REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT -REV-2020/00355

In the matter between:

SCHAMEERA SEVEN (7) REG: CC/2003/2211	**1ST APPLICANT**
SCHAMEERA FOUR (4) REG: CC/2003/2011	**2ND APPLICANT**
DANIEL KUDUMO KAMUNOKO	**3RD APPLICANT**

and

STANDARD BANK NAMIBIA LIMITED	**1ST RESPONDENT**
DR. WEDER, KAUTA & HOVEKA INC.	**2ND RESPONDENT**
THE MINISTER OF JUSTICE	**3RD RESPONDENT**

Neutral Citation: *Schameera Seven (7) Reg: CC 2003/2211 v Standard Bank of Namibia Limited* (HC-MD-CIV-MOT-REV-2020/00355) [2021] NAHCMD 449 (30 September 2021).

Coram: Masuku J

Heard: **22 September 2021**

Delivered: **30 September 2021**

Flynote: Civil law - Review Application – two different notices in terms of rule 66 - Rule 72 – Jurisdiction of the High Court to hear an application for review of an order or judgment from the same court – Section 16 of the High Court and Supreme Court Act - mandate to review decisions of this court is vested in the Supreme Court.

Summary: The applicants brought an application for review, in terms of which they seek to review judgment and orders handed down by this court constituted differently. One contention raised by the applicants during the hearing was that the respondents must non-suited the respondents for its failure to properly deal with the factual allegations contained in the founding affidavit. The respondent in terms of rule 66(1) (c) raised several points in *limine.* One of those points raised was that of jurisdiction and the court dealt with it as follows:

Held: that a respondent has a choice when served with an application that is to either file a notice of opposition which is to be followed by an answering affidavit or to deliver its notice containing the points of law he or she wishes to raise.

Held that: A party who wishes to file a notice in terms of rule 66(1) (c) should be wary of this route as they do not get a second opportunity to deal with the other aspects of the founding papers should their point or points in *limine* be dismissed.

Held further that: The court's jurisdiction is to be found in the High Court Act, the statute that establishes this court and not in subordinate legislation being its rules, governing the procedural aspects.

Held: that the High Court does not have any jurisdiction to review its own proceedings or decisions. This power rests with the Supreme Court.

Held that: This court is only placed in a position to rescind its own orders in terms of rule 16 and 103.

The court held that it has no jurisdiction to determine the application and dismissed the application.

ORDER

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1. The Applicants' application for review is dismissed for want of this Court's jurisdiction.
2. The Applicants are ordered to pay the costs of this application, jointly and severally the one paying the other being absolved.
3. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] With all the formidable powers courts have in their arsenal, to resolve disputes between and among persons, both natural and legal, including the State, the law, either in the Constitution, legislation, or the common law, where applicable, draws parameters beyond which the various levels of courts may not encroach

[2] The primary question for determination in this matter is whether this court would be acting within its constitutional and legislative remit, if it succumbed to the applicants' entreaties and heard a matter in which it is asked to review its own orders in terms of rule 76 of the rules of this court.

[3] There are other issues, both legal and factual that arise. They may only be entertained once this critical questioned has been answered in the applicants' favour.

The parties

[4] The 1st and 2nd applicants are Close Corporations duly registered in terms of the Close Corporations Act, 1988. Their addresses are both in Windhoek. The 3rd applicant is Mr. Daniel Kudumo Kamanoko, an adult Namibian male who also resides in Windhoek. The 4th Applicant is Mr. Elvis Bongani Ndala, an adult male and a member of the 2nd Applicant who resides in Windhoek.

[5] For all intents and purposes, there is only one effective respondent remaining in this matter. This is the 1st respondent, Standard Bank Namibia Limited, a company with limited liability and duly incorporated in terms of the Company Laws of this Republic. Its place of business is described as Erf 1378, 1 Chasie Street, Kleine Kuppe, Windhoek.

[6] The other respondents, namely, The Honourable Mr. Justice Parker, the Judicial Services Commission and the Minister of Justice are no longer parties to this case. This results from the court upholding a notice in terms of rule 61 and in terms of which it was argued, and successfully, that the citing and service of the papers on the said respondents constituted an irregular step or proceeding, as envisaged in the said rule 61.

[7] As a result of the rule 61 application being upheld, the position is that there is only one respondent remaining and against whom any of the orders sought, if granted, would be affected, and that is Standard Bank, the 1st respondent. It is for that reason that the 1st respondent will be referred to as ‘the respondent’ in this judgment.

[8] The applicants will be collectively referred to as ‘the applicants’. Where it becomes necessary to identify a particular applicant, it or he will be referred as they appear in the citation above.

Background

[9] The question for determination stated above arises in the following factual scenario. I can state without diffidence that the factual matrix within which the question arises, is not subject to much disputation. It may be the law applicable that may raise some controversy. The facts are stated below.

[10] Two critical events occurred on two different dates and which a decisive bearing on this case. On 23 September 2009, Marcus AJ, granted a judgment by default against the 3rd respondent. The relief granted by the court included an order declaring property described as Section 4 as shown and more fully described on Sectional Plan No. 32/2003, Schameerah Court, situate at Hochland Park specially executable. This property was subsequently sold on 09 March 2010.

[11] The second event involved Case No.3939/2015 in which case the respondent sued the 1st and 3rd applicants for payment of N$651 667.81 and for an order declaring Section no. 7 as shown and more fully described on Sectional Plan No. 32/2003 in the building or buildings known as Schameerah Court situate at Hochland Park, bonded property specially executable. The action was defended and a trial ensued and over which Parker AJ presided. The trial culminated in the learned Judge finding for the respondent and the property involved was accordingly declared executable.

[12] The applicants, in their papers, essentially seek an order that the judgments issued in both matters must be reviewed and they thus brought an application in terms of rule 76 of this court's rules. In their notice of motion, they seek a litany of prayers, 66, to be precise. Stripped to the bare bones, it would seem that the applicants complain about the judgments issued in respect of both properties and question the propriety of this court having granted the orders prayed for, including declaration of the properties involved, specially executable.

[13] It is worth noting that the applicants did not seek any order from this court rescinding any of the judgments granted against them. It is also clear on the record that

they also did not note an appeal to the Supreme Court in which they would have conveyed their dissatisfaction with the prayers granted in the matters. I mention this merely in passing but it is a fact.

[14] I find it unnecessary, in the circumstances, to regurgitate the grounds upon which the applicants seek the review of the judgments referred to and I do not do so for the reason that the respondent essentially took points of law *in limine* and decided, with their eyes wide open, not to engage the issues as raised by the applicants in the founding affidavit, pound for pound. The respondent raised four points of law, namely that this court does not have jurisdiction to grant the relief prayed for; that the doctrine of *res judicata* applies; that it would be inappropriate for the court to issue any interdict in favour of the applicants in respect of the first judgment because the property was sold to a third party, who is not a party to these proceedings and lastly, that the applicants, in her papers, failed to make out a case for any relief, as they violated what has become known as the *Stipp* principle in this jurisdiction[1].

Determination

[15] Having considered the matter deeply, I have come to the conclusion that the main issue that has to be decided, is whether the respondent's contention that this court does not have jurisdiction is sound in law. If it is, then it would appear to me that the matter can be regarded as *cadit quaestio* (the matter is at an end).

[16] I say so for the reason that if the court does not have jurisdiction to entertain this matter, as Ms. Kuzeeko, strongly submitted, then on no account may the court proceed to deal with and consider the other issues raised because that would be an exercise in futility. No jurisdiction - no case, it would seem to me.

[17] Before I do so however, it would be fair to address one procedural issue the applicants raised in their papers. It was not raised as a model of clarity, but shorn of all

[1] *Stipp and Another v Shade and Others* 2007 (2) NR 627 (SC) para 29-31.

the frills, the respondents complained that the court should non-suit the applicants for the reason that they did not deal with the allegations raised in the founding affidavit, pound for pound. That is a matter that I turn to next.

Failure to deal with allegations in founding affidavit

[18] As intimated earlier, the respondent did not deal with the vast and at times unintelligible allegations in the founding affidavit. It decided, upon advice, to file a short answering affidavit in which it sought a dismissal of the application, based largely on legal issues that it considered constituted insuperable obstacles in the applicants' way to obtaining any of the relief sought.

[19] It is probably understandable that this is an issue that could have been raised by the applicants as they did not have legal representation. The 3rd applicant appeared together with Mr. Ndala both are unlettered in law. A respondent has a choice, when served with an application.

[20] Rule 66(1) entitles a respondent to first enter its notice of opposition.[2] This must then be followed by an answering affidavit, to be filed within 14 days from the filing of the notice to oppose.[3] That is the first option. If the respondent wishes to raise points of law only, it may deliver its notice to do so within 14 days as well. In the said notice, the respondent must set out the question or questions of law.[4]

[21] Although the respondent did not strictly follow rule 66(1)(c), it filed a brief affidavit in which it raised pertinent points of law. This was in an expanded manner and not strictly in terms of rule 66(1)(c). This procedure adopted, did not prejudice the applicants but to the contrary, set out in very clear and precise terms the nature of the legal objection, together with the bases therefor.

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[2] Rule 66(1)(a).
[3] Rule 66(1)(b).
[4] Rule 66(1)(c).

[22] A notice in strictly in terms of rule 66(1)(b) normally raises the points of law, without necessarily engaging the facts, where applicable, on which the point of law is predicated. In the instant case, the applicants will have benefitted from the approach adopted by the respondent as the issues raised by them were expanded upon, rendering more easy to understand the points of law raised.

[24] It must be mentioned, as I pointed out to the applicants during the hearing that a party who chooses to employ the provisions of rule 66(1)(c) must be very wary as that choice may return to haunt him or her. I say so in the event that the point or points of law raised, are not upheld. This is because the respondent will ordinarily not have a second bite to the same cherry, by being allowed to file the answering affidavit dealing with the matters on the merits once the rule 66(1)(c), notice has failed.

[25] A party who decides to approach the matter in terms of subrule (1)(c), runs the risk of the matter being decided against him or her if the points of law raised are not upheld. This is so because that respondent would not have engaged the founding affidavit on the merits. A party who employs the rule 66(1)(c) option must be one who is overly confident of the success of the points of law *in limine*, ensconced in the knowledge that come rain or sunshine, the rule 66(1)(c) notice, will be upheld. That is a route a diffident respondent will fear to tread.

[26] In the premises, there is nothing, in my considered view that would suggest that the decision not to file a comprehensive affidavit, dealing with all the issues pertinently raised in the founding affidavit, is fatal to the case of a confident respondent, as the one in issue. The argument by the applicants should therefor fail. All that needs to be assessed now is whether the confidence shown by the respondent in this matter, was not misplaced and whether what looked like a risk has become a reality. It is to that enquiry that I presently turn.

Jurisdiction

[27] The argument advanced by Ms. Kuzeeko was simple and straightforward. It acuminated to this: this court does not have the jurisdiction to review its own orders in terms of rule 76. Is this contention tenable?

[28] In order to decide this issue, it is pertinent to have regard to the language of the rule in question. Rule 76(1) provides the following:

> 'All proceedings to bring under review the decision or proceedings of an inferior court, a tribunal, an administrative body or administrative official, are unless a law otherwise provides, by way of application directed and delivered by the party seeking to review such decision or proceedings to the magistrate or presiding officer of the court, the chairperson of the tribunal, the chairperson of the administrative body or the administrative official and to all the parties affected.' (Emphasis added).

[29] Ms. Kuzeeko argued that when proper regard is had to the above provision, it becomes clear that this court has jurisdiction only to review the decisions or proceedings of the bodies and courts mentioned in the underlined portion of the provision above. These are inferior court, tribunals, administrative bodies and administrative officials.

[30] I am of the respectful view that the proper place in which to determine the jurisdiction of the court is not in the rules of the said court but in the statute that establishes that court. To determine whether this court may review its own decisions, which it is being asked to do in this matter, the first port of call must be s 16 of the High Court Act.[5]

[31] Section 16 of the said Act, provides the following:

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[5] High Court Act No. 16 of 1990.

'The High Court shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within Namibia and all other matters of which it may according to law take cognisance, and shall, in addition to any powers of jurisdiction which may be vested in it by law, have power –

(a) to hear and determine appeals from all lower courts in Namibia;
(b) to review the proceedings of all such courts; . . .'

[32] The above provision, namely s 16(a), ties in neatly with the s 80(2) of the Constitution, which gives this court 'jurisdiction to hear and adjudicate review power of this court. It is accordingly to be found in the High Court Act and with which I have quoted above.

[33] It is accordingly clear, when one has regard to the above legislative enactments, including the rules, that the High Court has powers to review decisions of lower courts, which would also include, as stated in rule 76, decisions or proceedings of tribunals, administrative bodies and persons.

[34] What is starkly absent from all the provisions referred to above, is the power of this court, to review its own decisions. This jurisdiction has been conferred by law, to the Supreme Court in s 16 of the Supreme Court Act,[6] which provides the following:

'(1) In addition to any jurisdiction 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.'

[35] What comes out very clearly from the foregoing, namely the High Court Act and its rules, and the Supreme Court Act, is that the High Court does not have any jurisdiction to review its own proceedings or decisions. This power resides, by law only in the Supreme Court. Section 16(c) of the High Court Act, which was repealed, did

[6] Supreme Court Act 15 of 1990, section 16.

previously allow judges of this court to preside over appeals from a judgment of a single judge of this court. This is now distant memory.

[36] There is a canon of statutory interpretation, which in Latin is called *unius est exclusio alterius*. In common parlance, this means that the express mention of one thing, excludes the other. To bring this canon to bear on the instant case, it means that the fact that this court, has been given jurisdiction to review decisions and proceedings of specified courts and other bodies, excluding its own, means that it does not have jurisdiction to review its own decisions therefor. Its power or jurisdiction, is confined solely to those bodies it has in clear and unambiguous language in the statute books, been granted jurisdiction and no more!

[37] Where does the above treatise leave us? I am of the considered opinion that the only conclusion that can be reached in the circumstances, is that this court, whereas it has power to review decisions of inferior courts and tribunals, does not have the jurisdiction to review its own decisions and proceedings. That power lies only with the Supreme Court.

[38] A party, like the applicants, who approach this court seeking that it reviews its own decisions in terms of rule 76, are clearly barking the wrong tree. This court may, in appropriate circumstances, rescind its decisions, under rule 16 and rule 103. This is a far cry from what the applicants seek, which is a review by this court, of a decision of a judge of co-ordinate jurisdiction. This is an exercise this court cannot embark upon, regardless of the nature and seriousness that may be pointed out by a litigant before it. Its hands are permanently tied and it may not move its hands of justice to come to the rescue of such a party.

Conclusion

[39] I am of the considered view that this court, as argued on the respondent's behalf, does not indeed, have jurisdiction to review its decisions. The application cannot, in the

circumstances, be sustained. The confidence and temerity the respondent had to raise points of law only, has repaid the respondent handsomely and has benefitted the applicants as well.

[40] It is accordingly unnecessary, in the premises to deal with the other points of law that have been raised. It would only have been proper to do so, if the court in the first place found that it does have the necessary jurisdiction. That not being the case, the matter should end at this unpalatable juncture for the applicants.

Costs

[41] The ordinary rule applicable to costs is that costs follow the event. In this matter, the respondent has been successful. It is thus entitled to its costs. There is nothing submitted, or apparent from the papers, or the conduct of the matter, that would suggest, even remotely, that this is a proper case in which justice calls for any other order. The general rule will apply.

Order

1. The Applicants' application for review is dismissed for want of this Court's jurisdiction.
2. The Applicants are ordered to pay the costs of this application, jointly and severally the one paying the other being absolved.
3. The matter is removed from the roll and is regarded as finalised.

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T.S. Masuku

Judge

APPEARANCES:

THIRD AND FOURTH APPLICANT:	In person
RESPONDENT:	M. Kuzeeko Of Dr Weder, Kauta & Hoveka Inc.