REPORTABLE

CASE NO.:SA36/2011

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

CARGO DYNAMICS PHARMACEUTICALS (PTY) LTD **Appellan**t

and

MINISTER OF HEALTH AND SOCIAL SERVICES **First Respondent**

GOVERNMENT OF THE REPUBLIC OF NAMIBIA **Second Respondent**

Coram:	MARITZ JA, MAINGA JA andO'REGAN AJA
Heard on:	2 November 2011
Delivered on:	12 September 2012

APPEAL JUDGMENT

O'REGAN AJA(MARITZ JA and MAINGA JAconcurring)

[1] This appeal raises the question of the approach that should be taken to urgent applications by the High Court. Cargo Dynamics Pharmaceuticals (Pty) Ltd launched an urgent application in March 2011 seeking a rule nisi that the respondents (the Minister of Health and Social Services and the Government of Namibia) be required to show cause why they should not implement an agreement that the appellant alleged that they had concluded with the appellant in terms of

which the appellant would be appointed as an agent to procure and supply certain pharmaceuticals from Cuba. The application also sought a temporary interdict restraining the respondents both from procuring the pharmaceuticals themselves and from appointing any other intermediary to do so.

[2] The respondents filed answering affidavits on 25 March 2011 and the matter was enrolled for argument on 30 March 2011. On that day, Unengu AJ gave an *ex tempore* judgment dismissing the application with costs. On 20 April 2011, after being requested to do so by the appellant, the judge provided further reasons. The appellant now approaches this Court on appeal.

Facts

[3] The appellant is a company registered in Namibia. On 7 April 2010, itand three other companies were approached by the Ministry of Health and Social Services asking if it 'would be interested to make a proposalas to how you could assist the Ministry . . . to procure, transport and supply clinical and pharmaceuticalitems from the Republic of Cuba'. The company responded positively and on 21 April 2010, it received a letter from the Permanent Secretary of the Ministry of Health and Social Services stating that 'your proposal for the services described in the caption has been successful. I am therefore inviting you to contact my office to discuss the schedule of the negotiation process'. The appellant did so and entered into negotiations with the Ministry towards the conclusion of a contract.

[4] Although a draft agreement, including a schedule of prices, was finally prepared by July 2010, the agreement was never signed. Some months later in October 2010, having heard nothing further from the Ministry, the appellant instructed its legal representatives to write to the Ministry.A response was received from the Ministry that stated‘due to changed circumstances, our client is unable to enter into an agreement with your client . . . ’. A request for particulars elicited the following reply on 9 November 2010 – ‘after further diplomatic engagement on the matter with the Cuban Government it became clear to the Namibian Government that Cuban authorities preferred to deal with the Government of Namibia as opposed to private organisations’.

High Court proceedings

[5] The appellant thus launched urgent proceedings in the High Court on 8 March 2011 seeking the following relief:

> ‘1. That the court deals with the matter as one of semi-urgency pursuant to the provisions of rule 6(12).
>
> 2. That a rule nisi be issued calling on the respondents to show cause on a date to be determined by the above Honourable Court why the following relief should not be granted.
>
> 2.1 Ordering the respondents to implement and abide by the agreement entered into between the applicant and first respondent in terms whereof applicant is entitled to procure and supply pharmaceuticals and medical equipment respondents agreed to obtain from Cuba for a period of 24 months from the date of this order;
>
> 2.2 ordering the respondents to pay costs of this application jointly and severally, the one paying the other to be excused. ..

3. Interdicting and prohibiting the respondents either themselves or through any intermediary from importing or arranging importation from Cuba any medicines or pharmaceuticals products for use by the respondents in Namibia pending the return date of the rule nisi;

4. Granting the applicant such further and/or alternative relief as the Court deems fit.'

Opposing affidavits were filed asserting that the appellant was not entitled to relief as no contractual relationship existed between the parties.

[6] The appellant accepted that the written contract was never signed, but asserted that a contractual arrangement had nevertheless been agreed between it and the Ministry.In support of this assertion, the appellant pointed to several documents. First, the letter dated 21 April 2010 (referred to above) sent to it by the Permanent Secretary in the Ministry to the effect that'your proposal for the services . . . have been successful' and inviting it 'to contact my office to discuss the schedule of the negotiation process'. Secondly, a letter dated 14 June 2010 sent by the Permanent Secretary of the Ministry to the Cuban ambassador which stated that the Ministry had 'engaged the services' of the appellant to be 'the procurement and forwarding Agent for the Ministry'. Thirdly, a certificate of authentication issued by the Ministry of Foreign Affairs authenticating the letter of 14 June, as well as corporate documents of the appellant. Fourthly, an email message from a Ms Perez of a Cuban supplier indicating the supplier's readiness to supply pharmaceuticals to the appellant.

[7] The matter was argued in the High Court on 30 March 2011 when the High Court ordered that the application be dismissed with costs. Brief *ex tempore* reasons were given in support of the order. Those reasons have been transcribed and form part of the record in this appeal. Then on 17 April 2011, the appellant wrote to the Registrar of the High Court requesting that reasons be furnished for the dismissal of the application.

[8] On 20 April2011 in response to this request, the High Court provided further reasons for the order it had made on 30 March 2011. Those written reasons conclude by stating that the application is dismissed 'on the ground that the requirements of rule 6(12)*(b)* have not been complied with. The additional reasons, too, form part of the record in the appeal. A perusal of both the *ex tempore* and written reasons discloses that they are not identical although both sets of reasons are devoted in the main to a consideration of the merits of the matter and address the issue of urgency only briefly.

[9] Theappellant noted an appeal against the judgment on 13May 2011. Rule 5(1) of the rules of this Court provides that a notice of appeal shall be lodged within 21 days of the judgment or order against which the appeal is noted. If the date of the judgment or order appealed against is taken as 30 March, the notice of appeal was lodged seven days late. The appellant has lodged an application for condonation for the late filing of the notice of appeal, which the respondent opposes.

Issues for determination

[10] Four issues arise for decision in this case:

(a) What is the status of the second set of reasons furnished by the High Court on 20 April 2011?

(b) Should the application for condonation of the late filing of the appeal be granted?

(c) Is the order made by the High Court appealable at all?

(d) Whether, if the answer to the previous two questions is in the affirmative, the appeal should be upheld?

A further issue was raised by the respondents relating to the authority of the appellant's attorneys to act on its behalf. It is not necessary to deal with that argument. Each of the four issues set out above will be dealt with separately.

Status of reasons for order given by High Court on 20 April 2010

[11] The first question concerns the status of the further reasons issued by the High Court on 20 April. These reasons were furnished after the appellant had written to the Registrar requesting the reasons for the order despite the fact that Unengu AJ had given oral reasons in court on 30 March.

[12] The general principle is that once a court has duly pronounced a final judgment or order, it may not correct, alter or supplement it, as it is *functus officio.*[1]There are four main exceptions to this rule: the judgment may be supplemented in respect of ancillary matters such as costs which the Court overlooked;[2]it may be clarified if its meaning is obscure or ambiguous provided the clarification does not vary the 'sense and substance' of the order;[3]a court may correct a clerical, arithmetic or other error to give effect to its true intention;[4] and the Court may amend its costs order in specific circumstances.[5]

[13] In *S v Wells*,[6]the South African Appellate Division considered the extent of a court's jurisdiction to revise a judgment given orally. In that case, the Court had before it a typed transcript of the *ex tempore* judgment pronounced by the court below as well as a copy of the revised judgment released some weeks later by the same court. The Court noted that there were different approaches in the common law to the question of the revision of judgments. After outlining these differences, it held that it preferred the

> '. . . more enlightened approach [that] permits a judicial officer to change, amend or supplement his pronounced judgment, provided that the sense or substance of his judgment is not affected thereby . . .'.[7]

[1] See the leading South African case, *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 306 F-G.

[2]Id at para 306H.

[3] Id. At para 307A. See also *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 176, 186-7; *Marks v Kotze* 1946 AD 29; *S v Wells* 1990 (1) SA 816 (A) at 819–820; *Ex parte Women's Legal Centre v Greater Germiston TLC* 2001 (4) SA 1288 (CC) at paras 4–5.

[4]*Firestone,* cited above n1, at para 307 C –F; *Wessels& Co v De Beer* 1919 AD 172; *Randfontein Estates Ltd v Robinson* 1921 AD 515 at 520.

[5]*Firestone*, cited above n1, at para 307G–H.

[6] Cited above n3 at 819G-820G.

[7] Id 829 C. See also *Ex parte Women's Legal Centre v Greater Germiston TLC*, cited above n 3, at fn 3 of the judgment where the Court held that the views expressed in *Wells* 'seems to be in general conformity' with the views expressed by Trollip JA in *Firestone*, above n 1,at 306 F–G.

[14] The Court in *Wells* then examined the unrevised and revised judgments to determine whether the revised judgment dealt with basically the same *rationesdecidendii* as the unrevised judgment 'without changing or violating the tenor of the unrevised judgment'.[8]It concluded that the revised judgment did not change the sense or substance of the unrevised judgment and therefore dealt with the revised judgment as the judgment of the court below.

[15] Following this approach, the question in this case is whether the reasons issued on 20 April deal with basically the same reasons as the *ex tempore* judgment delivered on 30 March, and do not change or violate the tenor of that judgment. If the judgment of 20 April does not change the sense or substance of the earlier judgment, then it may be considered a revised version of the judgment.

[16] An examination of the two judgments shows that there are similarities between them, but there is at least one major difference between them. In the *ex tempore* judgment, the Court appears to have assumed that the appellant and the respondents had entered into a contract and it concluded that the non-performance of that contract by the respondents had arisen because of a supervening impossibility of performance for which the respondents were not responsible. In the reasons given on 20 April, the Court took the view that the respondents were correct in asserting that the appellant was 'relying on a contract which does not exist'. The Court did go on to set out reasoning similar to that in the *ex tempore* judgment on the supervening impossibility of performance, perhaps in the alternative to its conclusion on the non-existence of the contract.

[8] *S v Wells*, cited above n 3 at 820H.

[17] It cannot therefore be said that the reasons given on 20 April constitute merely a supplementation of the *ex tempore* judgment of 3 March that does not affect the sense or substance of that judgment. Accordingly, the reasons of 20 April do not fall within the acknowledged exceptions to the rule set out in *Firestone* that a court may not correct, alter or supplement a final judgment that it has pronounced. For the purposes of this appeal, therefore, the judgment of the High Court are the reasons given extemporaneously on 30 March and transcribed as part of the record of the High Court proceedings.

Condonation for the late filing of the appeal

[18] The appeal was noted seven days late.The appellant stated that the appeal was noted late because it was waiting for the reasons for the order to be furnished by the judge. The respondents, belatedly, lodged an answering affidavit opposing the application for condonation. The respondents did not assert prejudice, but opposed the application on the ground that sufficient cause had not been identified for the grant of condonation.

[19] In deciding whether to grant condonation for the late filing of the appeal, this Court will consider first the reason given for the delay, secondly, any prejudice caused by the delay and thirdly the prospects of success.

[20] Turning to the first issue, the appellant asserts that the reason for the late lodging of the notice of appeal was that it was waiting for the reasons from the

High Court. However, as mentioned above, the High Court furnished *ex tempore* reasons on 30 March when it dismissed the application. It is not clear why the appellant sought further reasons by its letter dated 17 April. It is clear from what has been discussed above that once the High Court had given a judgment on 30 March, it was *functus officio* and therefore not able to furnish fresh and different reasons, upon request by the appellant. So the appellant erred when it approached the registrar to ask for further reasons. In any event, the High Court judge responded promptly and further reasons were furnished within three days.

[21] The reason given by the appellant for the delay in lodging the appeal does not therefore hold weight. First, the appellant was provided with reasons by the High Court judge on 30 March. Secondly, once the appellant decided mistakenly to ask for written reasons on 17 April, the High Court judge provided the written reasons within three days. Accordingly, the reason provided by the appellant for the late lodging of the appeal notice is not persuasive.

[22] As to the question of prejudice, it is correct that the respondent does not assert that it has been prejudiced by this delay. Nor has this Court been prejudiced by the delay. Accordingly, the question of prejudice does not need further consideration.

[23] The third issue that requires consideration is the question of prospects of success; this is a matter to which this judgment now turns. An assessment of the prospects of success requires a consideration of the remaining two issues in the appeal: whether the High Court judgment is appealable; and if it is appealable,

whether the appeal should succeed. After these two issues have been considered, it will be possible to assess the appellant's prospects and finally determine the question whether condonation for late filing of the appeal should be granted.

Was the High Court judgment appealable?

[24] The order issued on 30 March reads: '. . . the application is hereby dismissed with costs'. This sentence, however, is preceded by a sentence which, after referring to rule 6(12), states that:

> 'I do not think it is really necessary for this Court to condone the non-compliance of the rules of this Court . . . to allow the Applicant to come on an urgent basis, to deal with this matter. So on that basis alone I reject the application with costs.'

[25] In an urgent application, ajudge will ordinarily decide the question of urgency on the assumed basis that the applicant has a case on the merits before deciding the merits. If the court decides that an applicant has not made out a case for the application to be heard as a matter of urgency even assuming that the applicant has a case on the merits, the application will ordinarily be struck from the roll.[9] The effect of striking the matter from the roll does not dispose of the merits of the application.[10]The applicant is entitled to re-enroll the application either in the ordinary course not by way of urgency, or again as a matter of urgency if circumstances change. Accordingly, a decision that a matter does not disclose

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[9] See *Shetu Trading CC v Chair, Tender Board of Namibia and Others* (SA 26/2011) as yet unreported judgment of this Court dated 4 November 2011 at paras 17 and 34.

[10] Id. Especially at para 34.

urgency is not ordinarily appealable,[11] whereas a decision that an application has been dismissed in its entirety is appealable.

[26] In this case, the High Court order of 30 March states that the application has been dismissed. Such an order would ordinarily be appealable as long as it is clear from the reasons that the High Court order did deal with the merits. A perusal of the *ex tempore* reasons discloses that theydeal in the main with the merits of the application though in the final paragraph the question of urgency is addressed.

[27] This case is therefore unlike *Shetu Trading*,[12] where the court had also made an order dismissing the application. In that case, there was no consideration of the merits of the application, only a consideration of the issues of urgency. This Court decided that, properly construed, the effect of the High Court order, given the reasons furnished by the High Court, was that the application had not in fact been dismissed, but merely struck from the roll. The result was that the High Court was not precluded from a reconsideration of the merits of the matter (and as it happened the matter had come again before the High Court before the matter was heard by the Supreme Court). This Court thus concluded that the order was not appealable and struck the appeal from the roll.

[28] In this case, however, unlike in *Shetu Trading,* the High Court judge did deal with the merits of the application at some length in his reasons, as well as briefly considering the issue of urgency. It cannot be said therefore that, properly

[11]Id at para 27. See also *Aussenkehr Farms (Pty) Ltd and Another v Minister of Mines and Energy and Another* 2005 NR 21 (SC) at 33 and *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd and Others* 2011 (2) NR 269 (SC) at para 41.
[12] See above n 9 at para 42.

construed, the order made by the High Court related to urgency only given the consideration of the merits. In the circumstances, it is clear that the order is appealable.

The merits of the appeal

[29] The next question that arises for consideration is the question whether the appeal has prospects of success. It is clear that the appellant can only succeed in the relief it seeks if it can establish that it had entered into a contract with the Ministry. The appellant's case does establish that the Ministry had identified it as a suitable agent to procure pharmaceutical products from Cuba, but it does not establish that a contract had been entered into between it and the Ministry. There are several key facts that make this plain.

[30] The first of these is that the Ministry prepared a draft contract that was never signed. Thatdraft contract contains, as the appellant acknowledges, the terms of the proposed agreement between the Ministry and the appellant. Clauses 19 and 21 of the draft agreement makes it plain that the terms of the written agreement embody the entire agreement between the parties, and that the agreement will only come into force on signature. These provisions in the draft contract are powerful indications of the fact that no contractual arrangement was concluded between the appellant and the Ministry.

[31] Secondly, it is clear that the Ministry intended at all times first to enter into a formal written agreement once it had identified a suitable agent and that the identification of the agent did not of itself result in contractual obligations. This

becomes plain if one examines the procedure followed by the Ministry. First, the Ministry wrote a letter to the appellant and three other companies on 7 April 2010 seeking an expression of interest. This letter wasfollowed by the Ministry's preliminary decision that the appellant would be suitable as an agent and the appellant was notified of this on 21 April 2010. Crucial, however, is the statement in the letter of 21 April that negotiations would then commence with the aim of finalisingthe terms of the agreement that would govern the relationship between the Ministry and the appellant. It is plain from this paragraph in the letter of 21 April that the Ministry did not consider that the identification of the appellant had itself resulted in any contractual obligations. The precise terms and conditions of the contract were yet to be negotiated. Appellant's founding affidavit makes clear that those negotiations, which covered key aspects of the agreement, particularly the price, continued till July 2010.

[32] In support of its argument that a contract had been concluded, the appellant points to the letter dated 14 June 2010 sent by the Permanent Secretary of the Ministry to the Cuban ambassador which stated that the Ministry had 'engaged the services' of the appellant to be 'the procurement and forwarding Agent for the Ministry'. On appellant's own version, however, as at 14 June, the negotiations regarding the contract terms were not yet complete. Accordingly, the letter of 14 June 2010which was addressed not to the appellant but the Cuban ambassador, cannot be read as implying that a contract had been concluded between the appellant and the Ministry, but only that the Ministry had identified a suitable company to act as agent.

[33] Thirdly, once the terms of the agreement were finalized, the draft contract had to go to the Attorney-General for his input. The appellant concedes this. The terms of the agreement remained provisional on 15 July when the draft was sent to the Attorney-General. As far as the Ministry was concerned, the terms of agreement had to be provisional and subject to variation depending on the advice of the Attorney-General.

[34] These facts all point to the conclusion that no binding contract had been entered into by the parties. The Ministry had identified the appellant as a suitable agent and had commenced negotiations to settle the terms of their contractual arrangement. Those negotiations did not result in a signed contract.

[35] Accordingly, the appellant has on his own papers failed to make out a case that the Ministry had entered into a contract with it to appoint it as an agent. Given this conclusion, there are no prospects of success for the appellant on appeal.

[36] It is time to return to the preliminary question whether the appellant's application for late filing of its notice of appeal should be granted. Given that the appellant has not provided a satisfactory explanation for the late lodging of the appeal notice, and that the appellant has no prospects of success on appeal, it is not appropriate to grant the application for condonation.

[37] In the circumstances, the appropriate order is that the application for condonation of the late lodging of the appeal is refused and the appeal is struck from the roll.

Costs

[38] Even though the appeal is to be struck from the roll, the respondents have incurred costs in opposing the appeal. It is appropriate, therefore, to order the appellant to pay the costs of the respondents, such costs to include the costs of one instructed and one instructing counsel.

Order

[39] The following order is made:

1. The application for late lodging of the notice of appeal is refused.
2. The appeal is struck from the roll.
3. The appellant is ordered to pay the costs of the respondents, such costs to include the costs of one instructed and one instructing counsel.

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O'REGAN AJA

_____
MARITZ JA

_____
MAINGA JA

APPEARANCES

APPELLANT:	G B Coleman
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