be definitive of the rights

[2] 2017 (3) NR 880 (SC), at para 51.
[3] 2010 (2) NR 754 (SC), para 10.
[4] 1993 (1) SA 523 (A) at 536B.

> of the parties; and it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.' (Footnotes omitted).

[15] The approach is no different in South Africa with whom we have much in common. In *Wallach v Lew Geffen Estates CC,*[5] that country's Supreme Court of Appeal recognised that an order of referral to oral evidence was a matter of procedure and would not 'if decided in a particular way . . . be decisive of the case as a whole or of a substantial portion of the relief claimed.' The court observed:[6]

> 'The order given by Coetzee J did not decide the merits. It was merely a direction that further evidence be given before deciding on the merits. It was no more than a ruling. This is clear from a long line of cases decided in this Court and in the Provincial Divisions.'

[16] In *President of the Republic of South Africa and others v South African Rugby Football Union*[7] the South African Constitutional Court stated the following in relation to a ruling for referral to oral evidence:

> 'It is a well-established principle in our law that a referral to evidence constitutes a ruling, not an order, by a Judge. As such, it is open to the court to withdraw that ruling and order that it is unnecessary to hear the oral evidence. We have held that the referral to evidence was clearly wrong and constituted a misdirection by the Judge. The appellants were, therefore, entitled to make an interlocutory application to the Judge seeking a reconsideration of the referral to evidence. Moreover, they were entitled to seek the revocation of the order requiring the President to give evidence, particularly given the extraordinary and sensitive character of such an order. Such interlocutory applications, therefore, though unsuccessful in the court below should in fact have

[5] 1993 (3) SA 258 (A) at 262 J to 263G.
[6] P 263B.
[7] 2000 (1) SA 1 (CC) para 248.

> succeeded for the reasons we have given earlier in this judgment. In the circumstances, therefore, the applications were in fact successful and effective. They were properly launched and should have succeeded.'

[17] Strydom CJ in *Aussenkehr Farms (Pty) Ltd & another v Minister of Mines and Energy & another* quoted the following with approval:[8]

> 'In the case of *Lubambo v Presbyterian Church of Africa* 1994 (3) SA 241 (SE), Jansen J came to the conclusion that such a ruling or order is analogous to an order giving a direction in regard to evidence or referring a matter to trial, and was therefore not appealable, not even with leave (243A-B).'

The law to the facts

[18] The impugned ruling related to a matter of procedure. The merits would be decided only after the oral evidence was received. The ruling did not have the effect of disposing of a substantial issue between the parties and was therefore not appealable. The High Court was therefore not competent to grant leave to appeal. That order is for that reason of no force and effect.

[19] As I understood Mrs. Miller, even if we find that the ruling of referral is not appealable, the appellants still insist that no adverse costs order should have been made against them *a quo*.

[20] It seems to me to defeat the mischief against non-appealability to use the issue of costs to re-open the very issue that the legislature has made non-appealable. That is

[8] 2005 NR 21 (SC), p 29E.

so because to adjudicate the costs order, we have to necessarily go into and determine whether or not the learned judge erred in making the referral order.

[21] Besides, as was correctly recognised in *SARFU*, it was open to the appellants, either after the referral order was granted or at the stage where leave to appeal was being considered, to ask the judge a *quo* to revisit not only the referral ruling but also the costs order associated with the referral.

[22] Where the parties have argued the merits and not the costs associated with it, but the court in granting judgment also makes an order as to costs, the court remains competent to correct, alter or supplement its order on costs. The rational of the rule is that in such circumstances the court is presumed to make an order on costs with the implied understanding that it is open to an aggrieved party subsequently to be heard on the appropriate order.[9]

[23] It became apparent during oral argument on appeal that when the referral was argued, the judge a *quo* in all probability was not addressed on costs. It is therefore unsafe to suggest or to assume that when the High Court ordered costs associated with the referral, it exercised its discretion improperly or on wrong principle. The reality is that it was not specifically invited to exercise its discretion other than what would be the normal order in such circumstances – that costs follow the result. The High Court's order on costs as an adjunct to the referral, was inevitable because a successful party

[9] *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306H and see also *Estate Garlick v Commissioner for Inland Revenue* 1934 AD 499 at 503-505.

may only be denied costs if there are good grounds for doing so. Denial of costs to a successful party in the absence of special circumstances can be interfered with on appeal.[10]

[24] In that sense, the costs order was not final as to raise *res judicata* on the principle that once a court has duly pronounced a final judgement or order, it loses the competence to correct, alter or supplement it as it has become *functus officio*.[11]

[25] Since the High Court is not *functus officio*, it is open to the appellants to approach the High Court to have the order of costs revisited. It is only after the High Court has specifically dealt with the costs order with the benefit of the parties' submissions thereon, that an informed view can be taken that it exercised its discretion improperly or on wrong principle.

[26] In the result, the appeal is struck off the roll, with costs.

_____
DAMASEB DCJ

_____
HOFF JA

[10] Damaseb, PT. (2020) *Court-Managed Civil Procedure of the High Court of Namibia*. Juta: Cape Town at para 14-008 and the authorities cited at *fn* 10 and 11.
[11] *De Villiers & another NNO v BOE Bank Ltd* 2004 (3) SA 459 (SCA) at 462, para 7-8.

_____
FRANK AJA

APPEARANCES:

Appellants:	S Miller of Shikongo Law Chambers Windhoek
1st, 2nd, 4th, 5th & 6th Respondents:	E Angula of AngulaCo. Inc. Windhoek