CASE NO.P3/1997

IN THE SUPREME COURT OF NAMIBIA

In the matter between

REINHARD EUGEN AUGUST STROWITZKI APPLICANT

And

THE STATE RESPONDENT

CORAM: MTAMBANENGWE, ACJ, TEEK, AJA *et* CHOMBA, AJA

HEARD ON: 10/04/2003

DELIVERED ON: 16/09/2003

APPEAL JUDGMENT

CHOMBA, A.J.A.

INTRODUCTION

This matter came before us as a result of a letter written by the Registrar of this Court (hereinafter "the Registrar's" letter) to Dr. Strowitzki, who, for convenience only, has been cited as the applicant in the process leading to this hearing. I state that Dr. Strowitzki has been

cited as applicant for convenience's sake only because of the reasons I shall delve into in the course of this judgment. The Registrar's letter has been pivotal to some of the arguments which were ably and forcefully submitted by Mr. Geier, who acted as *amicus curiae* on behalf of Dr. Strowitzki. I therefore proceed to reproduce the Registrar's letter.

It states :

" J H Viljoen
P.3/07 26 April 2002

Adv. H. Geier
Society of Advocates
Namlex Building
WINDHOEK

Dear Sir

RE: ARGUMENT: DR. R.E.A. STROWITZKI

The Honourable Chief Justice requested me to set the application of Dr. R.E.A. Strowitzki down for proper argument on the following, namely:

"1. Whether the High Court and Supreme Court have jurisdiction to consider a further application for leave to appeal and/or petition to grant leave to appeal after refusal of an application by the High and the dismissal of the petition to the Chief Justice even if the new application and petition are launched in respect of new or purported new evidence; and
2. If the Court should find that under the circumstances it has such jurisdiction whether the applicant has made out a case for the granting of leave to appeal".

Kindly take notice that the matter has been set down for argument in the Supreme Court on Wednesday 2 October 2002 at 10h00.

The Court also requested your assistance to argue the matter *amicus curiae* in view thereof that you were the Counsel in the criminal trial from the beginning.

A copy of the record which includes all the necessary documentation for purpose of the argument is attached.

Kindly file Heads of Argument in the same way as is required in an appeal before the Supreme Court.

Yours faithfully

J.H. Joubert
REGISTRAR: SUPREME COURT

Prosecutor-General
High Court
WINDHOEK

Copy for your attention.

Attached please find a copy of the record.

J.H. Joubert
REGISTRAR: SUPREME COURT

cc R.E.A. Strowitzki
C/o Hardap Prison
Private Bag 2135
MARIENTAL"

BRIEF HISTORY BEHIND DR. STROWITZKI'S SO-CALLED APPLICATION

For a better appreciation of the submissions which were made on Dr. Strowitzki's behalf, a brief summary of the history which propelled this matter to this court had better be narrated at the outset. Way back in 1993 in criminal case number 118 of that year, Dr. Strowitzki was charged together with one Bernd Albert Böck in an indictment containing 130 counts of fraud. The two stood trial before O'Linn, J, as he then was. For reasons we need not enter into, the trial went on into 1996 when both of them were convicted on all counts. Before sentence could be imposed on them, Dr. Strowitzki instituted recusal proceedings alleging bias on the part of the trial judge and consequently seeking the judge to recuse himself from the case. O'Linn, J heard the application and dismissed it in due course.

During the said recusal proceedings an affidavit deposed to by the said Bernd Albert Böck, who was the second accused in the criminal proceedings aforementioned, constituted the base of the accusation against O'Linn, J. At the instigation of the trial judge both Dr. Strowitzki and the said Böck were prosecuted on four counts charging, as to the first count that between 9th and 12th August 1996 the two accused persons colluded with each other with intent to wrongfully and unlawfully defeat the cause of justice, as to the second count that between the said same dates the two accused persons did unlawfully and intentionally vitiate the dignity, repute and authority of O'Linn, J, as presiding judge in the aforementioned criminal proceedings, as to the

third count, that on the self same dates the two accused persons did unlawfully and intentionally depose and swear to an affidavit making false allegations against O'Linn, J, and as to the fourth count, that on those very dates the two did wrongfully and unlawfully make false statements knowing the same to be false.

In substance the alleged falsehoods were to the effect that while the criminal proceedings were pending relating to the fraud charges, O'Linn, J, had made promises to Böck's mother, now deceased, and later to Böck himself, that O'Linn, J, would not send Böck to prison in consequence of the said criminal proceedings. The four counts were tried by Kotzé, J, who subsequently convicted Böck on all four counts while acquitting Dr. Strowitzki completely. After the sentences were imposed in respect of 130 counts of fraud Dr. Strowitzki unsuccessfully applied before O'Linn, J. for leave to appeal against both conviction and sentence. Undaunted by the rejection of his said application, Dr. Strowitzki submitted a petition to the Chief Justice still seeking leave to appeal as stated.

On July 2, 1997, by order of three judges of the Supreme Court, namely Mahomed, C.J, Mtambanengwe, A.J.A, and Gibson, A.J.A. , Dr. Strowitzki was informed that his petition for leave to appeal had been refused. It is necessary at this stage to mention that by section 316(7) of the Criminal Procedure Act, No. 51 of 1977, (the Criminal Procedure Act), a

petition to the Chief Justice is required to be considered in chambers by three appellate judges designated by the Chief Justice. And by subsection (9) (a) of the said section 316, “The decision of the Appellate Division or of the three judges thereof considering the petition, as the case may be, to grant or refuse any application, shall be final.”

Somewhat anomalously, despite the clear provision in section 316(9)(a) aforementioned Silungwe, J, entertained an application by Dr. Strowitzki submitted subsequent to the refusal of the petition to the Chief Justice. The application which Silungwe, J, entertained was two-fold, *viz*, for leave to appeal against Dr. Strowitzki’s conviction on the 130 counts of fraud and consequential 11 year prison sentence and secondly leave to adduce new evidence. For reasons which need not detain us it suffices to state that Silungwe, J, dismissed both applications. It is in consequence of that dismissal that Dr. Strowitzki once again submitted a petition to the Chief Justice and it was that petition which engendered the writing by the Registrar of this court of the letter I have reproduced hereinbefore.

CONSIDERATION OF THE REGISTRAR’S LETTER

In answering the first question posed in the Registrar’s letter the starting point has to be the time when Dr. Strowitzki first petitioned the Chief Justice for leave to appeal after refusal of a similar application which was considered by O’Linn, J. As we have already seen that

petition was treated pursuant to section 316 of the Criminal Procedure Act. Let me straight away reproduce some pertinent provisions of that section.

The Criminal Procedure Act as amended by Act No. 10 of 2001 provides as follows in as far as section 316 is concerned, quoting only the pertinent parts of it : -

> " (1) An accused convicted of any offence before the High Court of Namibia may, within a period of fourteen days of the passing of any sentence as a result of such conviction or within such extended period as may on application …….on good cause be allowed, apply to the judge who presided at the trial ……for leave to appeal against his or her conviction or against sentence………"

> (6) If an application under subsection (1) for condonation or leave to appeal is refused …..the accused may, within a period of twenty-one days of such refusal, or within such extended period as may on good cause be allowed, by petition addressed to the Chief Justice submit his application for condonation or for leave to appeal or his application to call further evidence ….to the Appellate Division, at the same time giving written notice that this has been done to the Registrar of the provincial or local division……within whose area of jurisdiction the trial took place …….and such Registrar shall forward to the Appellate Division a copy of the application……in question and of the reasons for refusing such application……

> (7) The petition shall be considered in Chambers by three judges of the Appellate Division designated by the Chief Justice.

> (8) The judges considering the petition may –

(a) -

(b) –

(c) whether they have acted under paragraph (a) or (b) or not

(i) -

(ii) in the case of an application for leave to appeal or an application for leave to call further evidence, grant or refuse the application.....

(d) refer the matter to the Appellate Division for consideration, whether upon argument or otherwise, and that Division may thereupon deal with the matter in any manner referred to in paragraph (a).

(9)(a) The decision of the Appellate Division or of the judges thereof considering the petition, as the case may be, to grant or refuse any application, shall be final."

The Criminal Procedure Act is by origin a South African statute the application of which was extended to South West Africa as a dependency of South Africa. The independent state of Namibia adopted this Act as one of its post-independence laws by virtue of Article No. 140 of the Constitution of Namibia. Therefore the reference in that Act to terms such as "Appellate Division" and "judges thereof" are references in present day Namibia to the Supreme Court of Namibia or judges of the latter court. In the event in my further discussion of the Criminal Procedure Act I shall simply refer to the Supreme Court or judges of that court, in place of the Appellate Division or judges of that Division.

In casu it is common cause that Dr. Strowitzki unsuccessfully applied for leave to appeal to the trial judge, namely O'Linn, J., and later petitioned the Chief Justice in the same vein and that that petition was considered in chambers by the Chief Justice and two appellate judges, namely Mahomed, C.J., Mtambanengwe, A.J.A. and Gibson, A.J.A. Therefore the provisions of section 316 subsections (1), (6), (7), (8)(c)(ii) and (d) and (9)(a) were satisfied . Consequently the decision of refusal made by the three appellate judges in chambers was in terms of subsection (9)(a), final. In this connection let me stress the peremptory language used in subsection 9(a): it states – "The decision of ….. the three judges …. considering the petition ……. to grant or refuse any application, shall be final" (emphasis mine).

The question which springs from the consequence of section 316 (9)(a) on the petition of Dr. Strowitzki may be posed, namely, was it competent for Silungwe, J, to entertain the application made by Dr. Strowitzki for leave to appeal and leave to adduce further evidence, considering the finality which that section attached to the decision made by the appellate judges. Fortunately we do not have to seek far for an answer to this question.

This is in the light of the heads of arguments submitted by Mr. Geier in the first of the four volumes containing his arguments. This is what is to be found at heading "C. Conclusion" of Volume 1 :

> "44. It would seem therefore that:
>
> 39.1 The proceedings before Silungwe, J, constitute a nullity as Silungwe, J, did not have the necessary jurisdiction to hear a further application for leave to appeal subsequent to the appeal procedures having been exhausted by (Dr. Strowitzki) with the refusal of his petition to the Supreme Court during 1997 ; and
>
> 39.2 The further application for condonation and for a special entry in terms of section 317 to the High Court can similarly not be entertained by such court on those grounds.
>
> 45. It has also become clear that no inherent jurisdiction of the High or Supreme Courts, to hear such further application, exists.
>
> 46. It is submitted therefore that the first question as posed by the Honourable Chief Justice in (the Registrar's letter) must be answered in the negative.
>
> 47. It follows that in such circumstances question 2 (in the Registrar's letter) does not require determination."

In agreeing with the position taken by Mr. Geier regarding the status of the proceedings before Silungwe, J., Mr. Small went a little further. His contention was to the following effect, namely that after the refusal of Dr. Strowitzki's petition by the three appellate judges, the High Court, upon being approached by Dr. Strowitzki on a purported subsequent application, ought to have reacted by informing him that it had no jurisdiction in the matter. As the High Court did not so react but instead

accepted to entertain the matter, the proceedings following upon such acceptance were a nullity. Such nullity could not give rise to a valid further petition to the Chief Justice which has now been referred by the Chief Justice to this court as evidenced by the Registrar's letter.

On the basis of the extended submission of Mr. Small as in the preceding paragraph, it can safely be asserted that the referral by the Chief Justice of Dr. Strowitzki's matter to us could not have been done under section 316(8)(d), which, as we have seen, empowers appellate judges who have been designated by the Chief Justice to consider a petition in chambers, to refer such petition to the Supreme Court sitting in open court. In other words the referral can only be validly made on a valid petition emanating from valid High Court proceedings, unlike the proceedings before Silungwe, J. By inverse reasoning, if the purported founding High Court proceedings are a nullity, no petition can be founded on a nullity. As Lord Denning stated in the *cause celebré* on this point, namely MACFOY v UNITED AFRICA CO. LTD (1961) 3 All E.R. 1169 at page 1172:

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

Lord Denning's dictum portrays graphically the emptiness of judge Silungwe's purported dismissal of Dr. Strowitzki's purported application. Therefore no petition could be premised on it.

In the result, on the common view taken by both Mr. Geier and Mr. Small relating to the present referral of Dr. Strowitzki's case to this court, these proceedings would falter at this stage and could not be taken any further but for the alternative arguments forcefully adduced by Mr. Geier into which I shall now delve.

MR. GEIER'S SUBMISSIONS

One of the arguments advanced by Mr. Geier touched on the status of judges of the Supreme Court sitting in chambers. Are they to be regarded as being at par with the Supreme Court sitting in open court? If not, what authority does a decision made in chambers by such judges carry? Do judges sitting in chambers constitute a court of record?

In advancing his arguments touching the foregoing questions Mr. Geier referred to statutory as well as constitutional provisions. In this vein he referred to Article 79(1) which defines the composition of the Supreme Court. By this article and sub-article –

> " The Supreme Court shall consist of a Chief Justice and such additional judges as the President, acting on the recommendation of the judicial service commission, may determine."

He linked this article with section 6 of the Supreme Court Act, No. 15 of 1990 (hereafter the Supreme Court Act) which provides that –

> " Save as otherwise provided in Art. 12(1)(a) and (b) of the Namibian Constitution, all proceedings in the Supreme Court shall be carried out in open court."

Crowning the argument on the question of the status of judges sitting in chambers, Mr. Geier also referred us to section 16(1) of the Supreme Court Act, which gives the Supreme Court the additional power of review. For a better appreciation it is needful to quote this provision in full thus –

> " 16.(1) In addition to any jurisdiction conferred upon it by this Act the Supreme Court shall, subject to the provisions of this section and section 20, have the jurisdiction to review proceedings of the High Court or any lower court, or any administrative tribunal or authority established or constituted by or under any law."

Submitting on the foregoing legal provisions, Mr. Geier argued that since the Supreme Court is mandatorily required to sit in open court, appellate judges sitting in chambers could not be considered to constitute the Supreme Court as provided in Article 79(1) of the

Constitution. Therefore, he concluded that the appellate judges sitting in chambers constitute a lower court falling within the contemplation of section 16(1) of the Supreme Court. In the event he contended that a decision of judges sitting in chambers was reviewable by the Supreme Court sitting as we did in open court in the present hearing. It was his further contention that a sitting in chambers is not a court of record. In making this submission he was focusing his attention on the decision of Chief Justice Mohamed sitting in chambers with acting appellate Justices Mtambanengwe and Gibson when they refused the petition by Dr. Strowitzki for leave to appeal.

These submissions beg a number of questions some of which are – first, what is a lower court within the purview of subsection (1) of section 16 of the Supreme Court Act; secondly, are proceedings taken in chambers by three appellate judges any less in the authority they carry than those proceedings held in open court; thirdly, in the light of section 6, what is the validity of proceedings held in chambers by appellate judges?

One answer to the question regarding the authority of a decision made in chambers by appellate judges is to be found in section 316(9)(a) of the Criminal Procedure Act. As we have seen that section places such a decision at par with a decision made by the Supreme Court sitting in open court. Both decisions are final. By necessary implication section 316(9)(a) belies the argument that judges sitting in chambers constitute

a lower court. Additionally the position is made more explicit by Article 83 of the constitution. This is what that article states –

"83. Lower Courts

(1) Lower courts shall be established by Act of Parliament and shall have the jurisdiction and adopt the procedures prescribed by such Act and regulations made there under;

(2) Lower courts shall be presided over by Magistrates or other judicial officers appointed in accordance with procedures prescribed by Act of Parliament."

Consistent with Article 83 the Criminal Procedure Act, in section 1(1) defines "lower court" as meaning any court established under the provisions of the Magistrates' Courts Act No. 32 of 1944."

More light is thrown on to this issue by sub-article (4) of Article 79. This provides that the jurisdiction of the Supreme Court with regard to appeals shall be determined by Act of Parliament. In this country there are two such Acts which prescribe the jurisdiction of the Supreme Court, these being the Supreme Court Act and the Criminal Procedure Act. The former deals more elaborately with civil appellate jurisdiction while the latter deals more elaborately with criminal appellate jurisdiction. In this sense we can state that both these statutes derive their authority from the constitution.

Furthermore, section 315 of the Criminal Procedure Act carrying the rubric "Appeals in cases of criminal appeals in superior courts" provides as hereunder:

> "(1) In respect of appeals and questions of law reserved in connection with criminal cases heard by the High Court of Namibia, the court of appeal shall be the Supreme Court of Namibia.
>
> (2) An appeal referred to in subsection (1) shall lie to the Supreme Court of Namibia only as provided in sections 316 to 319 inclusive, and not as of right."

We have already seen that section 316(7) of the Criminal Procedure Act makes provision for criminal petitions addressed to the Chief Justice to be considered in chambers by three appellate judges designated by the Chief Justice. Quite clearly this provision places the three judges sitting in chambers on a higher pedestal than that of judicial officers who preside in lower courts. The three judges are involved in the scheme of appeals to the Supreme Court. In the event to argue that such judges sitting in chambers constitute a lower court flies in the face of an express statutory provision.

When appellate judges in chambers consider issues pertaining to criminal appeals do they constitute a court of record or not? Mr. Geier's answer is, they do not. This answer is, in my view, premised on false ground. Let us consider a real situation which happens regularly in this court. Decisions made by judges in chambers when considering

petitions are in actual fact recorded whether they be in the negative or in the affirmative. Where the decision is one of granting the petition, the record of such grant goes forward to the Supreme Court sitting in open court when the latter hears the substantive appeal. This court would then note, as we have always done, that the appeal comes to it after the appellant was granted leave to appeal. In so stating we refer to the record emanating from chambers. Moreover this court did in the case of AFSHANI and ANOTHER v. KATRIN VAATZ, CASE NO. SA 9/2002 (unreported) recognize that when a judge is sitting in chambers he is by necessary implication required to keep a record of the proceedings. Delivering the judgment of the court, O'Linn. A.J.A. had this to say at page 13 :-

> "Although there is no express provision in any law or rule of court for a judge in chambers to keep a record, it is clearly a necessary implication from the provision that a judge is the functionary and from rule 48 itself, that a record must be kept of the proceedings in chambers."

I must, however, hasten to point out that the dictum of O'Linn was made in reference to a High Court judge dealing with a civil matter in chambers and the question in Afshani was whether a decision of such a judge was a judgment or order which, in terms of section 18 of the High Court Act, No. 16 of 1990, provides in subsection (1) that an appeal from a judgment or order of the High Court in any civil proceedings shall be heard by the Supreme Court. In contradistinction from the present case,

which is criminal, I must stress that Afshani was a civil case which turned on considerations alien to the present one. The considerations raised *in liminé* in Afshani were : whether the decision of a judge in chambers on a review was final and without a right of appeal, or, in the alternative, even if there was a right of appeal, whether leave to appeal was required but not actually obtained. In Afshani, therefore, the provision in section 316(9)(1) of the Criminal Procedure Act did not fall for consideration.

The third issue I must now address is as regards the status of proceedings before appellate judges in chambers in the light of the requirement of section 6 of the Supreme Court Act. As already noted, that section requires that save as provided in article 12(a) and (b) proceedings in the Supreme Court must be held in open court. If the provisions in this section are to be construed in their literal or ordinary sense, then no valid business can be conducted in the Supreme Court otherwise than in open court. Is such a situation tenable? According to Mr. Geier it is tenable because in relying on section 6 he has impugned the validity of the decision made by the three judges who rejected Dr. Strowitzki's petition in chambers and labeled it a decision made by a lower court.

Unhappily the word "proceedings" is not defined in the Supreme Court Act and I am presently not aware of any other statute or constitutional

provision which offers such a definition. In the event, I am of the view that since the meaning of section 6 aforesaid has been brought under scrutiny in the current case, it is incumbent on this court to find a purposive meaning of that word. In attempting to do this I have to consider the range of business conducted in the Supreme Court.

Article 79(4) of the constitution simply provides – "The jurisdiction of the Supreme Court with regard to appeals shall be determined by Act of Parliament." When the Supreme Court Act was enacted in 1990, Parliament provided not only for appellate jurisdiction of the Supreme Court, but also provided for jurisdiction to hear and determine other matters. Thus by section 2 of the Supreme Court Act it is enacted as follows :

> " The Supreme Court shall have jurisdiction to hear and determine appeals and any such other matters which may be conferred or imposed upon it by this Act or the Namibian Constitution or any other law". (underlining supplied).

This provision puts one on inquiry as to what other matters fall within the jurisdiction of the Supreme Court and how such matters are to be dealt with or in other words, what procedure is to be employed in dealing with the other matters.

By Article 79(2) "(T)he Supreme Court shall be presided over by the Chief Justice and shall hear and determine appeals emanating from the High Court ….. The Supreme Court shall also deal with matters referred to it for decision by the Attorney-General under this constitution, and with such other matters as may be authorized by Act of Parliament." Looking far afield, this time at the Supreme Court Act itself, there are three other provisions which vest in the Supreme Court jurisdiction in respect of other matters. Section 14(6)(a) imposes on the Supreme Court jurisdiction to hear petitions for leave to appeal. Section 15(1) of the same Act reaffirms the jurisdiction of the Supreme Court to entertain matters referred to it by the Attorney-General and section 16(1) vests in the Supreme Court the jurisdiction of review of proceedings of the High Court, any lower court, or any administrative tribunal or authority established by or under any law. The jurisdiction to receive and determine petitions for leave to appeal is also prescribed by the Criminal Procedure Act as already shown.

In as far as the procedural requirements of entertaining appeals, referrals by the Attorney-General and petitions for leave to appeal are concerned, these too are prescribed by statute. So far as the hearing and determining of substantive appeals is concerned the position does not lend itself to doubt. These are heard in open court with a normal complement of three judges one of whom must be the Chief Justice as presiding officer. (Art. 79(2).)

Regarding petitions for leave to appeal to the Supreme Court in criminal cases, these are required to be addressed to the Chief Justice who is given power to designate three appellate judges to consider the same in chambers. As regards petitions for leave to appeal in civil cases, by section 14(3)(b) of the Supreme Court Act, they are to be considered by the Chief Justice or any other judge designated for the purpose by the Chief Justice. To this end the Chief Justice or the designated judge may entertain arguments from the parties or their counsel before determining a petition one way or the other. By necessary implication such consideration of a petition, including the hearing of arguments, is to be conducted in chambers because there is no statutory provision for one judge only to hear and determine any matters in open court.

Coming to the procedure of dealing with referrals from the Attorney-General to the Supreme Court an unclear situation exists. According to Article 79(3) "(T)hree judges shall constitute a quorum of the Supreme Court when it hears appeals or deals with matters referred to it by the Attorney-General under this constitution: provided that provision may be made by Act of Parliament for a lesser quorum in circumstances in which a judge seized of an appeal dies or becomes unable to act at any time prior to judgment." The impression conveyed by this clause is that referrals, like appeals, are to be heard in open court with a normal complement of 3 judges. On the other hand the combined effect of sub-

rules (1) and (4) of rule 6 of the Supreme Court Rules is that when the Attorney-General refers a matter to the Supreme Court as provided under the constitution he/she has to do so by application addressed to the Chief Justice and the application has to be in the nature of a petition. The petition falls to be considered either by the Chief Justice or by a judge of the Supreme Court (sub-rule 4). In terms of rule 6, therefore, the referral by the Attorney-General has to be considered by one judge in chambers. Thus there appears to be a conflict between the constitutional provision and that found in the rules.

We were not addressed on this apparent conflict and therefore it would be imprudent to attempt any definitive conclusion on the matter. In any case the provisions cited earlier have amply demonstrated that the procedure of hearing certain matters in chambers is entrenched by statute, namely by the Supreme Court Act and the Criminal Procedure Act. Both statutes derive their efficacy from the constitution as we have seen. This leads me to the contention raised by Mr. Geier in regard to section 6 of the Supreme Court Act. He argued that all proceedings of the Supreme Court ought unfailingly to be held in open court.

As we have seen the section provides in apparent mandatory terms, that <u>all</u> proceedings in the Supreme Court <u>shall</u> be conducted in open court. If the section is to be understood in the ordinary grammatical or literal sense then it means that hearing proceedings in chambers is not

legally permissible. In other words proceedings in chambers are null and void in law. But is that the true legal position?

The following dictum by Park B. in BECK v SMITH (1836) 2M and W 191 at page 195 is now held as the *locus classicus* and is hallowed as the "Golden Rule" of construction of deeds and statutes. He said -

> "The rule (i.e. the golden Rule) is a very useful rule in the construction of a statute, to adhere to the ordinary meaning of words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance in which case the language may be varied or modified, so as to avoid such inconvenience, but no further."

Against the backdrop of the golden rule what construction should we put on the provisions of section 6 of the Supreme Court Act? Does it indeed mean that all proceedings in the Supreme Court, including all proceedings of an interlocutory nature, should be transacted in open court?

We have already noted that the supreme Court Act itself has provided that petitions for leave to appeal from High Court judgments or orders, both in criminal and civil matters, may be dealt with by an appellate judge or judges in chambers though procedural law allows the judges in certain circumstances to refer petitions and/or applications to the Supreme Court sitting in open court. It has also, though in apparent

conflict with the Constitution, provided that petitions from the Attorney-General may equally be considered in chambers by the Chief Justice or an appellate judge. The Criminal Procedure Act, which I must emphasize, also derives its authority from the Constitution, similarly makes provision for petitions for leave to appeal to be considered in chambers by three judges of the Supreme Court.

It is thus clear that the intention of the legislature is not to bind the Supreme Court to consider in open court all and sundry matters coming before it. It would be not only absurd and inconvenient to conduct all proceedings in open court, it would also be extremely costly to parties for such procedure to be adopted. Whereas in chambers some matters can be considered in the absence of the parties or their counsel, this cannot be so where open court hearings have to be held. Open court proceedings more often than not entail costs, especially in civil matters.

Consequently I venture to hold, and do in fact so hold, that the word "proceedings" as used on section 6 has a special and restricted meaning. It means proceedings pertaining to substantive appeals. To hold otherwise would be unrealistic and absurd, and indeed, as I observed in responding to Mr. Geier's submissions on this matter, I have yet to learn of any appellate court in any country which hears in the open court practically all matters coming before it. I would,

therefore, and with due respect dismiss as untenable Mr. Geier's vehement submissions on this issue.

Concomitant with the argument that all proceedings in the Supreme Court should be held in open court was a further submission by Mr. Geier that there was an irreconcilable conflict between section 6 of the Supreme Court Act and section 316(7) of the Criminal Procedure Act. He argued that in such an event the law implies that the later law has repealed the earlier law. As the Supreme Court Act was enacted in 1990 whereas the Criminal Procedure Act was enacted in 1977, section 316(7) is presumed, according to Mr. Geier, to have been repealed by implication by section 6. That argument is untenable in the light of the result I have come to in applying the golden rule of construction to section 6 of the Supreme Court Act.

Yet another forceful argument put forward by Mr. Geier is that this court should act under section 16(1) of the Supreme Court Act, that is by way of review. He urged that section 16(1) vests in the Supreme Court additional jurisdiction over and above its appellate jurisdiction. To this end therefore, notwithstanding the fact that in accordance with section 316(9)(a) of the Criminal Procedure Act the refusal by the three judges in chambers was a final decision, the court thus has additional jurisdiction to enable it to reopen the High Court case and review it because of irregularities committed by the trial judge in the course of

the trial proceedings. He was at pains in citing a number of cases which define what kind of irregularities would justify a review and in which it was held that the irregularities are acts which occur during a trial and not in consequence thereof.

The review jurisdiction is to be invoked by this court *mero motu*. This legal requirement did not escape the attention of Mr. Geier and he therefore repeatedly reminded us that there was no application for review before us. He contended that the reviewable irregularities would come to our attention by reading the records of the present case. In order to invoke the review jurisdiction a prescribed procedure has to be complied with. This procedure is to be found in rule 7 of the Supreme Court Rules. The rule provides : -

> " Wherever it comes to the notice of the Chief Justice or any other judge of the Supreme Court that an irregularity has occurred in any case contemplated in section 16 of the Act, and he or she decides to invoke the review jurisdiction of the Supreme Court in terms of that section –
>
> (a) the parties affected and the court or tribunal or authority referred to in the said section shall be informed of that decision by the registrar; and
>
> (b) the provisions of rule 6(5)(b) and (6) shall *mutatis mutandis* apply."

The said provisions of rule 6 state as hereunder :-

"(5) If the Chief Justice or any such judge of the Supreme Court, as the case may be, decides that an application is, by virtue of its urgency or otherwise of a nature sufficient to justify the exercise of the courts' jurisdiction as contemplated by section 15 of the Act –

(a) the petitioner or his or her attorney and the respondent, if any, or his or her attorney, shall be so informed by the registrar.

(b) the Chief Justice or such other judge, as the case may be, shall thereafter direct –

(i) what pleadings or affidavits or documents are required to be filed by the parties to the proceedings;

(ii) the period within which such pleadings or affidavits or documents shall be lodged;

(iii) whether or not any special dossiers are required to be compiled in terms of section 23 of the Act and if so, the time within which such dossiers are required to be lodged;

(iv) the date on which the Supreme Court shall hear the matter or any interlocutory proceedings pertaining thereto.

(6) The Chief Justice or such other judge, as the case may be, shall be entitled to call for or to hear argument from affected parties with regard to matters referred to in sub-rule (5), and such a hearing or such argument may be considered by the Chief Justice or such other judge of the Supreme Court as he or she may designate for that purpose."

As can be seen there is quite an elaborate procedure to be followed if a matter is to be reviewed under section 16(1). That procedure was not complied with and in particular the affected parties have not been given the opportunity to make representations pursuant to rule 6(5)(b) and

(6). Moreover much as Mr. Geier tried to persuade us to invoke the review jurisdiction *mero motu* we did not share his contention that the trial before O'Linn, J., should be reviewed. It is to be noted that Mr. Geier did concede that if the court did not find it fitting to invoke its review jurisdiction *mero motu* then that would be the end of the matter.

As the review argument did not find favour with the court, I find it otiose to delve into the many cited authorities which Mr. Geier referred us to on the point.

Another contention Mr. Geier submitted was in relation to inherent jurisdiction. In this connection he cited the case of SEFATSA and OTHERS v. ATTORNEY-GENERAL, TRANSVAAL and ANOTHER 1989 (1) SA 821. That was a case in which the Appellate Division of the Supreme Court of South Africa was urged to exercise its inherent jurisdiction to regulate its proceedings by way of carrying out a reappraisal of the convictions of the appellants in the light of further evidence which tended to show that the trial court was the victim of fraud. Rabbie, Acting Chief Justice, who delivered the judgment of the court stated at page 334, letter E. the following :

> " The cases referred to immediately above would seem to show, in my opinion that it is the settled view of this court that its jurisdiction in criminal matters is determined by statute, i.e. the Criminal Procedure Act and such other relevant statutory provisions as there may be."

Later at pages 838 letter J and 839, letters A-C the learned Acting Chief Justice had the following to say –

> "Records of this court relating to the matter reveal the following. The Chief Justice referred the petition for leave to appeal to a member of this Division (see section 316(7) of the Criminal Procedure Act 51 of 1977, as worded at that time) who, after considering it, refused leave to appeal. Sikweyiya was so notified. About ten days later the same judge cancelled his refusal of leave and granted leave. Sikweyiya was then notified that leave had been granted. There was no judgment by this court on the matter. The decision of the judge when he refused leave was, in terms of section 316(9) of the Criminal Procedure Act 51 of 1977, 'final', and the granting of leave thereafter appears to have been contrary to the provisions of section 316 (9). It hardly needs saying that a court cannot have an inherent jurisdiction which would entitle it to act contrary to an express provision of an Act of Parliament. Sikweyiya's case cannot, therefore, be regarded as authority for the petitioners' submission (underlining mine)."

Mr. Geier urged that the foregoing dicta by Rabbie, A.C.J., were now *non sequitur* because of the coming into force in South Africa of Article 173 of the Final Republic of South Africa Constitution Act No. 108 of 1996. By that article the superior courts in South Africa have been vested with inherent jurisdiction. The Article provides -

> " The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

Back here at home Article 78(4) of the constitution has provisions which are virtually in *pari materia* with Article 173, supra. The article is couched in the following terms –

> "The Supreme Court and the High Court shall have 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."

In distancing himself from the dicta of Rabbie A.C.J., see supra, Mr. Geier submitted that the 'fair hearing' provisions in Art. 12 of the Constitution reinforce the need for the Supreme Court to exercise inherent jurisdiction in order to do justice. The pertinent provisions of Art. 12 are the following : -

> "(1)(a) 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 part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society;
>
> (b) A trial referred to in Sub-Article (a) hereof shall take place within a reasonable time, failing which the accused shall be released."

As regards the need for invoking the inherent jurisdiction granted by the constitution, I would concur with learned Acting Chief Justice Rabbie that a court cannot have inherent jurisdiction which would entitle it to act contrary to an express provision of an Act of Parliament. In other words the exercise of inherent jurisdiction is justified where there is a *lacuna* in the law. In this country there no *lacuna* on the issue under review: in fact there is an express provision, namely section 316(9)(a), which dictates that the refusal decision by three appellate judges sitting in chambers shall be final.

Article 140(1) of the constitution provides that all laws which were in force immediately before independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent court. Neither of these two contingencies has occurred in respect of section 316(9)(a) of the Criminal Procedure Act. Therefore it still stands as part of the law of independent Namibia. In the event this court has no option but to apply it in the present circumstances.

Reverting to the fair hearing issue, I am by no means persuaded that Dr. Strowitzki was denied a fair hearing when he was jointly tried with Böck before O'Linn, J. I am reinforced in this view having regard to the fact that the records pertaining to this case show that the matters which were alleged to have constituted bias on the part of O'Linn, J, were

exposed to be false in a subsequent trial conducted by Kotzé, J. Böck was convicted of having told falsehoods. In any event Böck was not only convicted by O'Linn, J, on all the 130 fraud counts, but he was also sent to prison for 11 years, contrary to the complaint by Dr. Strowitzki that Böck was promised by O'Linn, J, that he would not be sent to prison. In my view therefore any motion of bias on O'Linn, J's part was no more than fanciful rather than one borne in reasonableness.

In the final analysis, I am of the firm view that much as I commend Mr. Geier for his industry, resourcefulness and thorough research which enabled him to argue his case with great verve, Dr. Strowitzki was not properly before this court in these proceedings. I must stress that he came by way of petition addressed to the Chief Justice after the purported dismissal of his applications considered by Silungwe, J. The Chief Justice then instructed the Registrar to refer the matter to us via the Registrar's letter quoted at the very beginning of this judgment. I reiterate that the first of the two questions posed in the letter was seeking our answer to the question whether this court had jurisdiction "to consider a further application for leave to appeal and/or petition to grant leave to appeal after refusal of an application by the High Court and dismissal of the petition to the Chief Justice even if the new application and petition are launched in respect of new or purported new evidence."

I have exhaustively, I believe, pondered over this question and the overwhelming conclusion I have arrived at is that this court does not, in the circumstances of this case, have jurisdiction to entertain the matter. In the event, the second question posed by the letter is irrelevant. In passing, however, I would, once again, remind Dr. Strowitzki that if he still feels strongly that he has been paid short shrift in his search for justice, he may avail himself of the provisions of section 327 of the Criminal Procedure Act the effect of which is to seek the exercise of the presidential prerogative of mercy in his favour.

As for the present case it is struck off the role on the ground that this court lacks jurisdiction to entertain it. I order accordingly.

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CHOMBA, A.J.A.

I agree

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MTAMBANENGWE, A.C.J.

I agree

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TEEK, A.J.A.

COUNSEL FOR THE APPLICANT :		ADVOCATE H. GEIER
	(*AMICUS CURIAE*)	
COUNSEL FOR THE STATE	:	ADVOCATE D.F. SMALL
	(PROSECUTOR-GENERAL'S OFFICE)	