REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

HC-MD-CIV-MOT-GEN-2017/00148

In the matter between:

AUGUST MALETZKY	**1st APPLICANT**
HENDRIK CHRISTIAN	**2nd APPLICANT**
LUCIANA CHRISTIAN	**3rd APPLICANT**
WILMA HOABES	**4th APPLICANT**
DORKA VICTORINE SHIKONGO	**5th APPLICANT**
EDUARD PAUL XOAGUB	**6th APPLICANT**
FRANCIS EVELINE XOAGUS	**7th APPLICANT**
CHRISTOFFEL STEENKAMP	**8th APPLICANT**
KATRINA FRANCINA STEENKAMP	**9th APPLICANT**
VICKSON VATILIFA ARMSTRONG HANGULA	**10th APPLICANT**
RONALD MOSEMENTLA SOMAEB	**11th APPLICANT**
BEN RIKONDJA KARAMATA	**12th APPLICANT**
ANTON HERMANN	**13th APPLICANT**
FRANS GEORGE NAIBAB	**14th APPLICANT**

and

THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**1st RESPONDENT**
PRESIDENT OF THE REPUBLIC OF NAMIBIA	**2nd RESPONDENT**
OMBUDSMAN OF THE REPUBLIC OF NAMIBIA	**3rd RESPONDENT**

THE MINISTER OF JUSTICE **4th RESPONDENT**
THE PERMANENT SECRETARY OF JUDICIARY **5th RESPONDENT**
THE ATTORNEY-GENERAL **6th RESPONDENT**
THE JUDGE PRESIDENT OF THE HIGH COURT OF NAMIBIA **7th RESPONDENT**
THE REGISTRAR OF THE HIGH COURT **8th RESPONDENT**
CLERK OF THE MAGISTRATE'S COURT, WINDHOEK **9th RESPONDENT**
THE REGISTRAR OF DEEDS **10th RESPONDENT**
THE DEPUTY SHERIFF OF THE HIGH COURT **11th RESPONDENT**
MESSENGER OF THE COURT OKAHANDJA **12th RESPONDENT**
THE DEPUTY SHERIFF OKAHANDJA **13th RESPONDENT**
BANK WINDHOEK LTD **14th RESPONDENT**
TJAKAZENGA KAMUHANGA HOVEKA **15th RESPONDENT**
MOSES PEKAKARUA KAZONGANGA TJIKUZU **16th RESPONDENT**
HES SHIKONGO **17th RESPONDENT**
ABRAHAM GARISEB **18th RESPONDENT**
PETRUS VILJOEN **19th RESPONDENT**
DAWID JOHANNES WERNER **20th RESPONDENT**
FIRST NATIONAL BANK NAMIBIA LTD **21st RESPONDENT**
NEDBANK LTD **22nd RESPONDENT**
STANDARD BANK NAMIBIA LTD **23rd RESPONDENT**
SWABOU INVESTMENTS (PTY) LTD **24th RESPONDENT**
SOUTH WEST AFRICAN BUILDING SOCIETY **25th RESPONDENT**
MESSENGER OF THE MAGISTRATE COURT, WINDHOEK **26th RESPONDENT**
NATIONAL HOUSING ENTERPRISE **27th RESPONDENT**
BUILDERS WAREHOUSE **28th RESPONDENT**

Neutral Citation: *Maletzky v The Government of the Republic of Namibia (*HC-MD-CIV-MOT-GEN-2017/00148*)[2019] NAHCMD* 142 *(2 May 2019)*

Coram: **MASUKU J**

Heard on: 19 July 2018

Delivered on: 2 May 2019

Flynote: Interpretation of Statutes – Repealed Rules of the High Court - Retrospective application thereof – Court frowning upon retrospectivity - Retroactive application favoured – Intention of the law maker a prerequisite in determining whether or not a law should apply retrospectively or prospectively – Effect of retrospective application to be considered.

Article 25 (3) of the Constitution - There are proper procedures to be followed by litigants who claim that they have suffered damages, be they delictual or constitutional in nature. This forum is ill-equipped to deal with that category of claims.

Summary: This is an application by the applicants stemming from a host of default judgments that were granted against them between the period 2002 and 2010 by the Registrar of the High Court as well as the Clerk of the Magistrates' Court respectively, and, as a consequence of which, their immovable properties were sold in execution.

The applicants failed to defend the actions against them and now bring this application to have the judgments and executions declared null and void *ab initio* on the grounds that the Registrar of the High Court as well as the Clerk of the Civil Court in the Magistrates' Court performed judicial functions which functions are only vested in the courts and as a consequence, that the actions performed by the latter parties were unlawful and that they be declared unconstitutional.

The applicants also claimed compensation from the 1st, 2nd, 4th, 5th, 7th-9th, and 11th -13th respondents jointly and severally.

Held: That by the time this application was brought, the Rule purported to be unconstitutional, had already been repealed in that the granting of default judgments in the High Court has since 2014, been in the sole and exclusive discretion of the judges of the High Court.

Further held: That the rule authorising the clerk of the Magistrates' Court to issue default judgments was declared to be unconstitutional in the case of *Hiskia v The*

Body Corporate of Urban Space. Consequently, the relief sought by applicants in prayers 1, 2 and 3 of their Notice of Motion falls away.

Held: That what is left for determination by the court is the relief claimed under paragraph 4 of the Notice of Motion wherein the applicants pray for an order 'Declaring all procedures, steps and processes founded on the Default Judgments granted by the 8th and 9th Respondents a nullity in law'.

Further Held: That unless, the conduct of either the registrar or clerk in granting the default judgments complained of was questionable, their actions were valid and in keeping with the state of the law at the time. There is no doubt that there can only be prospective application, especially considering the effect that any retrospective application of the new enactments would have on innocent third parties, as well as taking into account the fact that there is no allegation nor evidence that the claims against the applicants were not legitimate claims nor that the default judgments were granted maliciously, *mala fides* or erroneously at the time.

Held: That one cannot even with the greatest benevolence, draw the slightest inference that there was any intention on the part of the rule-maker for any of the rules of the High Court to apply retrospectively.

Held: That this forum chosen by the applicants, being an application, is ill-equipped to deal with claims for compensation. Applicants' application dismissed with costs.

ORDER

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1. The application is dismissed with costs.
2. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction and background

[1] Before the court is an application wherein the applicants, who act in person, seek an order in the following terms:

‘1. Declaring the exercise of judicial acts by the 8th Respondent in/ by granting Default Judgments against the Applicants herein as indicated unconstitutional and a nullity in law;
2. Declaring the additional directives to the Default Judgments granted by the 8th Respondent, declaring the Applicant's immovable properties executable as unlawful, and in any event a nullity in law;
3. Declaring the exercise of judicial acts by the 9th Respondent, in/by granting Default Judgments against the Applicants herein indicated as unconstitutional, and a nullity in law;
4. Declaring all procedures, steps and processes founded on the Default Judgments granted by the 8th and 9th Respondents a nullity in law;
5. Ordering the 1st, 2nd, 4th, 5th, 7th, 8th, 9th, 11th, 12th, and 13th Respondents, jointly or severally to compensate the Applicants with the current market value of the immovable properties they lost as a result of the unconstitutional conduct complained of herein;
6. Directing that such Respondents electing to oppose the application pay the costs of this application; and
7. Granting the Applicants such other or alternative relief as the above Honourable Court may deem fit.’

[2] The application by the applicants stems from a host of default judgments that were granted against them between the period 2002 and 2010 by the Registrar of the High Court as well as the Clerk of the Magistrates’ Court respectively, and, as a consequence of which, their immovable properties were sold in execution.

[3] It is evident from the papers that the applicants failed to enter notices or appearances to defend the actions against them.

[4] It is important to note that the applications for default judgment were brought in terms of the erstwhile Rule 31 of the repealed High Court Rules of 1990, which at the time, authorised the Registrar to grant default judgments. The said rule provided the following:

'31 (5) (a) Wherever a defendant is in default of delivery of notice of intention to defend an action where each of the claims is for a debt or liquidated demand, the plaintiff, if he or she wishes to obtain judgment by default, may file with the registrar a written application for judgment against such defendant, instead of following the procedure prescribed by sub-rule (2), 31 (5) (b) The registrar may -
31 (5) (b) (i) grant judgment as requested; 31 (5) (b) (ii) grant judgment for part of the claim only or on amended terms; 31 (5) (b) (iii) refuse judgment wholly or in part; 31 (5) (b) (iv) postpone the application for judgment on such terms as he or she may consider just; 31 (5) (b) (v) request or receive oral or written submissions; 31 (5) (b) (vi) require that the matter be set down for hearing in open court. 31 (5) (c) The registrar shall record any judgment granted or direction given by him. 31 (5) (d) Any party dissatisfied with a judgment granted or direction given by the registrar may, within 20 days after he or she has acquired knowledge of such judgment or direction, set the matter down for reconsideration by the court. 31 (5) (e) The registrar shall - (i) if the value of the claim as stated in the summons, apart from any consent to jurisdiction, is within the jurisdiction of the magistrate's court, and unless the plaintiff claims costs on the counsel and client scale, other than by virtue of an undertaking by the defendant under a written agreement to pay costs on that scale, grant judgment for costs on the appropriate scale in undefended actions in the magistrate's court plus the deputy sheriff's fees, or, if he or she is satisfied that the defendant has so undertaken to pay costs on the counsel and client scale, grant judgment for costs on the scale, plus the deputy sheriff's fees; 31 (5) (e) (ii) in other cases, unless the application for default judgment requires costs to be taxed or the registrar requires a decision on costs from the court, grant judgment for costs in an amount of N$800.00 plus the deputy sheriff's fees. 31 (5) (f) Where, as contemplated in subparagraph (ii) of paragraph (e), the plaintiff claims costs on the counsel and client scale, other than by virtue of an undertaking by the defendant under a written agreement to pay costs on that scale, the registrar shall refer such claim to a judge for decision and enter the judgment for costs in accordance with that decision.'

[5] Similarly, rule 12 (1) (a) of the Magistrates' Court Rules, empowered the clerk of court to grant default judgment and provided as follows:

'…If a defendant has failed to enter appearance to defend within the time limited by the summons or before the lodgment of the request hereinafter mentioned [except as provided in the proviso to rule 13 (3)] and has not consented to judgment, the plaintiff may lodge with the clerk of the court a written request, in duplicate, for judgment against such defendant…'

[6] The applicants' application was enrolled on 5 May 2017 and on 19 July 2018, the matter was heard as an opposed motion before this court. It is worth noting that by the time this application was brought, the Rule alleged to be unconstitutional, had already been repealed in that the granting of default judgments in the High Court has since 2014, been in the sole and exclusive discretion of the judges of the High Court, the Registrar excluded completely.

[7] Similarly, the rule authorising the clerk of the Magistrates' Court to issue default judgment was also declared to be unconstitutional in the case of *Hiskia v The Body Corporate of Urban Space*[1]. Consequently, the relief sought in prayers 1, 2 and 3 above falls away.

[8] Of relevance and what is left for determination by this court is the relief claimed under paragraph 4 of the Notice of Motion wherein the applicants pray for an order 'Declaring all procedures, steps and processes founded on the Default Judgments granted by the 8th and 9th Respondents a nullity in law'. The finding by the court will then determine whether or not it will be necessary to deal with the rest of the relief mentioned immediately above.

[9] The effect of the relief claimed by the applicants in paragraph 4 above, if granted by the court, is one that presupposes retrospective application of the law. Whether or not, in the circumstances, the law can properly be applied retrospectively, will be dealt with below.

[1] (HC-MD-CIV-MOT-GEN 2017/00143) [2018] NAHCMD 279 (31 August 2018).

The applicable law

[10] Article 25 of the Constitution provides for the Enforcement of Fundamental Rights and Freedoms and provides the following:

'(1) Save in so far as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid: provided that:

(a) a competent Court, instead of declaring such law or action to be invalid, shall have the power and the discretion in an appropriate case to allow Parliament, any subordinate legislative authority, or the Executive and the agencies of Government, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it. In such event and until such correction, or until the expiry of the time limit set by the Court, whichever be the shorter, such impugned law or action shall be deemed to be valid;

(b) any law which was in force immediately before the date of Independence shall remain in force until amended, repealed or declared unconstitutional. If a competent Court is of the opinion that such law is unconstitutional, it may either set aside the law, or allow Parliament to correct any defect in such law, in which event the provisions of Sub-Article (a) hereof shall apply.

(2) Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.

(3) Subject to the provisions of this Constitution, the Court referred to in Sub Article (2) hereof shall have the power to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms conferred on them under the provisions of this Constitution, should the Court come to the conclusion that such rights or freedoms have been unlawfully denied or violated,

or that grounds exist for the protection of such rights or freedoms by interdict.

(4) The power of the Court shall include the power to award monetary compensation in respect of any damage suffered by the aggrieved persons in consequence of such unlawful denial or violation of their fundamental rights and freedoms, where it considers such an award to be appropriate in the circumstances of particular cases.'

[11] The rule that laws passed relate to the future and are not to be construed as applicable to the past dates back to about 440 AD.[2] Whether a statute is to be construed in a retrospective sense depends on the intention of the legislature as expressed in the wording of the statute.

[12] The Rule relating to the granting of default judgments in the High Court now reads as follows:

> '(1) If a defendant fails to deliver a notice of intention to defend as contemplated in rule 14, the registrar may not allocate the case to a managing judge and in that case this rule applies. (2) If a defendant fails to deliver a notice of intention to defend or a plea, the plaintiff may set the action down for a default judgment as provided for in subrule (4). (3) The court or managing judge may, where the claim is for a debt, liquidated demand or the foreclosure of a bond, without hearing evidence and in the case of any other claim after hearing or receiving evidence orally or on affidavit, grant judgment against the defendant or make such order as the court or managing judge considers appropriate. (4) The proceedings referred to in subrule (2) must be set down for hearing before 12h00 on the day but one before the day on which the matter is to be heard. (5) No notice of set down for default judgment referred to in subrule (2) need be given to a party that fails to deliver a notice of intention to defend, except that if a period of six months has lapsed 20 Government Gazette 17 January 2014 5392 after service of summons, no order may be made in terms of subrule (3), unless a notice of set down has been served on the defendant. (6) Service in terms of subrule (5) must be effected not less than 10 days before the date on which the action has been set down for default judgment.'

[2] EA. Kellaway Principles of Legal Interpretation: Statutes, Contracts & Wills (1995).

[13] In as far as the amendments in the Magistrates' Court are concerned, the rule and sections declared unconstitutional have at the date of the writing of this judgment, not yet been amended. It would thus be impossible at this stage to know the extent to which they have been amended and whether they will provide for retrospective or prospective application. In this regard, the jury is out and it would be engaging in dangerous divination escapades for this court to make any pronouncements thereon and second-guess Parliament in the process.

[14] In order to arrive at the real meaning of a statute, a court has to consider the following[3]:

1. What was the law before the measure was passed;
2. What was the mischief or defect for which the law had not provided;
3. What remedy the legislature had appointed; and
4. The reason for the remedy.

[15] A court must look at the general scope and purview of the statute, and at the remedy sought to be applied, and consider what state of the former law was, and what it was that the legislature had contemplated.[4]

[16] The rule of interpretation is that statutes are construed to operate prospectively unless the legislative intent that they be given retrospective or retroactive operation clearly appears from the express language of the statute, or from the clear purpose of the enactment or by necessary or unavoidable implication.[5] Where there is no clear indication, the law is held to apply only from the date on which it comes into effect.

[3] Haydon (1584) 2 Coke's reports 18 Part III 7 (b).
[4] Pardo v Bingham (1870) LR 4 CH 735 739-740.
[5] Adampol (Pty) Ltd v Administrator, Transvaal 1989 3 SA 800 (A) 805.

[17] In the case of *Shewan Tomes & Co Ltd v Commissioner of Customs and Excise*[6], it was stated that where there is real room for doubt, an interpretation producing the less harsh results should be favoured.

Application of the law

[18] As is evident from the provisions quoted above, the procedure then was that the Registrar of the High Court, as well as the Clerk of the Civil Court in the Magistrates' Court could issue default judgments where defendants had failed to enter notices or appearances to defend. The ultimate effect of the granting of default judgments was the selling in execution of immovable properties belonging to defendants and other persons who had defaulted in fulfilling their obligations in terms of the agreements entered into with the various plaintiffs.

[19] The aforementioned actions by the Registrar and the Clerk were held to be unconstitutional for the reasons that, the latter parties are not judicial officers and can therefore not exercise judicial functions, which functions should be the sole and exclusive preserve and only vested in the courts.

[20] Prior to the impugned Rules being declared unconstitutional and the repeal of rule 31 of the High Court rules, there was no judicial oversight and the granting of default judgments, where there was no notice to defend, was in the sole discretion of either the Registrar or the Clerk in the respective Magistrate courts. The amendments were thus introduced to bring the rules in compliance with the Constitution so that there would be judicial oversight, especially taking into consideration that the selling in execution of immovable properties is a serious act that has a debilitating effect on the status of a party and may render people whose property is sold in execution homeless and subject to the elements.

[6] 1955 4 SA 305 (A).

[21] For purposes of this judgment, it is not necessary to dwell on the unconstitutionality of the already repealed and amended provisions. What is clear is that the law-maker has already remedied the flaw that manifested itself in the absence of judicial oversight in the granting of default judgments in the High as well as in the Magistrates' Courts.

[22] When regard is had to the wording of the enactments alluded to in paragraph 12 above, it is safe to say that it in no way presupposes that it can apply retrospectively.

[23] The relief sought by the applicants is against default judgments granted against them but they have not provided any evidence to this court suggesting that the plaintiffs in those cases did not have any valid claims against them, especially considering that most, if not all of them, never defended the actions against them.

[24] It is noteworthy that, when these default judgments were granted by the offices of the registrar and clerk of court, respectively, the said offices were authorised to do by law at the time. Differently put, their actions were lawful at the time and this court is of the view that unless, the conduct of either the registrar or clerk in granting the default judgments complained of was questionable in the sense of being capricious, *mala fide* or malicious, their actions were valid and in keeping with the state of the law at the time.

[25] Courts will generally frown upon the retrospective application of any statute and this court is not an exception. In *casu*, there is no doubt that there can only be prospective application of the law, especially considering the effect that any retrospective application of the new enactments would have on innocent third parties, as well as taking into account the fact that there is no allegation nor evidence that the claims against the applicants were not legitimate claims nor that the default judgments were granted maliciously, *mala fides* or erroneously at the time.

[26] The 2014 Rules of High Court repealed the 1990 Rules and had it been the intention of the legislature that they apply retrospectively, it would have

been clear from the wording of the relevant Gazette. It is in this regard imperative to quote the provisions of Rule 3 (6) of the 2014 Rules. It provides as follows:

'Proceedings instituted under the previous rules or practice directions are, from the date of coming into operation of these rules, governed by these rules and the practice directions made under these rules unless otherwise directed by the court, a judge or the managing judge.'

[27] From a reading of the rule immediately above, one cannot even with the greatest benevolence, draw the slightest inference that there was any intention on the part of the rule-maker for any of the rules of the high court to apply retrospectively.

[28] My Brother, Ueitele J, in the *Hiskia*[7] case made the following order: 'Rule 12(1)(a) of the Magistrates' Court Rules, is declared unconstitutional. Section 66(1)(a) of the Magistrates' Court Act, 1944, Rules 36 and 43 of the Magistrates' Court Rules are declared unconstitutional. These provisions will however remain in force until 31 August 2019, on condition that legislation correcting the defects (identified in this judgment) is properly passed and gazetted on or before 31 August 2019.'

[29] Ueitele J goes on to further state that 'The real problem in this case is to devise an order that is just and equitable in all the circumstances. To keep a manifestly discriminatory law on the statute books is to maintain discrimination. On the other hand, to abolish it with immediate effect without making practical alternative arrangements is to provoke confusion and risk injustice. It is common cause that transactions already completed under rule 12(1)(*a*) of the Magistrates' Court Rules, 66(1)(*a*) of the Magistrates' Court Act, 1944, rules 36 and 43 of the Magistrates' Court Rules must not be disturbed.' Similarly, in the present case, to have those default judgments complained of by the applicants set aside, would cause the very disruption and confusion Ueitele sought to avoid.

[30] The provisions of Article 25 (3) of the Constitution speak for themselves and the applicants in this case, considering the facts before court,

[7] Supra.

have in no way been deprived of any of their constitutional rights and or freedoms and are consequently not entitled to any compensation as prayed for in their notice of motion. There are proper procedures to be followed by litigants who claim that they have suffered damages, be they delictual or constitutional in nature. This forum, dealing with application proceedings, is ill-equipped to deal with that category of claims.

[31] Notwithstanding that the provisions complained of have already been declared unconstitutional, the applicants have failed to place any facts before court supporting not only the setting aside of the default judgments and/or executions, but also those supporting their claim for compensation. This court is therefore of the view that the application cannot succeed in the circumstances.

Costs

[32] The general rule is that costs follow the event. There is nothing peculiar in this matter nor are any facts alleged or submitted by the applicants that would serve as sufficient justification for this court not to apply this general rule.

Order

[33] In the premises, I incline to the view that the following order is condign:

1. The application is dismissed with costs.
2. The matter is removed from the roll and is regarded as finalised.

T.S Masuku

Judge

APPEARANCES:

APPLICANTS:	Mr. A. Maletzky
	In person
RESPONDENTS:	Mr. M. Khupe
	Of The Government Attorney