



NOT REPORTABLE

CASE NO: SA 36/2016

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

HENDRIK CHRISTIAN t/a HOPE FINANCIAL SERVICES

Applicant

and

**NAMIBIA FINANCIAL INSTITUTIONS SUPERVISORY
AUTHORITY**

Respondent

Coram: HOFF JA, MAKARAU AJA and PRINSLOO AJA

Heard: 11 November 2024

Delivered: 18 July 2025

Summary: This Court previously gave a costs order in favour of the applicant and limited such costs to disbursements as applicant then (as he is now) was unrepresented. The applicant instituted the present application purportedly in terms of rule 5 of the Rules of this Court, seeking an order declaring the costs order in the form of disbursements as wrong and inconsistent with the Namibian Constitution and declaring rule 125(12) of the Rules of the High Court unconstitutional and invalid. He

further sought an order interdicting the taxing master from applying rule 125(12) during taxation as well as an order correcting the costs order.

The applicant's heads of argument was filed late, for which he filed a condonation application.

Held that, since an interlocutory application is incidental to pending proceedings, it is impermissible to seek relief in an interlocutory application in the absence of pending proceedings or a pending appeal.

Held that, in terms of s 17(1) of the Supreme Court Act 15 of 1990, no appeal or review lies against any judgment or order made by the Supreme Court.

Held that, Art 81 of the Namibian Constitution provides *inter alia* that a decision of the Supreme Court is binding on all other courts and persons in Namibia unless it is reversed by the Supreme Court itself or is contradicted by an Act of Parliament lawfully enacted.

Held that, the Supreme Court, as apex court, must follow its own previous decisions and will not deviate from earlier decisions, unless the facts are distinguishable or the judgment is found to be demonstrably wrong.

Held that, it is only in exceptional circumstances that the Supreme Court would in terms of Art 81 of the Namibian Constitution not follow its previous judgment or order.

Held that, the Supreme Court will, as a general rule, not entertain any attempt, relying on Art 81, to re-open a case previously adjudicated upon and no litigant may as of right come to the Supreme Court to re-open its prior decision.

Held that, the applicant did not deal with the prospects of success in respect of the merits of the appeal, nor did he pray for the reinstatement of the application.

Accordingly, the application in terms of rule 5 of the Rules of the Supreme Court to reconsider a costs order given in a prior decision of the Supreme Court was refused and struck from the roll on the basis that: (a) there was no pending appeal and (b) there was a lack of exceptional circumstances which may prompt this Court to re-open its previous order in terms of Art 81 of the Namibian Constitution.

APPEAL JUDGMENT

HOFF JA (MAKARAU AJA and PRINSLOO AJA concurring):

[1] In an interlocutory application brought on notice of motion and in terms of rule 5(1)(b) of the Rules of this Court, the applicant sought the following declaratory relief, namely a court order:

- '1. Declaring that the costs order in the form of "disbursements" is wrong and inconsistent with the Namibian Constitution.
2. Declaring that rule 125(12) of the Rules of the High Court unconstitutional and invalid in terms of Art 10(1) and (2) of the Constitution as well as unjust and unfair.
3. Setting aside the rule and interdicting the taxing officers from applying rule 125(12) in taxation proceedings in relation to *pro se* litigants, or alternatively dealing with the rule in accordance with Art 25(1)(a) of the Constitution.
4. Declaring the costs order by the Supreme Court in SA 36/2016 on 7 October 2019 as consequently inconsistent with the Constitution and, therefore, stands to be corrected.
5. Correcting the costs order, *ex debito justitiae* in accordance with Art 81 of the Constitution and the law to be costs on a party-and-party basis.

6. Directing¹ the respondent and its legal representative from participating in any taxation proceedings pursuant to the SA 36/2016 judgment and cost order.
7. Granting a costs order on a party-and-party basis against the respondent for opposing this application, if opposed, and/or further punitive costs order for wilfully, knowingly and recklessly disregarding the court's judgments and orders relating to lack of authorisation and thereby committing grave contempt of court by participating in this proceeding.
8. Directing that the respondent and its legal representative for almost 13 years, acted unethically in connection to the circumstances that have led to the costs order, therefore, not legally entitled to any relief from this Honourable Court.
9. Granting further and/or alternative relief the court deems necessary or appropriate under the Constitution and in the circumstance and the matter before the court.'

[2] This application is opposed by the respondent.

[3] The applicant states in his founding affidavit that he was the appellant in SA 36/2016 in whose favour this Court granted judgment including a costs order on 7 October 2019.

[4] The applicant avers that the respondent has no right to oppose or to participate in this proceeding in the face of this Court's decision in para 48 of SA 36/2016 delivered on 7 October 2019 in which it was a respondent 'but without authorisation'.

[5] Rule 5(1) of the Rules of this Court provides that an interlocutory matter –

¹ The appellant did say 'directing', but it seems that he might have intended 'interdicting'.

- (a) may be brought before a single judge who may hear, decline to hear, or refer the matter to court;
- (b) must be brought by application on notice of motion to every other party and to the registrar.

[6] In his founding affidavit the applicant states that this application is pursuant to and relates to the costs order granted by this Court on 7 October 2019 at para 70(g) in which the respondent was ordered to pay the applicant's costs in the form of disbursements.

[7] The applicant explained that through taxation proceedings he has become aware of the 'unfairness of costs in the form of disbursements as interpreted and applied by taxing officers'. The applicant elaborated by stating that taxing officers relying on rule 125(12) of the Rules of the High Court, read with rule 28(c) of the Rules of this Court have severely limited applicant's costs.

[8] Rule 125(12) of the Rules of the High Court provides, in short, that where costs are awarded in favour of a litigant who represents himself or herself, such litigant's costs are limited to disbursements necessarily and reasonably incurred.

[9] The applicant argues that Art 25(1) of the Namibian Constitution prohibits Parliament or any subordinate legislative authority from making any law which

abolishes or abridges the fundamental rights conferred by Chapter 3 (of the Namibian Constitution) and provides that any law in contravention thereof is invalid. The Judge-President being subordinate legislative authority, so it was contended, by making rule 125(12) clearly abolishes or abridges the applicant's fundamental rights of equality before the law and freedom from discrimination in terms of Art 10 of the Namibian Constitution as to litigant costs.

[10] The applicant stated that Art 81 of the Namibian Constitution applies to this Court's costs order of 7 October 2019 which provides that this Court has the power to reverse its own decision – that the costs order in the form of disbursements has occasioned manifest injustice against the applicant.

Preliminary issues

[11] The applicant raised two preliminary issues. The first issue relates to the hearing of an application in terms of rule 5(1)(a) of the Rules of this Court which provides that a single judge may hear an interlocutory application. This, it was contended by the applicant, is inconsistent with Art 79(3) of the Namibian Constitution and s 13 of the Supreme Court Act 15 of 1990 which provides that any decision to hear or decline to hear an application must be made by this Court having the requisite quorum of three judges, through a public hearing in accordance with Art 12(1)(a) of the Namibian Constitution.

[12] The applicant states that rule 5(1)(a) is inherently unconstitutional and that no subordinate legislation can supercede the provisions of the Namibian Constitution or

statutory law, and that any judgment or order to the contrary would be null and void *ex tunc*.

[13] The second preliminary issue relates to the alleged lack of authority of the respondent. The applicant relies on the conclusion reached by this Court in its judgment of 7 October 2019 where it was held that ENSafrica | Namibia (incorporated as LorentzAngula Inc.) lacked the necessary authority to act on behalf of the respondent in applying for and obtaining a rescission of a court order (in the High Court), and that this lack of authority rendered the rescission judgment and all proceedings that followed the rescission judgment null and void *ex tunc*. The applicant contends that ENSafrica | Namibia did not have the authority to act on behalf of Namibia Financial Institutions Supervisory Authority (Namfisa) in the finalised matter.

[14] These two points *in limine* as correctly intimated by the applicant must be dealt with first and in accordance with the law.

The first point *in limine*

[15] The applicant's argument is that if this application is to be treated as interlocutory and in terms of rule 5(1)(a) to be heard before a single judge of the Supreme Court, then such a decision is inconsistent with Art 79(3) of the Namibian Constitution and s 13 of the Supreme Court Act, and is thus unlawful and unconstitutional.

[16] The applicant brought this interlocutory application pursuant to the costs order this Court granted on 7 October 2019 in terms of rule 5 of this Court. Rule 1 of this Court defines an interlocutory matter as 'any matter relevant to a pending appeal where the decision on it does not dispose of the appeal'. There is presently no pending appeal and there can be thus no application in terms of rule 5 as will be demonstrated hereinbelow.

[17] In any event this matter is being heard not by a single judge but by three judges of the Supreme Court as provided for by s 13(1) of the Supreme Court Act. Consequently the first point *in limine* raised has become superfluous and cannot be sustained.

The second preliminary point

[18] The applicant contends that the respondent is not entitled to oppose or participate in this application, but curiously the applicant cited and brought the respondent before this Court.

[19] Importantly, in my view, the applicant's basis for his proposition is based on an incorrect interpretation of this Court's judgment in SA 36/2016. Nowhere in that judgment did this Court bar the firm of legal representatives *ad infinitum* to appear on behalf of the respondent. On a proper reading of that judgment it is clear that this Court referred to the conduct by the respondent in previous matters and the court's order did not affect the respondent's right to oppose future litigation.

[20] In *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay & others*² the High Court³ dealing with joinder referred with approval to *Amalgamated Engineering Union v Minister of Labour*⁴ where the *ratio* was that a party with a legal interest in the subject matter of the litigation and whose rights might be prejudicially affected by the judgment of the court, has a direct interest in the matter and should be joined as a party.

[21] The costs order which constitutes the background of this application was made against the respondent and enforceable against the respondent, therefore it has a substantial interest in the matter. The second point *in limine* must therefore also fail.

Disbursements – Rule 125(12) of the High Court Rules

[22] The applicant contends that a costs order in the form of disbursements in terms of rule 125(12) of the Rules of the High Court is unconstitutional insofar as it provides for costs that are not only different from but also significantly less than costs that litigants represented by legal practitioners may recover when successful in litigation.

[23] It is contended by the applicant that since Art 10(1) of the Namibian Constitution guarantees all persons including litigants, equality before the law which includes equality in court proceedings and in judgments and orders of court, and Art 10(2) of the Namibian Constitution prohibits discrimination against litigants on the

² *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay & others* 2011 (2) NR 437 (HC) para 32.

³ Per Damaseb JP.

⁴ *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).

grounds of *inter alia* social or economic status, including the status of being represented or not by a legal practitioner, that rule 125(12) of the Rules of the High Court violates both Art 10(1) and 10(2) and is inconsistent with Art 12(1)(a) of the Namibian Constitution.

[24] It is further contended that the Namibian Constitution does not provide for a limitation of rights to the costs of a litigant not represented by a legal practitioner, therefore no law can provide for such a limitation, as rule 125(12) purports to do. Rule 125(12) is unconstitutional, so it is contended, insofar as the rule being delegated legislation fails to accord the applicant equality before the law and freedom from inherent discrimination.

[25] The applicant contended in this regard that s 39(a)(xvi) of the High Court Act 16 of 1990 empowers the Judge-President to make rules to *inter alia* determine and limit the fees legal practitioners may charge litigants. Similarly, s 37(1) of the Supreme Court Act empowers the Chief Justice to make rules prescribing certain fees as well as the taxation of costs. In both instances the rules do not include costs of *pro se* litigants. This according to the applicant is the 'genesis' of the unconstitutionality and consequent invalidity of rule 125(12) of the Rules of the High Court.

[26] The respondent submitted that given the jurisdictional powers of the High and Supreme Court embodied in Art 78(4) of the Namibian Constitution, this is not the appropriate forum to challenge the constitutionality of rule 125(12) of the High Court.

[27] The respondent submitted that rule 125(12) is not inconsistent with Chapter 3 of the Namibian Constitution since this rule ensures that where costs are awarded to *pro se* litigants those costs are limited to disbursements and that the applicant in pursuit of high costs disregards the purpose of an award of costs.

Discussion

[28] The authority to make rules of court given to the Chief Justice and to the Judge-President, is derived from the Namibian Constitution itself. Article 78(4) of the Namibian Constitution provides as follows:

‘(4) The Supreme Court and the High Court shall have the inherent jurisdiction which vested in the Supreme Court of South-West Africa immediately prior to the date of Independence, *including the power to regulate their own procedures and to make court rules for that purpose.*’ (Emphasis provided).

[29] The applicant elected in this application, in terms of rule 5 of the Rules of this Court, to challenge, and impermissibly so, an order made in a matter already concluded by this Court in *Christian t/a Hope Financial Services v Namibia Financial Institutions Supervisory Authority*.⁵

[30] It is impermissible to do so for the reasons set out hereunder.

[31] Section 17(1) of the Supreme Court Act 15 of 1990 provides as follows:

⁵ *Christian t/a Hope Financial Services v Namibia Financial Institutions Supervisory Authority* 2019 (4) NR 1109 (SC).

‘(1) There shall be no appeal from, or review of, any judgment or order made by the Supreme Court.’ This is self-explanatory.

[32] Article 81 of the Namibian Constitution (relied on by the applicant) provides for the binding nature of the decisions of the Supreme Court and provides unambiguously that:

‘A decision of the Supreme Court shall be binding on all other Courts of Namibia and all persons in Namibia unless it is reversed by the Supreme Court itself, or is contradicted by an Act of Parliament lawfully enacted.’

[33] The doctrine of precedence (*stare decisis*) requires that even the Supreme Court, as apex court, must follow its previous decisions, and will not deviate from those decisions unless the facts are distinguishable or the judgment is found to be demonstrably wrong.

[34] In *S v Likanyi*⁶ this Court *inter alia* discussed the circumstances under which this Court may deviate from a previous decision and expressed itself as follows in para 53 of that judgment:

‘[53] It must follow, therefore that, in an exceptional case, the Supreme Court has the competence under art 81 of the Constitution to correct an injustice caused to a party by its own decision. The exception will apply in matters involving the liberty of subjects, primarily in criminal matters, where this court is satisfied that its earlier decision was demonstrably a wrong application of the law to the facts which resulted in an indefensible and manifest injustice.’

[35] Importantly this Court in *Likanyi* (*supra*) also emphasised at para 58 that:

⁶ *S v Likanyi* 2017 (3) NR 771 (SC).

‘[58] . . . the Supreme Court will, as a general rule, not entertain any attempt (relying on art 81) to reopen a case previously adjudicated and determined just because subsequently we think it may have been wrongly decided. In addition, no litigant may as of right come to this court to reopen its prior decision in terms of art 81’

[36] In the matter of *Nationwide Detectives & Professional Practitioners CC v Standard Bank of Namibia Ltd*,⁷ a case where a party represented itself claiming fees and disbursements, the court held that a lay litigant (like the applicant in this matter) should not be allowed to make a ‘profit’ on disbursements; that the taxing officer should only allow the lay litigant to recoup his actual disbursements, reasonably incurred, and not to make a living, or profit, out of lay litigation.

[37] The applicant, in his founding affidavit, explained the reasons for only bringing this application at this stage. He stated that the applicant’s taxed costs prior to October 2022 seemed reasonable to the applicant –

‘However, the taxation decisions of October 2022 heightened the applicant’s perception of injustice wrought by the costs order. The last two taxations resulted in an *allocatur* of N\$378,93 of the N\$27 639,15 bill of costs for case A 34/2009 and N\$216 of the N\$15 558,20 bill of costs for case A 366/2009 . . . These *allocaturs* were made despite that costs orders of up to N\$20 000 may be granted in interlocutory proceedings. There is no doubt that the respondent upon success, would have been allowed much, much higher amounts than these.’

⁷ *Nationwide Detectives & Professional Practitioners CC v Standard Bank of Namibia Ltd* 2007 (2) NR 592 (HC).

[38] The applicant further averred that it was his 'decision to determine the fairness and lawfulness of the costs order and to raise it at this time'.

[39] This explanation does not amount to exceptional circumstances justifying the re-opening of a previous costs order of this Court. It is further not the applicant's case that the costs order was made *per incuriam*.

[40] This application in terms of rule 5 is inappropriate and ill-conceived. The applicant in essence, under the guise of an interlocutory application, attempts to appeal or review a previous costs order of this Court in terms of Art 81 of the Namibian Constitution without demonstrating an exceptional case or that the order of the finalised case was demonstrably wrong.

[41] Furthermore, as stated hereinbefore there is no pending appeal for applicant to have employed the procedure prescribed under rule 5 of the Rules of this Court which deals with interlocutory applications.

[42] For the sake of completeness I must mention that during the hearing of this application the applicant spent much time during oral argument to convince me as presiding judge to recuse myself.

[43] This was done in the absence of a substantive application for my recusal filed in terms of the Rules of this Court. On this topic I need to say no more other than to state that there was indeed no substantive recusal application before this Court.

Condonation application

[44] The applicant applied for an order condoning his non-compliance with rule 17(1) of the Rules of this Court by filing his heads of argument 14 days late. The applicant explained that his failure to file heads of argument timeously was not intended to disregard the Rules of this Court, but was due to circumstances beyond his control. He explained that due to his deteriorating health condition he was forced to be admitted to hospital for 'intensive treatments', and that the directives issued through the office of the Registrar were received by someone else (named by the applicant) who totally forgot to hand those directives to him. He further stated that there are 'extraordinary and exceptional circumstances' and it would be 'unjust to only pay "disbursements"'.

[45] The applicant stated that there is no prejudice to be suffered by the respondent.

[46] The applicant does not deal with the prospects of success in respect of the merits on appeal, as is required of him as an applicant, neither does he pray for the reinstatement of the application.

[47] It is trite that in considering an application for condonation a court must determine whether the reason for non-compliance with a rule of court is reasonable and acceptable and secondly whether or not there are in respect of the merits of the matter reasonable prospects of success on appeal. The court will also assess the *bona fides* of the application.

[48] It is further trite that there is an interplay between the reasons provided and the prospects of success. As such, good prospects of success compensate for a poor explanation and vice versa – a good and acceptable explanation will compensate for slim prospects of success on appeal. A court may, for example, refuse to condone non-compliance with a rule where in spite of a reasonable explanation, prospects of success in respect of the merits of the appeal are virtually non-existent.

[49] In the present matter even if this Court were to accept the applicant's explanation as reasonable in the circumstances, and as indicated in the judgment hereinbefore, the prospects of success in respect of the merits of the appeal, ie whether this Court should revisit its costs order of 2019, is non-existent. The applicant is faced with two insurmountable obstacles. Firstly, as mentioned (*supra*) no appeal is pending which is a bar for pursuing the present interlocutory application. Secondly, this Court may not sit as a Court of appeal or of review on a previous order given by this Court (which order is a final determination of the dispute between the parties) except in certain very rare and defined circumstances.

[50] In my view, the applicant has not made out a case for the prayers sought in para [1] of this judgment.

Costs

[51] The rule that costs should follow the event is applicable in the present application.

[52] In the result, the following orders are made:

- (a) The application for condonation is refused.
- (b) The application in terms of rule 5 of the Rules of this Court is struck from the roll.
- (c) The applicant is ordered to pay respondent's costs, such costs to include the costs of one instructing legal practitioner and one instructed legal practitioner.

HOFF JA

MAKARAU AJA

PRINSLOO AJA

APPEARANCES

APPLICANT:

H Christian

In Person

RESPONDENT:

L Ihalwa

Instructed by ENSafrica | Namibia

(Incorporated as LorentzAngula Inc.)