REPORTABLE

CASE SCA 3/2009

SUPREME COURT OF NAMIBIA

In the matter between

ALEX MABUKU KAMWI **APPLICANT**

and

LAW SOCIETY OF NAMIBIA **RESPONDENT**

CORAM: Maritz JA, Langa AJA *et* O'Regan AJA

Heard on: 13/10/2010

Delivered on: 01/12/2010

APPEAL JUDGMENT

O'REGAN AJA:

[1] The applicant, Mr A M Kamwi, approaches this court in terms of Article 81 of the Constitution and asks it to "reverse" a decision of this Court handed down on 20 October 2009.[1] Article 81 of the Constitution under the title "Binding Nature of the Decisions of the Supreme Court" provides that:

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

[1] *Ex parte Kamwi; In re Kamwi v Law Society of Namibia,* SA 21/2008 dated 20 October 2009 [2009] NASC 13 (per Mtambanengwe JA, Shivute CJ and Strydom AJA concurring).

[2] The decision that Mr Kamwi seeks to have reversed was a decision in which two appeals brought by Mr Kamwi against judgments of the High Court were dismissed. The first of the High Court judgments concerned, amongst other things, an *ex parte* application by Mr Kamwi for a declaration that he is authorized to practice as a "paralegal professional" and a *mandamus* requiring the Ministry of Justice to amend the relevant law and rules to provide for paralegal professionals. The second of the High Court judgments concerned, amongst other things, an order obtained by the Law Society of Namibia interdicting Mr Kamwi and certain others from practicing, or holding themselves out to be, legal practitioners.

[3] As stated above, this Court dismissed both appeals. In his substituted notice of motion,[2] the applicant sought to "review" the judgment dismissing the appeals on several grounds including that the judgment was made *per incuriam*; that it contained some irregularities; that it was "outdated"; and that it gave a narrow reading to Article 21(1)(j) and Article 21(2) of the Constitution.

[4] At the hearing of this application, under questioning from the Court, the applicant moved an amendment to his notice of motion seeking an order that the Court "reverse" its previous judgment, thus substituting the word "reverse" for "review" in the notice of motion. This amendment was not opposed by the Law Society and was granted.

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[2]It is not necessary to describe the contents of the original notice of motion lodged by the applicant. It was filed on 4 November 2009 but on 23 January 2010 the applicant filed an amended application substituting a new notice of motion for the notice of motion that had been filed on 4 November 2009.

Issue for decision

[5] At the commencement of the hearing on 13 October 2010, Maritz JA, presiding, proposed to the parties that the only issue that should be considered at the hearing was whether Article 81 of the Constitution did grant this Court jurisdiction to reverse one of its earlier decisions, in proceedings between the same parties, on the same facts and same issues. Should that question be answered negatively, Maritz JA proposed, the remainder of the applicant's arguments would fall away and require no further consideration by this Court. Should the question be answered in the affirmative, Maritz JA proposed, a further hearing would be convened possibly with an enlarged panel of judges at a future date to consider the remainder of the applicant's submissions. No objection was lodged by either of the parties and argument proceeded on this basis.

[6] The sole question for consideration in this judgment then is the proper interpretation of Article 81 and its application to the facts of this case.

Applicant's submissions

[7] The applicant submitted that, properly construed, Article 81 means that where an earlier decision of this Court constitutes a "nullity" then the Court is empowered in subsequent proceedings to reverse that decision. The applicant noted that section 17 of the Supreme Court Act, 15 of 1990, provides that "there shall be no appeal from, or review of, any judgment or order made by the Supreme Court". He argued, however, that this did not prevent the Supreme Court from reversing its own decision in a subsequent case. In making this submission, the applicant relied on two English cases. The first was *R v Medical Appeal Tribunal*

ex parte Gilmore, (1957) 1 QB 574 (CA) in which the Court had to consider a statutory provision[3] which provided that a decision of the Medical Appeal Tribunal would be "final". The Court of Appeal found that this statutory wording did not preclude the decision subsequently being challenged on legal grounds.

[8] The second case cited by the applicant was *Anisminic v Foreign Compensation Commission,* [1969] 1 All ER 208 (CA). Language with a similar effect to that considered in *Gilmore*'s case was contained in the Foreign Compensation Act, 1950. Section 4(4) of that Act provided that a determination of the Foreign Compensation Commission "shall not be called in question in any court of law". The House of Lords held that this provision did not protect a determination of the Commission that constituted a nullity.[4] The Court held that a determination of the Commission would constitute a nullity if it acted beyond its jurisdiction, if it acted in bad faith, or had failed to comply with the requirements of natural justice, or had not determined the question referred to it or taken into account considerations it should not have, or failed to take into account considerations it should have.[5]

[9] The applicant argued that the decision of the Supreme Court of 20 October 2009 constituted a nullity because, he argued, the decision had not properly evaluated his arguments, had not accorded sufficient weight to the applicant's constitutional rights, particularly in relation to its interpretation of sections 21(1)(a),

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[3] Section 36(3) of the *National Insurance (Industrial Injuries) Act*, 1946.
[4] At p 213 *per* Lord Reid.
[5] Id at 213 – 4 *per* Lord Reid.

(b), 21(2) and 22 of the Legal Practitioners Act, 15 of 1995, and it had contained some reasoning not proposed by the applicant.

Respondent's submissions

[10] The respondent submitted that the application was fundamentally flawed and based on an erroneous interpretation of Article 81 of the Constitution. According to the respondent, Article 81 establishes the constitutional basis for the doctrine of precedent in Namibia. In providing that the Supreme Court may "reverse" one of its own decisions, the respondent submitted, it meant that in a subsequent case, concerning different parties, a legal principle established by the Supreme Court in an earlier decision could be reversed if it was no longer legally tenable. Article 81 should not be interpreted, the respondent submitted, to permit what is in effect a further appeal by a litigant dissatisfied with a decision of the Supreme Court.

The proper interpretation of Article 81

[11] In *Schroeder and Another v Solomon and 48 Others*,[6] a decision drawn to the parties' attention during the hearing, this Court has recently considered the interpretation of Article 81. There the Court held that Article 81

> "… provides for the binding nature of the decisions of the Supreme Court on all other courts, and all persons in Namibia …. unless reversed by the Supreme Court itself …".[7]

[6]SCA 1/2008 handed down on 14 September 2010 (per Mainga JA, Chomba AJA and Mtambanengwe AJA concurring).
[7]Id at para 15.

[12] Thus the Court continued

> "Article 81 has the purpose of reaffirming the operation of precedent within the hierarchy of our court structure. It reaffirms the locality of this Court at the apex of the judicial authority, and the binding nature of all decisions on all other Courts and all persons…". [8]

[13] Article 81, the Court held, "does not create another forum for litigants to litigate beyond the decisions of this Court".[9] It is clear from the reasoning in *Schroeder* that Article 81 does not permit a litigant to seek a second "appeal". Properly construed, Article 81 is a provision that, amongst other things not directly relevant in these proceedings, regulates the application of the doctrine of precedent in Namibia.

[14] What of the applicant's argument that Article 81 permits this Court to "reverse" a decision of this Court that is legally incorrect? In the *Gilmore* case (see para 7 above), on which the applicant relied, the court held that despite the language of the statute stipulating that the decision of the tribunal was final, the statute did not prevent a court interfering with a decision of the tribunal where it was wrong in law. Roper LJ reasoned as follows:

> "…it would be deplorable if we were constrained to hold that the decision of a medical appeal tribunal, however wrong in law, and however obviously wrong, was immune from review by Her Majesty's courts. I cast no reflection whatever on tribunals such as that in the present case, and they do their work conscientiously and with efficiency. But in the nature of things these and similar inferior tribunals (and there are many of them nowadays) are bound to go wrong from time to time

[8] Id at para 19.
[9] Id at para 19.

> in matters of law. Their members consist in the main of people who have devoted their lives to activities far removed from the practice of the law; and neither by training nor experience can they be expected to have that knowledge of principles of construction which is so necessary for the proper understanding, and application of the various statutes and regulations which often come before them. Injustice may well result, and a sense of injustice is a grievous thing. I therefore think (and I have said as much before) that it is not in the public interest that inferior tribunals should be ultimate arbiters on questions of law."[10]

[15] Fundamental to the reasoning in the case, therefore, was the fact that the decision under challenge had been taken by an "inferior tribunal" that could not be expected to reach a correct decision on the law in all cases. The case differs from the one before this court entirely. This case concerns a challenge to a judgment of the highest court in the land. The considerations that informed the interpretation of the legislation at issue in the English case have no application here and the applicant's reliance on the case for this purpose does not advance his argument.

[16] The decision of this Court in *Schroeder* makes clear that section 81 cannot be interpreted to permit a dissatisfied litigant to have a decision of this court reversed on the basis that the litigant does not accept the decision made by the Court. To interpret Article 81 as the applicant proposes would lead to the absurd result that a litigant dissatisfied with a judgment of this Court could, under the guise of seeking its reversal in terms of Article 81, effectively appeal the judgment of this Court to this Court in relation to the same facts or issues already considered by the Court. Article 81 cannot be interpreted to permit that effect.

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[10] At pp 586 – 587.

[17] I turn now to consider the applicant's argument that Article 81 permits this Court to reverse a decision it has previously made that is a nullity. It is not clear that Article 81 is directed at this end at all.

[18] However, it is not necessary to decide whether Article 81 can permit this Court to reverse a judgment that is a nullity because the applicant has not established that the decision of 20 October 2009 is a nullity. As mentioned above, the applicant has relied on two English cases (*R v Medical Appeal Tribunal ex parte Gilmore,* (1957) 1 QB 574 (CA) and *Anisminic v Foreign Compensation Commission,* [1969] 1 All ER 208 (CA)). Both these cases concern decisions made by institutions that are not courts: in the one case, a medical appeal tribunal and in the other a compensation commission. The statutes establishing the institutions provided that their decisions were final, but in both cases the English courts held that the statutes did not intend to oust the power of the courts to set aside decisions of those institutions where the decisions constituted a nullity.

[19] In *Anisminic,* the Court held that a determination by the Compensation Commission would constitute a nullity if the Commission had acted beyond its jurisdiction or in bad faith, or had failed to comply with the requirements of natural justice, or had not determined the question referred to it or had taken into account considerations it should not have, or failed to take into account considerations it should have.[11] The applicant does not suggest, nor could he have, that in deciding the appeals on 20 October 2009, this Court acted beyond its jurisdiction or in bad faith or without compliance with the requirements of natural justice.

[11] Id at 213 – 4 *per* Lord Reid.

[20] The applicant argues that the decision by this Court on 20 October 2009 should be held to be a nullity on the ground that the Court took the decision without proper evaluation of his arguments, and without according sufficient weight to his constitutional rights, particularly in relation to its interpretation of sections 21(1)(a), (b), 21(2) and 22 of the Legal Practitioners Act, 15 of 1995, and that the judgment of the Court contained some reasoning not proposed by the applicant.

[21] These grounds, even if established by the applicant, which they have not been, would not render the judgment of this Court on 20 October 2009 a nullity. They are the kind of grounds ordinarily relied upon on appeal where a litigant seeks to persuade a higher court to overturn a judgment of a lower court on the grounds that it was wrong in law. But no appeal lies against a judgment of this Court to this Court. The grounds are therefore misconceived, as is the applicant's application, which must accordingly be dismissed.

[22] The application is unsuccessful and it is appropriate therefore that the applicant pays the cost of opposition incurred by the respondent.

Order

1. The application is dismissed.
2. The applicant is ordered to pay the costs incurred by the respondent in opposing this application.

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O'REGAN, A J A

I agree.

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MARITZ, J A

I agree.

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LANGA, A J A

COUNSEL ON BEHALF OF THE APPELLANT:	**In Person**
COUNSEL ON BEHALF OF THE RESPONDENTS:	**Mr. G. Dicks**
Instructed by:	**Dr Weder, Kauta & Hoveka Inc**