

REPORTABLE

CASE NO: SCR 1/2021

IN THE SUPREME COURT OF NAMIBIA

***EX PARTE* THE JUDGE-PRESIDENT OF THE HIGH COURT**

ATTORNEY-GENERAL OF NAMIBIA INTERVENING

IN RE

In the matter between:

BEN WILLY KAZEKONDJO

First Plaintiff

ASHLEY VAN WYK

Second Plaintiff

DONOVAN VAN WYK

Third Plaintiff

and

MINISTER OF SAFETY AND SECURITY

First Defendant

COMMISSIONER GENERAL OF THE NAMIBIAN

CORRECTIONAL SERVICE

Second Defendant

THE OFFICER IN CHARGE OF THE WINDHOEK

CORRECTIONAL FACILITY

Third Defendant

Coram: SHIVUTE CJ, SMUTS JA and FRANK AJA

Heard: 15 October 2021

Delivered: 25 October 2021

Summary: The plaintiffs in this matter instituted an action against the defendants for damages for assaults perpetrated upon them by correctional officers. On the day the trial was set to begin, the parties informed the presiding judge that they had reached a settlement of the action and it was made an order of court. The parties requested the court to keep the terms of the settlement agreement confidential and *in camera* (ie paragraph 5 of the agreement). The court gave effect to this by placing the entire proceedings (the e-justice file) *in camera* which resulted in the entire proceedings being inaccessible to the public and the media. Upon enquiry by a journalist, the Judge-President of the High Court sought reasons for this state of affairs from the presiding judge who indicated that the parties had agreed that the settlement agreement would be confidential and not open to the public and that because the e-justice system did not have a mechanism to place only the order *in camera* – in order to give effect to the settlement not being accessible to the public, he directed that the entire proceedings be declared and designated *in camera*. Lastly, the presiding judge stated that the interest of the journalist to have access to the proceedings was ‘outweighed and overshadowed by the direct interest of the litigants to justice and confidentiality and in particular the interest of impecunious plaintiffs to obtain an effective pecuniary award’.

The Judge-President approached the Chief Justice for the latter to invoke the Supreme Court’s review jurisdiction in terms of s 16 of the Supreme Court Act 15 of 1990 (the Act) who posed the following questions to be addressed: whether the decision by the presiding judge to place the court file *in camera* amounted to an irregularity for the purpose of s 16 of the Act and, if so, whether this court should invoke its review jurisdiction under s 16?

Both counsel for the plaintiffs and the Attorney-General intervening argued that the decision by the court *a quo* to place the proceedings *in camera* was in conflict with both Art 12 of the Constitution and s 13 of the High Court Act 16 of 1990 and that it

constituted an irregularity which should be set aside by this court in terms of s 16 of the Act.

Held that, the practice of making agreements orders of the court when parties settle their litigation has a long and well established tradition in our courts and the common law.

Held that, a court should observe and meet the basic requirements when it considers a request to make a settlement agreement an order of court.

Held that, the open court principle has long been recognised as an integral component of the rule of law which is a foundational principle of our Constitution embodied in Art 1.

Held that, the open court principle is expressly protected in the right to a fair trial embodied in Art 12(1)(a) subject to the exceptions listed there.

Held that, public access to courts, guaranteed by the Constitution, is not only an essential component of the right to a fair trial but ensures that the public have access to court proceedings to ensure that justice is not only done but seen to be done.

Held that, the proceedings in the matter involved a damages claim against the Namibian Correctional Service which raised abuse of inmates in a correctional facility – this claim does not remotely relate to the exceptions listed in Art 12(1)(a).

Held that, the principle of accountability, which is also a foundational principle of the Constitution, emphatically precludes any basis for proceedings and court orders of this nature being made secret by a court at the request of the parties.

Held that, the sentiment expressed by the presiding judge that the interest in the proceedings by a journalist on behalf of the public is outweighed by the interest in the litigants seeking to conceal the outcome of proceedings is fundamentally in conflict with the foundational principles of our Constitution of accountability and Art

12 entrenching the rights to a free trial as well as freedom of the media and must be repudiated.

This is thus held that, the order of court that the settlement agreement in this matter is confidential and *in camera* is in direct conflict with the Constitution and s 13 of the High Court Act 16 of 1990 and amounts to an irregularity on the part of the presiding judge. It is in the public interest for this order to be reviewed and set aside.

This court invokes its review jurisdiction in order to set aside this irregularity. Section 16 review application succeeds and the term of the court order (paragraph 5) to the effect that the settlement agreement and the order itself is made *in camera* is set aside.

REVIEW JUDGMENT

SMUTS JA (SHIVUTE CJ and FRANK AJA concurring):

[1] This matter raises the fundamental principle of court proceedings being held in public and whether a court can give effect to a settlement agreement in which the parties seek to have the terms of that agreement being withheld from the public.

Litigation history

[2] This question arises in the following way. In an action instituted in the High Court in 2017, the plaintiffs, then inmates at the Windhoek Correctional Facility, claimed damages against the Minister responsible for the Namibian Correctional Service, its Commissioner and the officer-in-charge of that facility for assaults perpetrated upon them by correctional officers. The plaintiffs were unrepresented throughout those proceedings.

[3] The plaintiffs' action was docket allocated and was the subject of judicial case management in accordance with the rules of the High Court. The trial was set down for 23 April 2019. At the commencement of the trial, the parties informed the presiding judge that they had reached a settlement of the action, in terms of which the defendants agreed to pay each plaintiff N\$100 000. Their settlement agreement was made an order of court on 23 April 2019.

[4] As part of the settlement agreement, the parties requested the court to keep the terms of the settlement confidential and *in camera*. This was embodied in paragraph 5 of the order which stated:

'The parties have agreed that this court order was agreed upon subject to non-disclosure by any of the plaintiffs.'

The presiding judge gave effect to this term of the agreement by placing the entire proceedings (the e-justice file) *in camera*, resulting in the entire proceedings being inaccessible to the public and the media.

[5] Following an enquiry by a journalist on 2 February 2021 as to why the entire court file had been placed *in camera*, the matter came to the attention of the Judge-President of the High Court who in turn sought reasons from the presiding judge for this state of affairs. The presiding judge explained that the parties had agreed that their settlement would be confidential and requested that it not be open to the public. The presiding judge further explained that in order to give effect to his ruling that the settlement not be accessible to the public, he directed that the entire proceedings be declared and designated as *in camera* because the e-justice system did not have a

mechanism to place only the order *in camera*. The presiding judge further expressed the view that the interest of the journalist to have access to the proceedings in order to inform the public 'is definitely outweighed and overshadowed by the direct interest of the litigants to justice and confidentiality and in particular the interest of impecunious plaintiffs to obtain an effective pecuniary award'.

[6] The Judge-President thereafter approached the Chief Justice to invoke the review jurisdiction of this court under s 16 of the Supreme Court Act 15 of 1990 (the Act) in respect of this ruling.

[7] On 7 May 2021, the Chief Justice requested submissions from the parties on the following questions:

- '(a) Whether the placing of the case file "*in camera*" amounted to an irregularity as contemplated in s 16 of the Supreme Court Act?
- (b) Whether the placing of the case file "*in camera*" was in accordance with Article 12 of the Namibian Constitution?
- (c) Whether the placing of the case file "*in camera*" was in accordance with section 13 of the High Court Act?'

[8] The Chief Justice also invited the Attorney-General to intervene, if so minded, and requested the President of the Society of Advocates to appoint counsel as

amicus curiae to make representations on behalf of the plaintiffs and represent them in the proceedings.

[9] At the outset, we express our gratitude to both *amicus* counsel and counsel for the Attorney-General for their detailed research. Their participation has been of considerable assistance to this court.

Review jurisdiction of the court

[10] Section 16 of the Act confers upon the Supreme Court review jurisdiction over proceedings of the High Court or any lower court or any administrative tribunal or authority established under any law. This court may exercise this review jurisdiction on its own motion (*mero motu*) whenever it comes to the notice of this court that an irregularity has occurred in any proceedings. As has been stressed by this court¹, s 16 limits this court to invoke this jurisdiction to cases when it decides to do so of its accord and does not confer a right upon any person to institute review proceedings under s 16 in this court as a court of first instance.

[11] This court has stressed that this power is confined to irregularities in proceedings and not whether the High Court's decision is correct because the preferred means for correcting judicial error is by way of appeal.² What would constitute a reviewable irregularity would depend on the facts and circumstances of each case.

¹ *Christian v Metropolitan Life Namibia Retirement Annuity Fund & others* 2008 (2) 753 (SC) para 9 (*Christian*).

² *Schroeder & another v Solomon & 48 others* 2009 (1) NR 1 (SC); *Christian* para 10; *Knouws NO (in his capacity as Provisional Liquidator of Avid Investment Corporation (Pty) Ltd) v Josea & another* 2010 (2) NR 754 (SC). See generally the helpful discussion on s 16 in Petrus T. Damaseb *The Supreme Court of Namibia: Law, Procedure and Practice* (2021) p 35-36.

[12] In *Ardea Investments (Pty) Ltd v Namibia Ports Authority & others*,³ the Chief Justice set out factors this court may take into account in exercising its discretion to invoke its review jurisdiction under s 16:

‘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;
- (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.’

Whether the decision to place the case file *in camera* amounted to an irregularity?

[13] The questions for determination in these proceedings are accordingly whether the decision by the presiding judge to place the court file *in camera* amounted to an irregularity for the purpose of s 16 and, if so, whether this court should invoke its review jurisdiction under s 16.

[14] The defendants in the trial action have elected to abide the decision of this court on the questions posed by the Chief Justice.

³ [2017] NASC 9 (28 March 2017) para 13.

[15] Both *amicus* counsel and counsel for the Attorney-General filed comprehensive written submissions arguing that the decision to place the proceedings *in camera* was in conflict with both Art 12 of the Constitution and s 13 of the High Court Act and constituted an irregularity which should be set aside by this court under s 16. Counsel for the Attorney-General also contended that the decision to do so was in conflict with the duty of a judge in making a settlement agreement an order of court, given its conflict with Art 12 and s 13 of the High Court Act.

[16] The practice of making agreements orders of the court when parties settle their litigation has a long and well established tradition in our courts and common law.⁴ This practice was confirmed by the Appellate Division in South Africa in 1925, at a time when that court was the court of appeal in respect of Namibia, in *Schierhout v Minister of Justice*⁵:

‘ . . . if there exists no objection in the nature or terms of such compromise or other agreement between the parties, embodied in a consent paper, the practice of the Courts is to confirm it, and make the agreement arrived at a rule or order of Court’.⁶

[17] Following the introduction of judicial case management in the High Court, with its primary objectives including ensuring and promoting the speedy and economic disposal of actions and applications and the efficient use of judicial resources, this deeply rooted practice should enjoy even more frequent use and prominence. It should also arise at earlier stages of litigation, given the objective of identifying the issues in dispute at an early stage.

⁴ *PL v YL* 2013 (6) SA 28 (ECG) (Full Bench) para 17.

⁵ 1925 AD 417.

⁶ At p 423. See also *PL v YL* para 17.

[18] Despite the frequency of the occurrence of this practice, a court should however not be mechanical in its adoption of a settlement agreement.⁷

[19] It is accordingly apposite to reiterate the basic requirements which are to be met when a court considers a request to make a settlement agreement an order of court. It would in the first instance be incumbent upon the presiding judge to be satisfied that the terms 'relate directly or indirectly to an issue or *lis* between the parties'.⁸ Secondly, and as was stressed in *Schierhout*,⁹ the terms of an agreement must also not be against the law or public policy. As has been held by this court, public policy is now embedded in the values enshrined in the Constitution.¹⁰

[20] In the third instance, the agreement must 'hold some practical and legitimate advantage'.¹¹

[21] The second of these requirements is raised by this matter. Was the term seeking to make the agreement (and proceedings) *in camera* in conflict with the Constitution and the law?

[22] Article 12(1)(a) of the Constitution, enshrining the right to a fair trial, provides:

'In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any

⁷ *Eke v Parsons* 2016 (3) SA 37 (CC) para 25.

⁸ *Id* para 25.

⁹ *Id* para 26.

¹⁰ *Moolman & another v Jeandre Development CC* 2016 (2) NR 322 (SC) paras 63–64 following *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 28.

¹¹ *Eke* para 26.

part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.’

[23] The open court principle has long been recognised as an inherent component of the rule of law¹² which is a foundational principle of our Constitution embodied in Art 1. The open court principle is furthermore expressly protected in the right to a fair trial embodied in Art 12(1)(a) subject to the exceptions listed there. This principle is also deeply embedded in the common law.¹³

[24] Public access to courts, now guaranteed by the Constitution, is thus not only an essential component of the right to a fair trial but ensures that the public have access to court proceedings to ensure that justice is not only done but seen to be done. As was aptly stated by the Canadian Supreme Court in this context ‘an open court is more likely to be an independent court. Justice seen to be done is in that way more likely to be done’.¹⁴ The openness of the courts is central to their legitimacy and their independence and thus to the Constitution.¹⁵

[25] The exceptions to this fundamental principle set out in Art 12 are confined to reasons of morals, the public order, or national security as are necessary in a

¹² *Scott & another v Scott* [1913] AC 417 (HL).

¹³ *Ibid.*

¹⁴ *Named Person and Attorney General of Canada v The Vancouver Sun & others* [2007] 3 S.C.R. 253; 2007 SCC 43 para 31 (per Bastarache, J for the majority).

¹⁵ By virtue of Arts 1 and 78.

democratic society.¹⁶ The fundamental principle of open courts is given effect to in s 13 of the High Court Act which reads:

‘Save as is otherwise provided in Article 12(1)(a) and (b) of the Namibian Constitution, all proceedings in the High Court shall be carried on in open court.’

[26] The proceedings in this matter involved a damages claim as against the Correctional Service which raised abuse of inmates in a correctional facility. This claim does not remotely relate to the exceptions listed in Art 12(1)(a). Nor was there any suggestion on the part of presiding judge or the parties to that effect.

[27] On the contrary, the principle of accountability, which is also a foundational principle of the Constitution,¹⁷ would emphatically preclude any basis for proceedings and court orders of this nature being made secret by a court at the request of the parties. Part and parcel of the principle of open court proceedings entrenched in Art 12 is the right of the public to know and have access to court proceedings and the concomitant right of the media to have access to the information in question.

¹⁶ The right to a fair trial in Art 12 concerns the determination of the civil rights and obligations of persons. Those rights are not necessarily determined and Art 12 not necessarily engaged in a preliminary phase of proceedings held *ex parte* in exceptional circumstances as permitted by the common law such as in Anton Piller orders or as authorised by the court under s 98(2) of the Prevention of Organised Crime Act 29 of 2004 as the ensuing orders granted *ex parte* are by their very nature provisional, irrespective of the form they take, and subject to being set aside on the return date or on application by a person affected by it when the civil rights and obligations of a person affected by it are determined. *Prosecutor-General v Uuyuni* 2015 (3) NR 886 (SC) para 33 approving *Shalli v Attorney-General & another* 2013 (3) NR 613 (HC). On the return day of those preliminary *ex parte* proceedings (which may have been held *in camera* if, in the court’s discretion, there is a likelihood of harm ensuing if those preliminary proceedings are open to the public), the civil rights and obligations are thus determined, and Art 12 engaged and the proceedings are held in public - after service of the proceedings on the respondent because the harm apprehended at the preliminary hearing would no longer arise.

¹⁷ *Koujo v Minister of Mines and Energy* 2020 (3) NR 809 (SC) para 53; *President of the Republic of Namibia & others v Anhui Foreign Economic Construction Group Corporation Ltd & another* 2017 (2) NR 340 (SC) para 69; *Minister of Agriculture, Water and Forestry & others v Ngavetene & others* 2021 (1) NR 201 (SC) para 105.

[28] The sentiment to the contrary expressed by the presiding judge that the interest in the proceedings by a journalist on behalf of the public is outweighed by the interest in the litigants seeking to conceal the outcome of proceedings is thus fundamentally in conflict with the foundational principles of our Constitution of accountability and Art 12 entrenching the rights to a free trial as well as freedom of the media and also s 13 of the High Court and must be repudiated. Openness and accountability trenchantly dictate the contrary conclusion. These considerations are compounded by the fact that the indigent inmates, being vulnerable persons, were not legally represented in the proceedings. The Attorney-General furthermore rightly referred to the important role of the media in documenting human rights abuses so that remedial action can be taken in furtherance of accountability.

[29] By making an order of court that the settlement in this matter is confidential and *in camera* is thus in direct conflict with the Constitution and s 13 of the High Court Act and amounts to an irregularity on the part of the presiding judge. It is plainly in the public interest for this specific order to be reviewed and set aside.

[30] This court accordingly invokes its review jurisdiction in order to set aside this irregularity. The term of the court order (paragraph 5) to the effect that the settlement agreement and the order itself is made *in camera* is set aside.

[31] If parties desire to keep the contents of an order secret and confidential, they would not be able to enlist the authority of the court to do so in a court order. They may rather consider seeking to remove the matter from the roll and enter into a

confidential settlement agreement which would however lack the enforceability of a court order.

Costs

[32] Counsel for the Attorney-General requested that no order as to costs should be made. Counsel who have appeared for plaintiffs have not sought any cost order as they have acted *pro amico*. In the special circumstances of these proceedings, it would not be appropriate to make any cost order.

Order

[33] The following order is made:

- (a) Paragraph 5 of the order of the High Court is set aside as an irregularity under s 16 of the Supreme Court Act 15 of 1990.
- (b) Case no.: HC-MD-CIV-ACT-OTH-2017/02869 including the court order embodying the settlement agreement, is restored to the e-justice platform.
- (c) No order is made as to costs.

SMUTS JA

SHIVUTE CJ

FRANK AJA

APPEARANCES

PLAINTIFFS: N Bassingthwaighe (with her L
(*Amicus curiae*) Ambunda-Nashilundo)

ATTORNEY-GENERAL: J Ncube
(Intervening) Of Government Attorney