



**REPORTABLE**

CASE NO: SCR 2 / 2016

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**OSBERT MWENYI LIKANYI**

**Applicant**

and

**THE STATE**

**Respondent**

**Coram:** SHIVUTE CJ, DAMASEB DCJ, SMUTS AJ, MOKGORO AJA et

FRANK AJA

**Heard:** 12 July 2017

**Delivered:** 7 August 2017

**Summary:** The applicant initially approached the Supreme Court to 'review' its prior decision dismissing the High Court's decision to uphold a special plea of lack of jurisdiction. He subsequently amended the relief to rely on Art. 81 which empowers the Supreme Court to reverse its own prior decision. The applicant formed part of a group of fugitives who were removed from Botswana by the Namibian authorities to stand trial on, amongst others, charges of high treason. At his trial he raised a plea of lack of jurisdiction on the part of the Namibian courts in terms of s 106 of the Criminal

Procedure Act 51 of 1977. The High Court upheld his plea but on appeal by the State this decision was reversed by the Supreme Court in *S v Mushwena and Others* 2004 NR 276 (SC). A differently constituted Supreme Court, however, upheld a special plea of jurisdiction raised by Mr Boster Mubuyaeta in *S v Munuma and Others* 2016 (4) NR 954 (SC) based on the same facts relied on by the applicant, and ordered a permanent stay of prosecution. The applicant sought relief from the Supreme Court relying on the outcome of the *Munuma*-appeal arguing that he was in a position no different to Mr Mubuyaeta whose special plea was upheld by the Supreme Court holding that his removal from Botswana by the Namibian authorities constituted an act of international delinquency denuding our courts jurisdiction. The applicant premised his relief on Art.10 of the Namibian constitution which guarantees equality before the law and on Art. 81 which empowers the Supreme Court to reverse its own decisions.

The court delivered three judgments: the main judgment by Damaseb DCJ holding that the court could reverse the result of an earlier decision by the court pursuant to Art 81 of the constitution and in its inherent jurisdiction could determine a procedure for this purpose and granted an order reversing the previous decision and indemnifying the applicant against prosecution on the charges he faced. A concurring judgment by the Chief Justice expanding on the unlawfulness of the activities of the Namibian police and the suitability of the relief and a dissenting judgment by Frank AJA disagreeing that the actions by the Namibian Police were unlawful and that the relief was appropriate.

Court *held* (unanimously) that the review relief under s 16 of the Supreme Court's Act, 15 of 1990 is misplaced as it only confers a jurisdiction to review decisions of the High Court, a lower tribunal or administrative body and not the Supreme Court's decisions. In discussing Art. 81, the court *held*, inspired by comparable international jurisprudence,

that the Supreme Court has jurisdiction to revisit a prior decision and to reverse it in exceptional circumstances.

Court further *held* that it is against the principle of legality for the Supreme Court to be powerless to put right a manifest injustice caused to an individual; that such approach is unsustainable under Namibia's constitution with a justiciable Bill of Rights; that the exception to *res judicata* will not be sought as of right but upon the Chief justice being satisfied after representation that there are good reasons to invoke the court's jurisdiction under Art 81; emphasising that a litigant may not as of right come to the Supreme Court to seek relief under the Article.

On the facts of the case, the court *held* that Mr Likanyi's case presented exceptional circumstances warranting the relaxation of the *res judicata* rule.

Court further *held* (Frank AJA dissenting) that the court in the *Mushwena*-appeal failed to give full effect to the peculiar factual circumstances of the applicant resulting in an indefensible injustice to him and that it was competent to reverse the prior decision concerning the applicant. Court held that the State failed to prove beyond reasonable doubt that the High Court had jurisdiction to try Mr Likanyi. Permanent stay of prosecution and immediate release of Mr Likanyi ordered.

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## APPEAL JUDGMENT

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### SHIVUTE CJ:

[1] I have had the privilege of reading in draft the erudite judgments prepared by the Deputy Chief Justice (the main judgment) and by my colleague Frank AJA (the dissenting judgment).

[2] As is apparent from the background given in the main judgment, the applicant, Mr Osbert Mwenyi Likanyi, has approached this court with an application (as amended) for this court to reverse its decision pursuant to Art 81 of the Namibian Constitution in *S v Mushwena and others* 2004 NR 276 (SC) (*Mushwena*). The facts of the matter are ably set out in the main judgment and it is not necessary to repeat them here. I note that the Deputy Chief Justice, for the reasons set out in the main judgment, proposes an order in terms of which (a) the judgment and order of the Supreme Court in *Mushwena* upholding the State's appeal against the order of the High Court in a special plea of lack of jurisdiction in respect of Mr Likanyi is reversed and set aside; (b) Mr Likanyi's conviction and sentence are set aside and he is released forthwith, and (c) permanently staying Mr Likanyi's prosecution.

[3] I note furthermore that while not endorsing the reasoning and conclusion of the main judgment, Frank AJA 'reluctantly' agrees with the order proposed in that judgment. I find the lucid exposition of legal principles and their application to the facts in the main judgment to be compelling. I entirely concur with its reasoning and outcome.

[4] While agreeing with the conclusion reached in the dissenting judgment concerning the power of this court under Art 81 of the Namibian Constitution to revisit a previous decision, I find myself unable to agree with the dissenting judgment's analysis of *S v Munuma* and others 2016 (4) NR 954 (SC) (*Munuma*) and *Mushwena* especially concerning the nature of the remedy granted by this court in *Munuma* as set out in the main judgment in this appeal. In the paragraphs that follow, I will give in brief, reasons why I am unable to agree with the dissenting judgment's reasoning on those issues.

[5] What the dissenting judgment appears to overlook is that it was not necessary for this court in *Munuma* to revisit the statement of principle by Mtambanengwe AJA in *Mushwena*. Such statement was in fact embraced by this court in *Munuma* in para 15, but was unfortunately not correctly applied to the factual circumstances of Mr Likanyi in *Mushwena*, as is spelt out in the main judgment. To that very limited extent and on the facts pertaining to Mr Likanyi, this court in *Munuma* overruled the factual finding of the majority in *Mushwena*.

[6] As noted in the preceding paragraph, the approach in *Munuma* did not contradict the exposition of principles set out by Mtambanengwe AJA in *Mushwena*. It was not necessary to do so because the majority had misapplied those principles to the facts pertaining to the three persons who were arrested in Botswana by members of the Namibian Police Force with the assistance of the Botswana Police. As the main judgment explains, Mr Likanyi, Mr Boster Mubuyaeta Samuele and one other person who has since deceased constituted that group.

[7] Once it was found in *Munuma* that the Namibian authorities acted unlawfully in removing Mr Samuele from Botswana to place him within the jurisdiction of the courts of Namibia, the State failed to establish that the High Court had jurisdiction to try him. Mr Samuele had appealed against the dismissal of his special plea of lack of jurisdiction. That order was set aside and a permanent stay of prosecution was granted in respect of the offences preferred against him in the indictment. An order to this effect was necessary to prevent his possible re-arrest on the same charges upon his release from custody.

[8] Article 1 of the Namibian Constitution provides that the Republic of Namibia is established as a sovereign, secular, democratic and unitary state founded upon the principles of democracy, the rule of law and justice for all. The rule of law requires that even people accused of committing heinous crimes must be dealt with according to law. Where a person is brought before court in violation of international law, the rule of law – a foundational principle of the Constitution – requires that a court critically examine the conduct of the law enforcement agency in securing the presence of the accused within the territorial jurisdiction of the court. This was also the view of Strydom ACJ in *Mushwena* who at 286I, referred to the ringing terms in which this principle was articulated by Lord Bridge in *Bennet v HM Advocate* 1995 SLT 510:

'Whatever differences there may be between the legal systems of South Africa, the United States, New Zealand and this country, many of the basic principles to which they seek to give effect stem from common roots. There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial

jurisdiction of the court, I think that respect for the rule of law demands that the court take cognisance of that circumstance. To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view. Having then taken cognisance of the lawlessness it would again appear to me to be wholly inadequate response for the court to hold that the only remedy lies in civil proceedings at the suit of the defendant or in disciplinary or criminal proceedings against the individual officers of the law enforcement agency who were concerned in the illegal action taken. Since the prosecution could never have been brought if the defendant had not been illegally abducted, the whole proceeding is tainted. If a resident in another country is properly extradited here, the time when the prosecution commences is the time when the authorities here set the extradition process in motion. By parity of reasoning, if the authorities, instead of proceeding by way of extradition, have resorted to abduction, that is the effective commencement of the prosecution process and is the illegal foundation on which it rests.'

[9] In this matter the order not only includes a permanent stay of prosecution along similar lines to the order given in *Munuma*, but it is preceded by the setting aside of Mr Likanyi's conviction and sentence. The latter was also the relief granted in *S v Ebrahim* 1991 (2) SA 553 (A). Although a stay may not be strictly necessary in view of the provisions of Art 12(2) of the Constitution (prohibiting a trial, conviction or punishment again for a criminal offence for which a person had been convicted or acquitted according to law), I concur with the order directing a stay as it confirms the application of the principle embodied in Art 12(2) and serves to stress the supremacy of the Constitution and the rule of law.

[10] The importance of the State adhering to the rule of law and values enshrined in our Constitution cannot be overemphasized. This principle was cogently set out by the South African Constitutional Court in its unanimous judgment in *Mohamed and another v President of the Republic of South Africa and others* 2001 (3) SA 893 (CC) at para 68

with reference to the timelessly applicable dictum of Justice Brandeis in *Olmstead et al v United States* 277 U.S. 438 (1928) at 485:

'In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously . . . . Government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . . If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy.

[11] Having cited the above passage in *Olmstead et al* case, the Constitutional Court proceeded to make the following equally pertinent remarks that resonate with our recent historical past:

'The warning was given in a distant era but remains as cogent as ever. Indeed, for us in this country, it has a particular relevance: we saw in the past what happens when the State bends the law to its own ends and now, in the new era of constitutionality, we may be tempted to use questionable measures in the war against crime. The lesson becomes particularly important when dealing with those who aim to destroy the system of government through law by means of organised violence. The legitimacy, of the constitutional order is undermined rather than reinforced when the State acts unlawfully. . . . '

[12] The suggestion in the dissenting judgment (if I understand it correctly) that after the court had found in *Munuma* that Mr Samuele had been brought into the jurisdiction unlawfully the status quo ante should have been restored by, for example, (and in effect) deporting Mr Samuele to Botswana from where he was removed is with respect untenable. In the first place, according to the evidence led in *Munuma*, Mr Samuele was a Namibian citizen. Section 2(1)(a) of the Immigration Control Act 7 of 1993, provides as follows:



Subject to the provisions of subsection (2), the provisions of Part V, except sections 30, 31 and 32 thereof, and Part VI of this Act shall not apply to –

- (a) a Namibian citizen.
- (b) ...

[13] Subsection (2) provides that despite what the provisions of subsection (1) above say, Part V and Part VI of the Act will apply to a person appearing before an immigration officer with the intention to enter Namibia unless the person satisfies the immigration officer that he or she is the person referred to subsection (1). Part V of the Act deals with limitations on entry into and residence in Namibia and related matters while Part VI deals with prohibited immigrants. The provisions of sections 30, 31 and 32 are not relevant to the present discussion. A reading of s 2(1)(a) and the other provisions of Act referred to in the subsection makes it plain that it is not possible in law for the Namibian authorities to remove a Namibian citizen from Namibia. In any event, the forcible removal of Mr Samuele from Namibia with a view to facilitating his 'lawful' return would seriously undermine the court's finding that he was in the first place brought before the court's jurisdiction unlawfully and this would in turn undermine the rule of law.

[14] For all these reasons, I am unable to agree with the reasoning of the dissenting judgment on *Munuma*. On the contrary, I concur in the judgment of the Deputy Chief Justice. I agree that the State did not succeed to prove that the High Court had jurisdiction to try Mr Likanyi and I further concur with him in the orders he has proposed and more so for the reasons he has given for the grant of those orders.

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**SHIVUTE CJ****DAMASEB DCJ (SHIVUTE CJ, SMUTS AJ, et MOKGORO AJA concurring):**Introduction

[15] The present proceeding was initially launched as a purported 'review' of the Supreme Court's prior decision by a differently constituted bench, in terms of s 16 of the Supreme Court Act 15 of 1990 (the Supreme Court Act). The relief claimed called upon the Supreme Court to:

'1. Review its decision in *S v Mushwena and others* 2004 NR 276 (SC) in so far as it relates to the 8<sup>th</sup> appellant in the aforesaid case, namely Osbert Mwenyi Likanyi in respect of his special plea in terms of section 106 (1) (f) of the Criminal Procedure Act 51 of 1977 regarding the offences that were preferred against him in the indictment to which he raised the special plea of jurisdiction in the High Court of Namibia in *The State v Malumo* (CC 32/2001) NAHCMD 213.

1.1 Set aside the applicant's conviction and sentence by the aforesaid Court on the 7<sup>th</sup> to the 14<sup>th</sup> September 2015 and the 8<sup>th</sup> day of December 2015 respectively, on the grounds that

1.1.1 The Namibian authorities performed a sovereign act on Botswana territory in arresting and removing the applicant from Botswana and placing him within jurisdiction of the Court of Namibia.

1.1.2 The High Court had no jurisdiction to try him, thereby rendering the whole proceedings culminating in applicant's trial, conviction and sentence irregular.' (Emphasis supplied)

[16] The 'review' relief is supported by an affidavit in which the 'applicant' (Mr Likanyi) states that the majority (Mtambanengwe AJA, Chomba AJA and Gibson AJA<sup>1</sup>) in *S v Mushwena and Others* 2004 NR 276 (SC) (the *Mushwena*-appeal) ought to have dismissed the State's appeal against Hoff J's (as he then was) judgment and upheld his special plea of lack of jurisdiction.

#### Basis for relief claimed

[17] According to Mr Likanyi, he is in a position no different to Mr Boster Mubuyaeta (7<sup>th</sup> appellant in *S v Munuma and Others* 2016 (4) NR 954 (SC)) whose special plea of lack of jurisdiction was dismissed by the High Court (Unengu AJ) but upheld by this court on appeal. I shall henceforth refer to the latter case as the '*Munuma*-appeal'.

[18] After the *Mushwena*-appeal was decided, a differently constituted court<sup>2</sup> (Shivute CJ, Damaseb DCJ, Smuts JA, Chomba AJA, and Mokgoro AJA) unanimously held in the *Munuma*-appeal that the removal by the Namibian authorities of Mr Boster Mubuyaeta from Botswana and placing him within the jurisdiction of our courts, with the assistance of Botswana authorities, and by so doing Namibia exercising over him an act of sovereignty in the latter jurisdiction, was unlawful and denuded our courts jurisdiction.

[19] Mr Likanyi relies on the undisputed fact that he was one of three people brought to Namibia by agents of Namibia in circumstances found by this court in the *Munuma*-appeal to be in breach of international law (*Munuma*-appeal paras 61-64). As he states under oath:

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<sup>1</sup> The minority consisted of Strydom ACJ and O'Linn AJA.

<sup>2</sup> But which, significantly, included Chomba AJA who supported the majority view in *Mushwena*.

'[I] humbly submit that it is manifestly unfair and unjust for two persons in exactly the same or indistinguishable circumstances to be treated completely differently, with one being prosecuted whilst the other is granted a permanent stay of prosecution.'

[20] Mr Likanyi relies for the relief he seeks on Art. 10(1) of the Constitution which states that:

'All persons shall be equal before the law'.

[21] The proceeding brought by Mr Likanyi was first set down for hearing in the Supreme Court's first term of 2017 but was postponed as the Chief Justice took the view that it must be heard by a panel of five judges. In the intervening period Mr Likanyi gave notice that at the hearing of the matter he would apply to add an alternative ground that the decision of the majority in the *Mushwena*-appeal be 'reversed as opposed to review if need be'. In the supplementary heads of argument filed on behalf of Mr Likanyi together with the notice to amend, specific reliance is placed on Art. 81 of the Constitution which states 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'. (Emphasis supplied)

[22] The State's case is that neither the review nor appeal avenues are open to Mr Likanyi, relying on this court's *dicta* which I will presently refer to. The posture is that what has happened is not open to be revisited: In other words, any injustice that might have occurred is incurable! It is not surprising, therefore, that the State does not engage with Mr Likanyi on his factual allegation that he is in no different a position than the 7<sup>th</sup> appellant in the *Munuma*-appeal and the submission that the majority in the *Mushwena*-

appeal did not deal with his distinguishing factual matrix that called for a legal conclusion different to other accused whose factual circumstances are different. The State suggests, in essence, that this court has no power under any circumstance to revisit its prior decision, however substantial the injustice visited upon a person in the criminal process. The justification for that argument is that if the Supreme Court comes to Mr Likanyi's assistance it carries the ominous prospect of opening the floodgates for the relitigation of cases finally determined by the court and thus compromising the interest of the sound administration of justice.

#### Review incompetent

[23] The first issue we have to determine is whether, by invoking s 16 of the Supreme Court Act, Mr Likanyi is properly before the Supreme Court. Section 16 of the Supreme Court Act provides that:

'(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 the proceedings of the High Court or any lower court, or any administrative tribunal or authority established or instituted by or under any law.

(2) The jurisdiction referred to in subsection (1) may be exercised by the Supreme Court *mero motu* whenever it comes to the notice of the Supreme Court or any judge of that court that an irregularity has occurred in any proceedings referred to in that subsection, notwithstanding that such proceedings are not subject to an appeal or other proceedings before the Supreme Court: Provided that nothing in this section contained shall be construed as conferring upon any person any right to institute any such review proceedings in the Supreme Court as a court of first instance. (Emphasis supplied.)

[24] In *Schroeder and Another v Solomon and 48 others* 2009 (1) NR 1 (SC) 8, paras 10-11, Mainga JA said the following concerning s 16 of the Supreme Court Act:

[10] The section makes it clear beyond doubt that this court has jurisdiction to review proceedings of the High Court if they are tainted by an irregularity. Its jurisdiction to do so does not, without more, give the applicants cause to institute review proceedings under s 16 in this court as of right.

...

[11] This court has already decided in *S v Bushebi* 1998 NR 239 at 242E-G that the jurisdiction to review proceedings contemplated in s 61(1) is subject to the provisions of ss (2) which narrow the scope of enabling provisions to irregularities in those proceedings. It is also the view I take: the court may only invoke its jurisdiction under the section if it appears to the court or any of its judges that there was an "irregularity" in the proceedings.'

[25] As correctly stated in the above *Schroeder* judgment, in its plain meaning, s 16 confers a jurisdiction on the Supreme Court to review a decision of the 'High Court, any lower court, administrative tribunal or authority', not the decisions of the Supreme Court. Mr Likanyi's reliance on s 16 in seeking to reverse a prior decision of this court is therefore misplaced.

#### Scope of Supreme Court's power under Article 81

[26] What remains to consider is the alternative ground seeking 'reversal' of the Supreme Court's decision in the *Mushwena-appeal* in terms of Art. 81.

[27] In *Schroeder and Another v Solomon and 48 Others* 2011 (1) NR 20 (SC) (*Schroeder* No. 2), an attempt to persuade the Supreme Court to revisit its own decision between the same parties (in circumstances similar to the present case) was rejected on account of s 17 of the Supreme Court Act which states that:

- '(1) There shall be no appeal from, or review of, any judgment or order made by the Supreme Court.
- (2) The Supreme Court shall not be bound by any judgment, ruling or order of any court which exercised jurisdiction in Namibia prior to or after Independence.'

[28] In *Schroeder No. 2 Mainga JA* stated as follows (at 28):

[13] Section 17(1), which first applicant concedes speaks in peremptory tones, makes it clear without exceptions, "that there shall be no appeal from, or review of, any judgment or order made by the Supreme Court". In other words, a judgment or an order of the Supreme Court is final, which means it is not appealable or reviewable. Section 17 is headed "Finality of the decisions of Supreme Court". If there were any exceptions to s 17 Parliament would have said so.

[14] Article 81 of the Constitution is headed "Binding Decisions of the Supreme Court". The provision in whole reads as follows:

"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".

[15] The Article requires no interpretation, it is precise and unambiguous, no more can be necessary than to understand the provision in its natural and ordinary sense. It provides for the binding nature of the decisions of the Supreme Court on all other courts, and all persons in Namibia, I may add, including the Supreme Court itself, unless reversed by the Supreme Court itself or contradicted by an Act of Parliament. In *Bloemfontein Town Council v Richter* 1938 AD 195 at 232 *Stafford JA* stated that the ordinary rule is that this court is bound by its own decisions and, unless a decision "has been arrived at on some manifest or misunderstanding, that is, there has been something in the nature of a palpable mistake", or its attention was not drawn in the previous decisions to relevant authorities'. (My underlining for emphasis)

[29] Mainga JA therefore recognised that in exceptional circumstances and acting under the authority of Art 81, the Supreme Court has the jurisdiction to revisit a prior

decision and to reverse it. That raises the question: In what circumstances can the Supreme Court reverse its prior decision? That issue has not yet been authoritatively settled by this court and is raised squarely in the present proceedings for the first time.

#### Binding nature of Supreme Court decisions: Two nuances

[30] There are two nuances to the 'binding nature' of the Supreme Court's decisions: the *res judicata* sense and the *stare decisis* sense. In the first, as a general rule, once this court has taken a decision in a case it is final, binds the parties to the dispute and the court becomes *functus officio*. In other words, a party to the dispute in which the court has rendered a decision cannot come back to reopen the case. In the second sense, this court must follow a legal principle established by it after due deliberation, if similar facts occur in the future. It can only depart from such principle if later facts are distinguishable, it was arrived at *per incuriam* or is found to be clearly wrong. Art. 81 involves both nuances.

#### Comparative jurisprudence: relaxation of *res judicata*

[31] As regards decisions of an apex court, the drift of authority internationally is that *res judicata*, as important a value it is, remains a doctrine of the common law which may in exceptional circumstances be relaxed in order for the court to do justice. In such a case the court will rehear a case already determined on the merits in order to give an aggrieved party an effective remedy.

#### *U.K*

[32] In regard to civil matters, the reluctance of the England and Wales Court of Appeal (CA) to depart from its own prior decisions in civil matters is borne of two



considerations: the importance of ensuring certainty in the law and the fact that there is an apex court which, if the CA got it wrong, the then House of Lords (HL) (now Supreme Court) as the apex court would correct and settle the law. The CA is, however, prepared to depart from a prior decision *in favorem libertatis*. Conversely, the HL allowed a measure of latitude to revisit its own earlier decision in a particular case to correct an injustice precisely because it was the apex court whose decision was not subject to correction by any other court except by itself. Both strands are captured in two seminal decisions as shown below.

#### *Court of Appeal: England and Wales*

[33] In *R v Taylor* [1950] 3 K.B. 368 C.C.C.A. at 731, Lord Goddard CJ put it thus:

‘The Court of Appeal in civil matters usually considers itself bound by its own decisions or by decisions of a court of co-ordinate jurisdiction...

...

and as is well known the House of Lords also always considers itself bound by its own decisions. In civil matters this is essential in order to preserve the rule of stare decisis. This court, however, has to deal with questions involving the liberty of the subject, and if it finds, on reconsideration, that in the opinion of the full court assembled for that purpose, the law has been either misapplied or misunderstood in a decision which it has previously given, and that, on the strength of that decision an accused person has been sentenced and imprisoned, it is the bounden duty of the court to reconsider the earlier decision with a view to seeing whether that person had been properly convicted.’

#### *U.K House of Lords (HL)*

[34] In *R v Bowstreet Metropolitan stipendiary Magistrate and Others ex parte Pinochet (No 2)* 1999 1 ALL ER 577, a law lord participated in an appeal without disclosing that he was a director of a charity which was (as an intervening party) actively

involved in seeking the extradition to Spain of the former Chilean military ruler (Pinochet) to stand trial. The HL had to consider whether the law lord's participation in the appeal automatically disqualified him from hearing the appeal and whether his participation vitiated the proceedings. Lord Browne-Wilkinson, with whom the other law lords agreed, wrote (at 585j-586a):

'In principle, it must be that your Lordships, as the ultimate court of appeal, have the power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In *Cassell & Co Ltd v Browne (No 2)* [1972] 2 ALL ER 849, your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point. However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong. (Emphasis supplied)

[35] The HL set aside the previous decision in which the disqualified law lord participated and the case was reheard by a differently constituted Court.

### Canada

[36] In *Mohammed v. Minister of Citizenship and Immigration*, 2005 FC 1442 (CanLII), the Federal Court held at paragraph 12 that *res judicata* applies when the following three elements are present:

- a) The parties in the previous proceeding are the same as those in the second proceeding;
- b) The previous decision was final and;

c) The issue is the same.

[37] The Court, however, acknowledged that there may be special circumstances which warrant departure from *res judicata*<sup>3</sup>, allowing a rehearing on the merits. In 'determining whether such circumstances exist, it is necessary to ask whether, taking into account all of the circumstances, the application of the principle of *res judicata* would work an injustice'.<sup>4</sup> The 'patently unreasonable' nature of the error is the appropriate standard of review.<sup>5</sup>

[38] The principle was confirmed in *Deuk v. Canada (Citizenship and Immigration)*, 2006 FC 1495 (CanLII)<sup>6</sup> where it was held at paragraph 19 that there may be exceptional circumstances to justify the non-application of *res judicata*. In *Apotex Inc. v. Merck & Co.*, [2003] 1 FCR 243, 2002 FCA 210 (CanLII)<sup>7</sup>, the Federal Court of Appeal stated that the doctrine of *res judicata* comprised two forms of estoppel which can be differentiated but are based on similar policies:

- (a) 'cause of action estoppel': the need for finality in litigation;
- (b) 'issue estoppel': an individual should not be sued twice for the same cause of action.

However:

'special circumstances may restrict the application of the issue estoppel rule, and allow a party to re-litigate what would, absent those special circumstances, be estopped. Taking into account the entirety of the circumstances, the Court must consider whether application of issue estoppel in the particular case would work an injustice. Any special

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<sup>3</sup> *Mohammed v. Minister of Citizenship and Immigration*, 2005 FC 1442 (CanLII) at [10].

<sup>4</sup> *Ibid.* [12].

<sup>5</sup> *Ibid.* [19].

<sup>6</sup> <http://canlii.ca/t/1szrz>>

<sup>7</sup> <<http://canlii.ca/t/4j4f>>

circumstances which would give rise to an injustice would make the Court reluctant to apply the estoppel.'

[39] The court held in *Apotex* at page 340 that:

'Issue estoppel is a rule of public policy and, as a rule of public policy, it seeks to balance the public interest in the finality of litigation with the private interest in achieving justice between litigants. Sometimes these two interests will be in conflict, or at least there will be tension between them. Judicial discretion is required to achieve practical justice without undermining the principles on which issue estoppel is founded. Issue estoppel should be applied flexibly where an unyielding application of it would be unfair to a party who is precluded from re-litigating an issue.

That the courts have always exercised this discretion is apparent from the authorities. For example, courts have refused to apply issue estoppel in "special circumstances", which include a change in the law or the availability of further relevant material. If the decision of a court on a point of law in an earlier proceeding is shown to be wrong by a later judicial decision, issue estoppel will not prevent re-litigating that issue in subsequent proceedings. It would be unfair to do otherwise.' (My underlining for emphasis).

[40] In support of this proposition, Laskin J.A. relied on the decision of the House of Lords in *Arnold v. National Westminster Bank Plc.*, [1991] 2 A.C. 93, at pages 110-111. The principle has been reiterated in Canada in *R v Mahalingan* [2008] 3 SCR 316, 2008 SCC 63 (CanLII).

### India

[41] The position in India is concisely captured by Theron AJ in the South African case of *S v Molaudzi* 2015 (2) SACR 341 (CC) at para 28. Suffice it to say that the

Indian Supreme Court also recognises that, in exceptional circumstances, it would relax the doctrine of *res judicata*.

[42] The *Molaudzi* decision was brought to the court's attention by Mr Nyoni on behalf of Mr Likanyi only during his reply after Mr Campher for the state had completed his argument. The court therefore invited Mr Campher to submit additional written submissions on the relevance of the case, which he did. The additional submissions by Mr Campher do not detract from the view I take of the relevance of that case to the present appeal.

#### South Africa

[43] That the apex court of South Africa will in exceptional cases relax the principle of *res judicata* was put beyond doubt in *Molaudzi supra*. Just as in the case before us, in *Molaudzi*<sup>8</sup> accused persons whose criminal prosecution arose on the same facts, after conviction and unsuccessful appeal to the Supreme Court of Appeal, approached the Constitutional Court (CC) in separate proceedings with different outcomes. The first (Mr Molaudzi) who was at the time not legally represented was unsuccessful in that his leave to appeal was refused by the CC on the ground it did not raise a constitutional issue. His alleged co-perpetrators separately approached the CC challenging the conviction on constitutional grounds but relying on the same facts as Mr Molaudzi. They were successful. Based on the result in the latter case, the CC gave directions for Mr Molaudzi's case to be reheard on the merits.

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<sup>8</sup> 2015 (2) SACR 341 (CC).

[44] The CC was unequivocal that the fact that Mr Molaudzi's leave to appeal was refused on the basis that it did not raise a constitutional issue - while in the second that was pertinently the case - made his case no less *res judicata* (at para 17-21). In the first place, the court emphasised the importance of finality of decisions and that once a criminal case is determined there will generally be no opportunity to reopen it. The CC stated at 350-351:

'[19] . . . An accused who has been convicted and sentenced, generally may not appeal against the decision more than once –despite changing the grounds of appeal.

[20] This accords with the public-policy considerations underpinning criminal *res judicata*: to bring about finality to a conviction. If a convicted person were allowed to launch successive appeal proceedings, this would undermine legal certainty and inundate courts with frivolous litigation. Even though a constitutional challenge was not raised and decided in the first application, the second application ought to be considered *res judicata*, as the merits of Mr Molaudzi's appeal were considered by this court and ruled on.'

[45] The CC recognised though that *res judicata* was not an inflexible doctrine and that even before the advent of the new constitutional era ushered in in 1994, the courts of South Africa exceptionally relaxed it in order to ameliorate a grave injustice.<sup>9</sup>

[46] In *Molaudzi*, Theron AJ made the following important observations:

'[37] The administration of justice will...be adversely affected if parties are free to continuously approach courts on multiple occasions in the same matter. However, legitimacy and confidence in a legal system demand that an effective remedy be provided in situations where the interests of justice cry out for one. There can be no legitimacy in a legal system where final judgments, which would result in substantial

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<sup>9</sup> *Molaudzi* paras 22-23.

hardship or injustice, are allowed to stand merely for the sake of rigidly adhering to the principle of *res judicata*.

[38] As in this case, the circumstances must be wholly exceptional to justify the departure from the *res judicata* doctrine. The interests of justice are the general standard, but the vital question is whether there are truly exceptional circumstances.

[39] The parties agreed that, apart from this court reconsidering the appeal, there is no effective alternative remedy. If this court could not entertain Mr Molaudzi's second application, this would deny him his right to equality before the law. His case is similarly situated to the related cases [of the alleged co-perpetrators].'

[47] The learned judge stated at para 40 that Mr Molaudzi was 'serving a sentence of life imprisonment, of which he has already served 10 years. His co-accused, convicted on similar evidence, had their convictions and sentences overturned. A grave injustice will result from denying him the same relief simply because in his first application he did not have the benefit of legal representation, which resulted in the failure to raise a meritorious constitutional issue'.

[48] Closer to home, the Appellate Division (AD), the constitutional predecessor of the Namibian Supreme Court, considered the issue to some extent in *Estate Garlick v Commissioner for Inland Revenue* 1934 AD 499. It is clear from that case that the AD, as the apex court, recognised the existence of an inherent jurisdiction to correct an unfairness occasioned to a litigant through a procedure adopted by the court and not arising from any fault of the litigant: *Garlick* at 503-505. In *Bloemfontein Town Council v Richter* supra, Stratford JA stated (at 232) as follows:

'The ordinary rule is that this Court is bound by its own decisions and unless a decision has been arrived at on some manifest oversight or misunderstanding that is there has

been something in the nature of a palpable mistake a subsequently constituted Court has no right to prefer its own reasoning to that of its predecessors-such preference, if allowed, would produce endless uncertainty and confusion.'

Exceptional relaxation of criminal *res judicata* not in conflict with Art. 81

[49] It is settled jurisprudence that legality requires that all law (including the common law) and state conduct infringing rights must be rationally related to a legitimate governmental purpose: *Müller v President of the Republic of Namibia and Another* 1999 NR 190 (SC) at 200A; *Fedsure Life Assurance Ltd v Greater Johannesburg Traditional Metropolitan Council* 1999 (1) SA 374 (CC); *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC); *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC).

[50] In *S v Makwanyane* 1995 (3) SA 391 (CC) para 156, Ackermann J stated the rationality standard as follows:

'In reaction to our past, the concept and values of the constitutional state, of the "regstaat", and the constitutional right to equality before the law are deeply foundational to the creation of the "new order" referred to in the preamble. The detailed enumeration and description in section 33(1) of the criteria which must be met before the legislature can limit a right entrenched in Chapter 3 of the Constitution emphasises the importance, in our new constitutional state, of reason and justification when rights are sought to be curtailed. We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional state where state action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional state presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order. Neither arbitrary action nor laws or rules which are inherently arbitrary or must lead to arbitrary application can, in any real sense, be tested against the precepts or principles of the



Constitution. Arbitrariness must also inevitably, by its very nature, lead to the unequal treatment of persons. Arbitrary action, or decision making, is incapable of providing a rational explanation as to why similarly placed persons are treated in a substantially different way. Without such a rational justifying mechanism, unequal treatment must follow'.

[51] There is, undoubtedly, a legitimate governmental purpose in the finality of decisions. Finality of litigation is an important value, but it is not the only value at play. In my view, the importance of finality of decisions does not justify a conclusion that the apex court is powerless to correct an injustice caused to an accused through no fault of his or her own. Although *Schroeder No. 2* was correctly decided because, just like the review procedure under s 16, an appeal to the Supreme Court against its own decision is not permitted by s 17 of the Supreme Court Act, it offends the principle of legality that the Supreme Court, being the apex court and ultimate guardian of the Bill of Rights, in an exceptional case, should be powerless to put right a manifest injustice caused to an individual. There is no justification in a constitutional state for a rigid rule which admits of no exception at all to the principle of criminal *res judicata* in relation to decisions of the Supreme Court.

[52] I am in respectful agreement with the approach to *res judicata* expressed in the jurisdictions which I have surveyed and commend its application by the Namibian Supreme Court. As the international trend shows, there are compelling public interest reasons why an inflexible adherence to *res judicata* should be guarded against especially where the liberty of the subject is involved. It is indefensible to argue that the need for finality must, at whatever cost, take precedence however manifest and grave an injustice done to a subject during a criminal process involving the apex court. Such

an approach is unsustainable in a country governed by a justiciable bill of rights coming as it does with a culture of justification for all legal rules including those developed under the common law.

[53] It must follow, therefore that, in an exceptional case, the Supreme Court has the competence under Art. 81 of the Constitution to correct an injustice caused to a party by its own decision. The exception will apply in matters involving the liberty of subjects, primarily in criminal matters, where this court is satisfied that its earlier decision was demonstrably a wrong application of the law to the facts which resulted in an indefensible and manifest injustice.

#### How is the exception to be applied?

[54] The starting point is that the Supreme Court has the inherent jurisdiction to determine its own procedure: *Universal City Studios Inc. v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 754.

[55] Article 78 (4) of the Constitution preserves the court's inherent jurisdiction as follows:

'(4) The Supreme Court and the High Court shall have the 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.' (Emphasis supplied)

[56] Tait, *'The Inherent Jurisdiction of the Supreme Court'*. Juta & Co. Ltd. (1985) at 54 describes the inherent jurisdiction of the superior courts as:

' . . . the unwritten power without which the court is unable to function with justice and good reason.'

[57] Having concluded that the Supreme Court may on the authority of Art. 81 relax the operation of *res judicata* in a criminal case in order to give a litigant an effective remedy, it must follow that in the absence of a specific procedure how that power is to be exercised, the Supreme Court is competent in the exercise of its inherent jurisdiction to determine a procedure as to how that is to be done. It is important to reiterate that it is a power that will be exercised only exceptionally and not as of right: The procedure to be applied must take that into account. The caution expressed in *Moulded Components and Ratomoulding SA (Pty) Ltd v Coucourakis and Another* 1979 (2) SA 457 (W) at 461F- 462H is worth repeating:

'I would send a word of caution generally in regard to the exercise of the court's inherent power to regulate procedure. Obviously, I think, such inherent power will not be exercised as a matter of course. The rules are there to regulate the practice and procedure of the court in general terms and strong grounds would have to be advanced, in my view, to persuade the court to act outside the powers provided for specifically in the rules. Its inherent power, in other words, is something that will be exercised sparingly . . . The court will exercise an inherent jurisdiction whenever justice requires that it should do so. I shall not attempt a definition of the concept of justice in this context. I shall simply say that, as I see the position, the court will come to the assistance of an applicant outside the provisions of the rules when the court can be satisfied that justice cannot be properly done unless relief is granted to the applicant.'

[58] I cannot stress too strongly that the Supreme Court will, as a general rule, not entertain any attempt (relying on Art. 81) to reopen a case previously adjudicated and determined just because subsequently we think it may have been wrongly decided. In addition, no litigant may as of right come to his court to reopen its prior decision in terms

of Art. 81. The Chief Justice will, upon a representation made, consider the matter and only if satisfied that exceptional circumstances exist having regard to all circumstances – including the imperative to safeguard finality to litigation – afford leave for the matter to be argued and give directions as to how it will be heard. It is unnecessary to set out what would constitute exceptional circumstances as the jurisprudence in that respect should be developed over time. Each case will be considered on its own facts and circumstances and the power will be invoked only exceptionally.

[59] Until a procedure is authoritatively determined by the Chief Justice under s 37 of the Supreme Court Act, the procedure to be adopted will be the following. A party seeking to invoke the exceptional jurisdiction under Art. 81 may make representations to the Chief Justice, clearly setting out the factual and legal bases for the grievance. If the Chief Justice is satisfied that a good basis exists to invoke the jurisdiction, he will give directions as to how the matter should proceed with due regard to the rights of all affected parties.

#### Law to facts

[60] Mr Likanyi alleges unequal treatment by the Supreme Court contrary to Art. 10 of the Constitution. He asks the court to extend to him the same treatment or benefit given by it to a person in exactly the same position as his. Although Mr Likanyi initially invoked the wrong procedure, he has since filed an amendment to introduce an alternative ground based on Art. 81.

#### *Common cause facts*

[61] Mr Likanyi formed part of a group of accused who were arraigned in the High Court on charges of, amongst others, high treason, perpetrated during 1999 in the Caprivi region (now Zambezi region). He was part of the group that fled to Botswana but were subsequently arrested by that country's authorities and handed over to agents of Namibia and tried in this country.

[62] Aggrieved by his surrender to Namibia by agents of Botswana, Mr Likanyi, together with 12 others, brought an application in the High Court on 27 October 2003 in terms of s 106(1)(f) of the CPA, pleading that the court lacked jurisdiction to try them (*S v Mushwena and Others 2004 NR 35 (HC)*). Mr Likanyi and others objected to the High Court's jurisdiction on the ground, *inter alia*, that their apprehension in and abduction from Botswana and subsequent surrender to Namibia, violated international law and was therefore unlawful.

[63] The state opposed the application claiming that the Namibian courts had jurisdiction as the accused were delivered to the Namibian authorities by Botswana officials; that Namibia had no choice but to receive them as they are Namibian citizens; that the Botswana authorities stated that the accused had violated the conditions of their refugee status in Botswana and that they were being deported to their homeland; that Namibia did not request the accused fugitive's deportation to Namibia; that in receiving the accused Namibian officials did not act contrary to the wishes of Botswana authorities; that the accused were arrested in respect of the treason-related offences on Namibian territory, and that it was the duty of Namibian law enforcement officials to investigate if any of the accused had any involvement in the secessionist activities and to pursue charges if they did.

[64] At first instance, Hoff J upheld Mr Likanyi's special plea of lack of jurisdiction. The learned judge made factual findings in respect of Mr Likanyi and concluded that the evidence does not establish that there was collusion or connivance by the Namibian authorities with Botswana to abduct him. The court *a quo*, however, found that the conduct of the Namibian authorities was in breach of public international law in that the deportation of the Mr Likanyi flouted formal extradition procedures.

[65] The State appealed and the majority upheld the appeal and referred the matter back to the court *a quo*, where Mr Likanyi was tried, convicted and sentenced. Conversely, the minority (Strydom ACJ and O'Linn AJA) proposed to dismiss the appeal and to confirm the discharge of the applicant. In regard to Mr Likanyi, both Strydom ACJ and O'Linn were satisfied that he was removed from Botswana by agents of Namibia at the instigation of the former. As Strydom ACJ put it at p 288F-G:

'The last group consisted of three persons, of which Osbert Likanyi was one, which was brought from Botswana and handed to the Namibian authorities still inside Botswana'.  
(My emphasis)

[66] O'Linn AJA came to the same conclusion at p 298C-D.

[67] Mr Likanyi did not testify during the special plea proceedings. Evidence on behalf of the State in relation to Mr Likanyi was led by Mr Hironimus Goraseb who admitted to entering Botswana on 6 December 2002 following a call from the Botswana authorities who wished to surrender some Namibian citizens who were alleged to be illegal immigrants in Botswana. It is common cause that in Botswana he met up with his

Botswana interlocutors some 2km into Botswana territory at a disused weighbridge. Mr Goraseb described the events as follows:

'[W]e were led by Botswana police officers driving in front. I think we had two vehicles a police van plus a sedan vehicle in which I was travelling. When we came at this weighbridge, I observed a Botswana police van. Our police van . . . reversed to face back to back or hind side to hind side with the Botswana police van. The Botswana police officers then took the prisoners out of their vehicles. I recall the moves, the handcuffs and then we transferred them on to the Namibian police van.

. . . .

We thanked the Botswana police for good cooperation promise that we will do the same if we ever find criminals from their side and that we will also hand them over to them and we then proceeded to . . . border post where they were detained.'

Did the evidence establish the exercise of an act of sovereignty by agents of Namibia in Botswana in respect of the applicant?

[68] It was common cause that the group deported from Zambia were surrendered to Namibian authorities on Namibian territory whereas Messrs Likanyi, Mubuyaeta and another were handed over to Namibian law enforcement agents on Botswana territory. The suggestion that no arrest took place when Mr Goraseb and others 'received' Mr Likanyi is not supported by the evidence of Mr Goraseb that he thanked his counterparts for handing over Likanyi to Namibia and that they would do the same if they find Botswana 'criminals' on the Namibian side.

[69] It is clear from the evidence of Mr Goraseb that Mr Likanyi was taken into custody by agents of Namibia on Botswana territory. It was the Namibian agents who transported him to Namibia from Botswana. It is also clear that Mr Likanyi's liberty was restricted and that he was under the coercive power of Namibian agents, negating any

voluntary surrender to the Namibian authorities. That was sufficient to constitute the performance by Namibian authorities in Botswana of a sovereign act of arrest in violation of international law: *Munuma*-appeal para 36.

[70] Mtambanengwe AJA correctly stated the principle as follows in the *Mushwena*-appeal at 416D-E:

'The important point that clearly emerges from cases such as *R v Bow Street Magistrate's, Ex parte Mackeson* (1981) 75 CT App R 24; *Bennet's case supra*; *S v Ebrahim* 1991 (2) SA 553 (A); *R v Hartley* (1978) 2 NZLR 199; and *Beahan's case supra* is that the court will exercise its power to decline jurisdiction where the prosecuting authorities, the police or executive authorities have been shown to have been directly or indirectly involved in a breach of international law or the law of another State of their own municipal law'. (My underlining for emphasis.)

[71] However, having correctly stated the principle he applied it in a manner which, based on the judgment in the *Munuma*-appeal, is not sustainable. In the *Mushwena*-appeal the majority took the view that the manner in which agents of Namibia took Mr Likanyi and Mr Mubuyaeta into custody was no different to agents of a foreign country surrendering a fugitive to Namibia without following extradition procedures. Mtambanengwe AJA stated at 415H-I and 416A:

'One important difference between these facts and the facts in the present case is that no Namibian police officer took part in the arrest of any members of the first to the third group in Zambia, or of Likanyi in Botswana. As to the request by Shali, no causal link was established before the court a quo between the request and the handing over. All the actions taken by Zambia or Botswana in handing them over to the Namibian authorities were in the spirit of co-operation between (in the case of Zambia, at least) two States faced with a situation that could have political and security repercussions on both sides of the border. All the decisions of deporting the concerned respondents in this case were taken by the Zambian and Botswana authorities without any influence from



the Namibian authorities; alternatively, it has not been shown that in taking the decision to deport, either the Zambian or the Botswana authorities were influenced by the Namibian authorities.'

And again at 419F-G as follows:

'It is clear from its judgment that the court a quo laid a lot of store by the fact that respondents were, by 'the disguised extradition', or the bypassing of the formal extradition proceedings, deprived of the benefits or safeguards embodied in Extradition Acts or treaties, and therefore of their human rights. The answer to any such argument is, first, that the Zambian or Botswana authorities did not have an obligation to wait for Namibia, or to urge Namibia, to initiate extradition proceedings to get rid of undesirable foreigners from their territory. Secondly, the Namibians did not have to refuse to receive the returned fugitives (see the *Staines* case supra), let alone to instruct Zambia or Botswana how they should get rid of their unwanted visitors.'

[72] The approach that Namibian authorities performing a coercive act on foreign soil is not an act of international delinquency was rejected by a unanimous full bench in the *Munuma-appeal*, which included Chomba AJA who was part of the majority of three (out of five) in the *Mushwena-appeal*. We said:

'[21] Therefore, the court must decline jurisdiction in respect of a fugitive who was abducted with the involvement of agents of the receiving state. The same result will follow where agents of the receiving state connive with those of the refuge state to circumvent extradition laws to bring the fugitive before the courts of the receiving state. The exercise of coercive power such as an arrest by agents of the receiving state in the country of refuge is an act of international delinquency.

[22] International law does not countenance violation by one state of the territorial sovereignty of another. It is a violation of international law for a state to carry out an act of sovereignty such as an arrest in another state's territory. It does not matter that such an act is sanctioned by the country on whose sovereign domain the coercive act of arrest is being carried out because that is contrary to international law. In *S S Lotus (Fr*

*v Turk*), 1927 P C I J (ser A) No 10 (Sept 7) in the Publications of the Permanent Court of International Justice laid down that:

“[45] The first and foremost restriction imposed by international law upon a state is that failing the existence of a permissive rule to the contrary, it may not exercise its powers in any form in the territory of another state. In this sense jurisdiction is certainly territorial; it cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from international custom or from a convention”.

[73] Regrettably, the majority did not give full legal effect to the peculiar factual circumstances of Mr Likanyi and conflated his case and the applicable legal principles with those of others who were surrendered by Zambian authorities to agents of Namibia on Namibian territory.

[74] I therefore agree with Mr Nyoni's submission on behalf of Mr Likanyi that the majority overlooked the legal effect of the fact that the liberty of Mr Likanyi was restricted on Botswana territory by agents of Namibia and that state of affairs continued until he was brought into Namibia and ‘detained’ as testified by Mr Goraseb. The majority’s conclusion that the manner of Mr Likanyi’s surrender to Namibia was not in breach of international law was therefore clearly wrong. The grave injustice to Mr Likanyi, which would entitle us to revisit the majority's conclusion in the *Mushwena-appeal*, is the fact that the facts relating to him were not distinguished from those of his co-accused who were surrendered to agents of Namibia on Namibian territory.

#### The exceptional circumstances

[75] The present is a unique case which, because of its special circumstances, is bound to be confined to its facts. That said, it bears mention that, on legal principle, the South African case of *Molaudzi* - which I find immensely persuasive – is

indistinguishable from our facts.<sup>10</sup> The first, perhaps the most important exceptional circumstance of the case before us is that Mr Likanyi and Mr Boster Mubuyaeta's facts are identical: they were taken into custody by agents of Namibia together on foreign soil. As fate would have it, they stood trial separately and before different trial judges and different benches of appeal judges with differing outcomes in respect of their jurisdiction pleas – one successful and the other not – on identical facts!

[76] The consequence is that, by sheer quirk of circumstance, Mr Likanyi is denied the benefit of the law which was extended by this court to Mr Mubuyaeta. The second exceptional circumstance is that a subsequent unanimous bench of the apex court expressed an authoritative view in respect of him, holding that his surrender to Namibia was unlawful and that he ought not to have been subjected to the jurisdiction of the courts of this country. In effect, the latter court in respect of him came to a conclusion diametrically opposed to that reached by the earlier court. If *res judicata* is strictly enforced he would remain without a remedy to vindicate the benefit of the law extended to him by this court in the *Munuma*-appeal. The third exceptional circumstance is that the relaxation of *res judicata* will not open the proverbial floodgates as Mr Likanyi was one of only three people who find themselves in the same position – one since having passed away and the other having already been released by an order of this court. The fourth exceptional circumstance is that one of the judges (Chomba AJA) who supported the majority decision in the *Mushwena*-appeal in respect of Mr Likanyi, participated in the *Munuma*-appeal and supported the court's conclusion in respect of the legal consequence to attach to the manner of his surrender to Namibia.

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<sup>10</sup> More so because the Constitutional Court premised its conclusion for the relaxation of *res judicata* on the court's power to develop the common law consistent with the constitution (*Molaudzi* at 355, para 31), whereas in Namibia the Supreme Court's power to reverse its prior decisions is expressly provided for under the Namibian constitution.

[77] Finally, although Mr Likanyi was not a party to the appeal where Mr Mubuyaeta's case was determined, the outcome would have been exactly the same as that of Mr Mubuyaeta's if he were, given that their facts are identical.

#### Injustice to Mr Likanyi

[78] It is, as I already stated, common cause that the majority in the *Mushwena*-appeal, after having correctly stated the applicable legal principles, did not give full effect to the peculiar factual circumstances of Mr Likanyi which are radically different to those of others who were removed from Zambia by agents of that country and brought into Namibia where they were handed over to the Namibian law enforcement authorities. In other words (to borrow from Goddard CJ in *R v Taylor* supra at 372), the majority in *Mushwena* 'did not proceed to give logical effect' to the principles of law which they found applicable. The result reached in respect of Mr Likanyi was therefore demonstrably wrong resulting in an indefensible injustice to him.

[79] The injustice to Mr Likanyi arises from the fact that on account of a decision of this court on facts identical to his, he has been placed in a position different to that of another person who has escaped imprisonment while he has not. The only answer offered by the State for that undisputed differentiation is the importance of finality of a decision of this court. In a constitutional state, there is no justification for such a result.

[80] On the undisputed facts concerning Mr Likanyi, the ineluctable conclusion to which the majority would have come if they applied the correctly stated legal principles to his facts, is that arrived at by the full court in the *Munuma*- appeal relating to 7<sup>th</sup>

appellant, Mr Mubuyaeta. Mr Likanyi has, therefore, established that he was subjected to a grave injustice which this court, in the exercise of its jurisdiction under Art. 81, is competent to correct by reopening the appeal in so far as it relates to him. That would entitle us to reconsider the result reached by the majority in the *Mushwena*-appeal in so far as it concerns Mr Likanyi, given the test applied in the *Munuma*- appeal in circumstances of surrender identical to his.

### Disposal

[81] It follows that the State failed to prove beyond reasonable doubt that the High Court had jurisdiction to try Mr Likanyi in connection with the offences he stood charged with under the indictment to which he raised the special plea of jurisdiction.

[82] We made clear in the *Munuma*- appeal that if the State fails to discharge the burden of proof that the court has jurisdiction, the proper order to be made is a permanent stay of prosecution which will have the effect that the accused may not be prosecuted again on any of the charges of which he was indicted in the High Court.

### Order

[83] In the result, the following order is made:

1. The judgment and order of the Supreme Court in the *Mushwena*-appeal (Case No. SA 6/2004) allowing the State's appeal against the order of the High Court upholding a special plea of lack of jurisdiction in respect of Mr Obsert Mwenyi Likanyi (Mr Likanyi) is reversed and therefore of no effect;

2. Mr Likanyi's conviction and sentence on the charges preferred against him under an indictment in Case No CC 32/2001 in the High Court of Namibia (the indictment), are hereby set aside and his immediate release ordered;
3. There is hereby ordered a permanent stay of prosecution against Mr Likanyi in respect of the offences preferred against him under the indictment.

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**DAMASEB DCJ**

I have had the benefit and pleasure of reading the judgment of the Deputy Chief Justice, Chief Justice and Frank AJA. I find the reasoning in the judgment of the Deputy Chief Justice to be compelling and concur in it. I do so without qualification. I also expressly concur in the judgment of the Chief Justice.

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**SMUTS JA**

I concur.

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**MOKGORO AJA**

**FRANK AJA:**

[84] I have read the judgment of Damaseb DCJ (majority judgment) and partially agree therewith. I however do not agree with the conclusion and reluctantly agree with the order proposed. The reasons for my stance are set out below. The essential facts are dealt with in the majority judgment and I do not reiterate them. I do however briefly refer to some facts so as to place my judgment in context.

[85] Subsequent to an armed insurrection in the Zambezi Region of Namibia (then known as the Caprivi Region) the alleged participants were arrested and charged with treason and certain other offences in mainly two criminal trials which respectively became to be referred to as the main or first treason trial and the second treason trial. Why more than one trial eventuated is not evident from the record before this court. The applicant was an accused person in the first treason trial whereas Mr Samuele was an accused person in the second treason trial. In the *Mushwena*<sup>11</sup> case (first treason trial) this court found that the High Court had jurisdiction over the applicant in respect of the charges he faced connected to the armed insurrection. In the *Munuma*<sup>12</sup> case (second treason trial) this court found that the High Court did not have jurisdiction over Mr Samuele in respect of similar charges faced by him and ordered a permanent stay of prosecution against him in respect of the offences he was allegedly involved in in connection with the armed insurrection. By the time the decision in the *Munuma* case was handed down applicant's trial (together with the other accused in the first treason trial) had been concluded and he was convicted of treason, 9 counts of murder and 91 counts of attempted murder. He is currently serving a lengthy prison sentence awaiting the result of an appeal to this court. The two judgments referred to were given about 12 years apart.

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<sup>11</sup> *S v Mushwena and Others* 2004 NR 276 (SC)

<sup>12</sup> *S v Munuma and others* 2016 (4) NR 954 (SC)

[86] Both judgments' point of departure in dealing with the jurisdiction issue they faced can be summarised with reference to the following extract from the majority judgment in the *Mushwena* case:

'(T)he court will exercise its powers to decline jurisdiction where the prosecuting authorities, the police or executive authorities have been shown to have been directly or indirectly involved in the breach of international law or the law of another State or their own municipal law.'

[87] In the *Munuma* case the issue was dealt with as follows:

'[61] I propose to dispose of the appeal of seventh appellant first in view of the common cause factual circumstances surrounding him which show that the Namibian Government acted unlawfully in bringing him within the jurisdiction of the Namibian courts.

[62] It is abundantly clear from the evidence of the then Regional Nampol commander in the Caprivi Region, Goraseb that the seventh appellant alongside other persons not involved in the present appeal, were taken into custody by Namibian Police on Botswana territory. It was the Namibian agents who transported them to Namibia in a fashion not dissimilar to the facts of *Wellem*.

[63] Mr Goraseb's suggestion that Namibian agents did not perform a sovereign act on Botswana territory as they only 'received' seventh appellant, is not consistent with the admission that his freedom was restricted upon him being surrendered to Namibian agents on Botswana soil. It is abundantly clear from the exchange between Mr Tjombe and Mr Goraseb during cross-examination that whilst in the



presence of Namibian agents on Botswana territory, the seventh appellant was under the coercive power of Namibian agents. That was sufficient to constitute the performance by Namibian authorities in Botswana of a sovereign act of arrest in violation of international law – as recognised in the authorities to which I already referred.

[64] It is idle to suggest under those circumstances that seventh appellant was not under arrest by agents of Namibia on the territory of Botswana. That arrest amounts to the exercise of a sovereign act by Namibia in the territory of Botswana and it matters not that it was sanctioned by the Botswana authorities.

[65] We are satisfied that the High Court misdirected itself in holding that the Namibian authorities did not act unlawfully in removing the seventh appellant from Botswana and placing him within the jurisdiction of the courts of Namibia.'

[88] In the *Mushwena* case the majority found that as the Botswana police had handed over the applicant to the Namibian police the latter did not violate the territorial integrity of Botswana, its laws or acted in breach of international law. In the *Munuma* case this court narrowed the above approach by stating that the fact that the Botswana authorities allowed the arrest of applicant in Botswana, which constituted a sovereign act by the Namibian Authorities in international law, remained a violation of international law. The proposition was stated as follows:

'[22] International law does not countenance violation by one state of the territorial sovereignty of another. It is a violation of international law for a state to

carry out an act of sovereignty such as an arrest in another state's territory. It does not matter that such an act is sanctioned by the country on whose sovereign domain the coercive act of arrest is being carried out because that is contrary to international law. In *S S Lotus (Fr v Turk)*, 1927 P C I J (ser A) No 10 (Sept 7) in the Publications of the Permanent Court of International Justice laid down that:

“The first and foremost restriction imposed by international law upon a state is that failing the existence of a permissive rule to the contrary, it may not exercise its powers in any form in the territory of another state. In this sense jurisdiction is certainly territorial; it cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from international custom or from a convention”.<sup>13</sup>

[89] The applicant, perhaps not surprisingly, is aggrieved by the fact that his plea to jurisdiction was dismissed and he faces the melancholy prospects of a long-term imprisonment whereas the plea to jurisdiction by one of the persons apprehended with him in similar circumstances was upheld and that person is for all extent and purposes a free man and will never have to account for his alleged deeds during the armed insurrection.

[90] The original application in this matter was premised on section 16 of the Supreme Court Act, 15 of 1990. As pointed out in the majority judgment this section is not applicable in the current circumstances. I agree with the reasoning in the majority's judgment on this score and has nothing to add thereto. Counsel for the respondent took issue with the manner the application was brought before this court. However, per letter

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<sup>13</sup> *Munuma* case above para 22

dated 26 October 2016 from the Chief Justice the applicant was informed that the intended review had been set down for hearing and gave directions to the parties as to the filing of heads of argument. In these circumstances it is incumbent on this court to consider the matter.<sup>14</sup>

[91] The first hurdle facing the applicant is the doctrine of *res judicata*. Because of the public policy consideration that requires that disputes should not continue endlessly but must be finalised there is an irrebuttable presumption that a final judgment in any dispute by a competent court is correct. This is referred to as the principle of *res judicata* which binds the parties to a final judgment to such judgment. In other words the parties to such final judgment cannot dispute the correctness of such judgment. This principle applies in both civil matters and criminal matters.<sup>15</sup>

[92] Both the applicant, as an appellant, and the State are bound by the decision in the *Mushwena* case as they were parties to that decision. Their dispute with regard to the jurisdiction of the High Court in respect of the applicant was finally determined in that case and as far as that dispute between them is concerned a judgment of that court is irrebuttably presumed or deemed to have been correct.

[93] From the authorities referred to in the majority judgment in cases where exceptional circumstances cause grave injustice or hardship courts in other countries have come to the assistance of the parties adversely or detrimentally affected by the doctrine. With one qualifying comment, about which more later, I have nothing useful to add to the exposition and agree, provided there is a legal basis to do so, that a carefully drafted exception to the

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<sup>14</sup> *Schroeder and Another v Solomon and 48 Others* 2009 (1) NR 1 (SC)

<sup>15</sup> In respect of criminal matters see *S v Ndou* 1971 (1) SA 668 (A) at 676C

*res judicata* doctrine, especially where the liberty of a person is involved, may be necessary. In this regard I am comfortable with the exception as proposed in the majority judgment and support it.

[94] The qualifying comment I make is in relation to the English authorities referred to. These English authorities do not deal with the exceptions on the basis that they are exceptions to the *res judicata* doctrine but from the reasoning quoted in the majority judgment it is clear that they exercise what in our law would be called a review jurisdiction. Thus in the *Pinochet (No 2)* case it is clear that the court of appeal will correct an injustice caused by an earlier order of that same court where a party in the earlier proceedings “has been subjected to an unfair procedure”. In *R v Taylor* which relates to criminal matters the test is whether “the law has been either misapplied or misunderstood.” It is also clear that from the English authorities that a previous decision cannot be reversed “just because it is thought that the first order is wrong”. This approach is fully in line with the distinction in our law between reviews and appeals. What is clear from the English authority is that the final court there will revisit its own decisions on a review basis and not on an appeal basis as these concepts are understood in our law.<sup>16</sup> This, of course, avoids the application of the *res judicata* doctrine, as the previous judgment is then regarded as a nullity in law with the result that no final judgment would then have been given between the parties to the earlier decision.<sup>17</sup>

[95] Although the majority judgment does not say so explicitly the approach seems to me to be this. It is clear from the conspectus of the international authorities that there is a need to revisit and to ameliorate the approach that once the apex court has made a

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<sup>16</sup> *Schroeder* case above at 6 par [6]

<sup>17</sup> *Trade Fairs and Promotions (Pty) Ltd v Thompson* 1984 (4) SA 177 (W) at 183 C-F

decision the concrete result can never be revisited. Whereas these cases show that this is done by way of an exception to the *res judicata* doctrine or treated as a review this is not of relevance in Namibia because Article 81 of the Constitution provides for this eventuality. In other words in this country it is to be categorised as constitutional relief and in this sense is *sui generis*. This court can thus, as empowered by the Constitution, determine in which cases it will entertain such relief but it is clear that it will do so taking cognisance of the public importance of the doctrine of *res judicata* (and I would add to this the doctrine of *stare decisis*). This being *sui generis* constitutional relief it is not hit by the provisions of section 17 of the Supreme Court Act. The legal basis to craft the exception to the *res judicata* rule in this matter is thus Article 81 of the Constitution and there is no need to put another label to it or to attempt to classify it as an appeal or a review as is ordinarily understood by these latter two concepts.

[96] As pointed out in the majority judgment the court gets its power to revisit a previous decision of this court from the Constitution (Article 81) which expressly allows this court to “reverse” a previous decision. Once it has this power it follows that a procedure must be put in place to allow persons to approach this court so as to convince it to exercise the power granted. There is currently no legislation or rules of court that provides for this eventuality. Section 16 of the Supreme Court Act provides for a procedure when it comes to persons aggrieved by decisions of the lower courts where there are no other remedy available. This section is probably an outcome of the fact that the apex court in South Africa (which was also the apex court for this country prior to independence) heard appeals in circumstances not covered by legislation or rules of court by virtue of its inherent jurisdiction relating to appeals. This required “very special circumstances” which would only be done where there was a “disregard of forms of legal process” or because of

some violation of the principle of natural justice or otherwise, substantial or grave injustice has been done”.<sup>18</sup> It was also stated that this would be done “if the facts show there is some fear that a miscarriage of justice may result”.<sup>19</sup> *Ubi jus, ibi remedium*. I thus fully endorse the reasoning in the majority judgment that this court, in its inherent jurisdiction, has the power to regulate its own procedure so as to determine the manner in which it will deal with applications to “reverse” a previous decision. I also go along with the laid down procedure in this regard.

[97] Apart from authority to adjudicate the present matter Article 81 also enshrines the common law principles of *stare decisis* (judicial precedent). It is apposite that I deal with the principles in little more detail for reasons that will become apparent below.

[98] In terms of the principles of *stare decisis* lower courts are bound by the decision of courts higher up in the judicial hierarchy and as indicated in Article 81 of the Constitution all other courts are bound by the decisions of the Supreme Court. The Supreme Court is the exception to the rule as is Article 81 expressly empowers it to reverse previous decisions. It is other courts that are bound by the decisions of the Supreme Court, not the Supreme Court itself. The Supreme Court is thus not bound by its previous decisions. This is in line with the Roman-Dutch common law and thus prior to independence the South African Appellate Division (which was the highest court in the judicial hierarchy) never considered itself absolutely bound by its own prior decisions.<sup>20</sup> In this context, it should also be borne in mind that a majority decision (where there is a split decision) is just as binding as a unanimous decision on a lower court as “the authority of a decision

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<sup>18</sup> *Enyati Colliery Ltd and Another v Meson* 1922 AD 24 at 32

<sup>19</sup> *Solomon v Law Society of the Cape of Good Hope* 1934 AD 401 at 409 and *Bloemfontein Town Council v Richter* 1938 AD 195 at 232

<sup>20</sup> Hahlo & Kahn *The South African Legal System and its Background* at 246

rests on the status of the court and not on counting heads".<sup>21</sup>

[99] The principle mentioned above seems, in general, also be the approach in English law. Halsbury's put the position as follows in respect of the decisions of the House of Lords when it was still the highest court in England:

'The decisions of the House of Lords upon questions of law are normally considered by the House to be binding upon itself, but because too rigid adherence to precedent may lead to injustice in a particular case and unduly restrict the proper development of the law the House will depart from a previous decision when it appears right to do so, although it bears in mind the danger of disturbing retrospectively the basis upon which contracts, property settlement and fiscal arrangements have been entered into and the special need for certainty as to criminal law.'<sup>22</sup>

[100] I must point out that although this court is not bound by its own previous decisions it will not easily depart from them as the principles stated in the extract from Halsbury's above also finds application in our law. If this court does not respect its previous decisions appeals would be more akin to lotteries rather than establishing universal judicial practise as, instead of producing legal certainty, it will produce endless uncertainty and confusion.<sup>23</sup> Thus the underlying policy consideration such as the importance of legal certainty so as to allow persons to arrange their affairs accordingly, the protection of vested rights, the catering to legitimate expectations and the upholding of the dignity of the court are all

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<sup>21</sup> *Fellner v Minister of Interior* 1954 (4) SA 523 (A) at 538

<sup>22</sup> *Halsbury's Laws of England* 4<sup>th</sup> Ed Vol 26 par 577

<sup>23</sup> *Bloemfontein Town Council v Richter* 1938 AD 195 at 232

factors that needs to be considered when a decision is made to depart from a previous approach. It goes without saying that without departing from previous approaches when it comes to the law there will be no development of the common law which is also an undesirable consequence.

[101] The same approach is followed in South Africa where that country's Constitutional Court stated the position as follows:

[28] Moreover, in seeking to meet the two threshold requirements for leave to appeal, the applicants further argued that this court should now confirm, that the interpretation of s 7(1) of the Building Act it adopted in *Walele* constitutes binding authority from which the Supreme Court of Appeal was not entitled to deviate, as it did in *True Motives*, and in this case. This argument raises issues concerning the principle that finds application in the Latin maxim of *stare decisis* (to stand by decisions previously taken), or the doctrine of precedent. Considerations underlying the doctrine were formulated extensively by *Hahlo & Kahn*. What it boils down to, according to the authors, is: '(C)ertainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of *stare decisis*.' Observance of the doctrine has been insisted upon, both by this court and by the Supreme Court of Appeal. And I believe rightly so. The doctrine of precedent not only binds lower courts, but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. *Stare decisis* is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos.



[29] . . . .

[30] Of course, it is trite that the binding authority of precedent is limited to the ratio decidendi (rationale or basis of deciding), and that it does not extend to obiter dicta or what was said 'by the way'. But the fact that a higher court decides more than one issue, in arriving at its ultimate disposition of the matter before it, does not render the reasoning leading to any one of these decisions obiter, leaving lower courts free to elect whichever reasoning they prefer to follow. It is tempting to avoid a decision by higher authority when one believes it to be plainly wrong. Judges who embark upon this exercise of avoidance are invariably convinced that they are 'doing the right thing'. Yet, they must bear in mind that unwarranted evasion of a binding decision undermines the doctrine of precedent and eventually may lead to the breakdown of the rule of law itself. If judges believe that there are good reasons why a decision binding on them should be changed, the way to go about it is to formulate those reasons and urge the court of higher authority to effect the change. Needless to say this should be done in a manner which shows courtesy and respect, not only because it relates to a higher court, but because collegiality and mutual respect are owed to all judicial officers, whatever their standing in the judicial hierarchy.<sup>24</sup>

[102] The word "decision" in the context of the *stare decisis* principle needs some elaboration as in its common usage it may refer to various matters which are not of the same nature. It may be a reference to the whole case, e.g. where reference is made to a

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<sup>24</sup> *Camps Bay Rataepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC)

decision by a court to convict or acquit someone. In this sense it is also equivalent to the whole judgment or only the order of that court. It may refer to a ruling on a particular aspect such as a decision that a confession is inadmissible in evidence or it may mean the reasons for a ruling. It is only this latter meaning that is relevant when it comes to the principle *stare decisis*. In this context “decision” refers to the reason(s) for the decision and not the concrete result. The reference to the *Bloemfontein Town Council* case in the majority judgment must be viewed in this context. The test pronounced in that case to reverse a decision was to go back on (reverse) the *ratio decidendi* and not to revisit the concrete or actual result of the previous case. This case is thus relevant to the doctrine of *stare decisis* but not as an example for an exception to the *res judicata* doctrine.

[103] What is binding on lower courts is the *ratio decidendi* (reason of or for the decision) of the higher court. It is the principle underlying the decision that is binding on lower courts and not the order or concrete results (also sometimes loosely referred to as the decision as pointed out above). In context this is obvious as the parties to a particular legal suit is bound by a final decision or order and no other court will pronounce itself in respect of the same matter involving the same parties. This is simply the effect of the principle of *res judicata*. In contrast the principle(s) pronounced (*ratio decidendi*) may be relevant to other similar cases.

[104] To summarise the principle of *stare decisis* in general terms; a court is bound by the *ratio decidendi* only of higher courts unless it was rendered *per incuriam* or there was subsequent overriding legislation and this court will follow its own past decisions unless satisfied it is wrong when it will overrule it. It goes without saying that where no binding

principle is laid down the doctrine does not apply.<sup>25</sup> Lastly, only a pronouncement of law can constitute a *ratio decidendi*. Here it must be borne in mind that where there are two contradictory judgments the rules of *stare decisis* do not prescribe that the later decision must be followed. In such case the court must follow the decision it considers the correct one.<sup>26</sup> A decision on the facts in one case can never bind another court who must decide any other matter on its particular facts.<sup>27</sup>

[105] The *Munuma* judgment, although contradictory to the *Mushwena* judgment did not reverse the *Mushwena* judgment by dealing with it in any detail so as to indicate why it was wrong. It thus follows that this court is free to decide which judgment it must follow. It is worth emphasizing again that the fact that the *Mushwena* judgment was a majority judgment and the *Munuma* judgment an anonymous one is irrelevant in this regard. The majority judgment now at least clearly deals with this aspect and stipulates that going forward the *ratio decidendi* of the *Mushwena* judgment is not to be followed and that the *ratio decidendi* *Munuma* judgment is to prevail.

[106] Before I deal with the two judgments and which judgment I consider to be the correct one it is necessary to deal with the order granted in the *Munuma* judgment which is repeated in the majority judgment. The relief granted in the *Munuma* judgment and repeated in the majority judgment is granted without any reasons explaining or justifying it.

There is simply no motivation for the relief. There is thus at present no *ratio decidendi* in respect of this relief and no other court is thus obliged to order similar relief where a similar

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<sup>25</sup> *R v Welcome* 1957 (3) SA 22 (N)

<sup>26</sup> *R v Sillas* 1959 (4) SA 305 (A)

<sup>27</sup> *R v Wells* 1949 (3) SA 85 (A) at 87-88

case is dealt with it.

[107] Mr Samuele was given “a permanent stay of prosecution against him in respect of the offences preferred against him on the present indictment”. Why he was not only indemnified for a specific period to allow him to return to Botswana from where he was taken in a manner “inconsistent with the sovereignty of the refuge country in breach of international law” or to leave Namibia is not stated. It seems that the acts of the Namibian police to fetch him in Botswana (with the full co-operation from their Botswana counterparts) was regarded as so reprehensive as to warrant a lesson to the authorities to the extent of giving Mr Samuele a “get out of jail free card” in respect of the very serious charges he would potentially be facing if he otherwise decided to voluntary return to Namibia. Instead of facing the prospects of remaining a refugee in Botswana or returning to Namibia and face charges, he can now remain in Namibia without ever having to account for his whereabouts during the armed insurrection referred to in the introduction to this judgment.

[108] If a person suspected of a crime decides it is not worthwhile to stand trial and remove himself/herself from the jurisdiction of Namibia and in the process run the risk that he/she will never be able to return without having to face the charges and is then abducted and brought to Namibia, the Namibian courts should decline jurisdiction so as not to legalise the abduction. In such case I am of the view that the *status quo ante* should be restored and the person either delivered back from where taken or allowed to leave Namibia. On what basis such person must be given a blanket indemnity against prosecution on the charges and allowed to remain in Namibia is not clear. If the Israeli court had to apply this approach not only would they have had to allow Adolf Eichmann to, say, return to Argentina, but would also have had to give him an indemnity against all the

charges he faced. This in my view is totally unacceptable and unheard of.

[109] It follows that when it comes to the appropriate order in cases where the court declines jurisdiction because a person was unlawfully brought before it, it should attempt, in my view, to restore the *status quo ante* the unlawful acts and not indemnify such person against prosecution against such charges. If he or she removes himself or herself from the jurisdiction to avoid a trial so be it. However if he or she voluntarily returns or are lawfully brought back then he or she must face the music. To indemnify such person may cause a grave injustice to the State and the administration of justice. It will only serve to reinforce a perception that the courts can and are used to escape justice rather than to face and do justice. This is especially so when the conduct of the Namibian police is morally above reproach as in the instant matter where they simply co-operated with their Botswana counterparts.

[110] The *Mushwena* case makes it clear that the court will not adjudicate the actions by agents of the foreign state on its territory but nevertheless concludes that a sovereign act in another country is illegal in international law “even if sanctioned by the authorities of that country”.<sup>28</sup> For support of this proposition reliance is placed on the *Lotus* case. I must say I find this approach problematic. The extract from the *Lotus* case does not support the proposition as it expressly refers to the exception where a “convention” allow such activity. A “convention” in international law is nothing but an agreement between states. The term is used in a general sense to distinguish agreements between States from agreements between non-State entities. Agreements between states form the basis of international law.<sup>29</sup> This is also evident from the *Lotus* case which is referred to and

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<sup>28</sup> Par [26] of the *Mushwena* case, *supra*

<sup>29</sup> John Dugard: *International Law*, 4<sup>th</sup> ed at 24-25 and *Lotus* case.

quoted in the *Mushwena* case. In the paragraph immediately prior to the one quoted the following

is stated:

'International law governs the relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law as established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore presumed.'

[111] Akweenda<sup>30</sup> points out that the designation of the agreement between states is irrelevant provided the intention to assume an obligation is reasonably clear. He refers to the International Court of Justice discussion in the South West Africa cases (Preliminary Objections) (1962) which itself stated the position as follows:

'Terminology is not a determinant factor as to the character of an international agreement or undertaking. In the practise of States and of International organisations and in jurisprudence of international courts, there exists a great variety of usage: There are many different types of acts to which the character of treaty obligations has been attached.'

He points out that in this context the terms "agreement", "convention", "exchange of notes or letters" and "treaty" are the most used ones whereas there are also a myriad of others terms, e.g. "accord", "arrangement", "charter", "covenant", "notes *verbales*", "pact",

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<sup>30</sup> S Akweenda: *International Law and the Protection of Namibia's Territorial Integrity: Boundaries and Territorial Claims* (1997) at 173-174

“protocol” and “understanding”. In fact the current use of convention is mostly in relation to multi-lateral treaties.<sup>31</sup> It is worth pointing out in passing that the exact border of Namibia delineated by the Zambezi river in the north-east of the country was established by way of an exchange of letters between the countries concerned.<sup>32</sup>

[112] When it comes to extra-territorial enforcement measures Brownlee sets out the position as follows:

‘The governing principle is that a state cannot take measures on the territory of another state by way of enforcement of national laws without the consent of the latter. Persons may not be arrested, a summons may not be served, police or tax investigations may not be mounted, orders for production of documents may not be executed, on the territory of another state, except under the terms of a treaty or other consent given.’<sup>33</sup>

[113] It is thus clear that the use of the word “convention” in the *Lotus* case and especially in 1927 from which year the case dates was a reference to nothing more than consent as the portion above from Brownlee clearly indicates. If Botswana in a spirit of good neighbourliness allows suspected cattle rustlers in Namibia to be followed and apprehended in hot pursuit cross-border operations, in terms and conditions set out in a treaty or in letters exchanged between the countries, it will matter that this conduct was sanctioned by Botswana for the purposes of jurisdiction if persons so apprehended are arraigned on stock theft charges before a Namibian court. Similarly, if Namibia seeks the extradition of a suspected criminal from Botswana and the latter country agrees to this and

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<sup>31</sup> *Akweenda, supra* at 174 and footnote 23

<sup>32</sup> *Akweenda, above* at 184-186

<sup>33</sup> Brownlee: *Principles of Public International Law* 6<sup>th</sup> ed at 306

allows members of the Namibian police to fetch that person in, say, Gaborone and transfer that person back by air to Namibia, the actions of the Namibian police cannot be stated to be acts contrary to international law, “even though sanctioned by the authorities in Botswana”. In both the examples given the Namibian police will not be authorised by Namibian law to apprehend the suspects because the Namibian law does not operate extraterritorially. They will be authorised by the Botswana authorities. Because of the consent by the refuge country for the conduct of the Namibian authorities the latter would not have acted contrary to international law as is evident from the authorities referred to. However according to the *Munuma* decision they would have acted contrary to international law.

[114] I have already referred to the principles applicable which must be applied in deciding whether to accept jurisdiction in any particular matter by reference to the quotation from the *Mushwena* judgment. Apart from the fact that this principle seems to be common cause in the two judgments, it is also common cause between these two judgments that what the Botswana authorities did in that country must be regarded as neutral facts and this court cannot evaluate the lawfulness or otherwise of such actions against the Botswana law. The *Munuma* judgment emphasized this point on more than one occasion when in stipulating what is termed relevant legal principles it, amongst others, states the following:

‘(a) The courts of Namibia will not review dealings of a sovereign state within the latter’s territorial jurisdiction as they do not control the acts of a foreign sovereign.

(b) The courts of Namibia will not enquire into or require the justification of the



legality of the acts of a foreign state within its territorial boundaries.

(c) What the sovereign state does by its agents within its territory is beyond the scope of the jurisdiction of the Namibian courts.

(d) Namibian courts will only interfere with the officials of this country acted extraterritorial in a manner that is inconsistent with the sovereignty of the refuge country in breach of international law.<sup>34</sup>

[115] Once it has to be accepted that the consent and co-operation of the police in Botswana are neutral facts and need no justification then whatever the Namibian Police did in Botswana cannot be inconsistent with the sovereignty of Botswana and in breach of international law. Then this was done “by virtue of a permissive rule derived from a convention” (agreement)<sup>35</sup> or “under the terms of a consent given”.<sup>36</sup> The reliance on the *Lotus* case for the conclusion reached in the *Munuma* case was thus not warranted. In fact the case supported the opposite conclusion as indicated above. To state as a principle that the conduct of the Namibian Police was “a sovereign act by Namibia in the territory of Botswana and it matters not that it was sanctioned by the Botswana authorities” runs contrary to the most basic tenet of international law that consent by a State to activities in its territory is not a breach of international law or a breach of such consenting country’s sovereignty.

[116] I have already pointed out that when the Namibian Police acted with the consent

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<sup>34</sup> *Munuma* judgment para 26

<sup>35</sup> *Lotus* case

<sup>36</sup> *Brownlee* above

and co-operation with their Botswana counterparties it must be accepted that those counterparties were allowed in terms of their law to empower the Namibian Police to act as they did. I mention this because what the Namibian Police did is also not contrary to our municipal law. Our municipal law does not extend to Botswana as it does not operate extraterritorially. The Namibian Police were either thus acting lawfully in terms of Botswana law or not. However as both the *Mushwena* and *Munuma* cases confirmed this is not an area where this court can go. (This follows from the principles of *stare decisis*). Without deciding this issue it cannot be stated that the Namibian Police acted in any manner contrary to Botswana law. Taking this restriction into account, insofar as the legal position in Botswana is concerned they were either exercising a sovereign act by Botswana in Botswana when they apprehended the applicant there with the consent and co-operation of their Botswana counterparts to assist them to deport the applicant or they were exercising a Sovereign Act by Namibia with consent of the Botswana authorities (whose authority cannot be challenged as this is to be determined by Botswana law), neither of which scenarios involve a breach of international law.

[117] I am thus of the view, having to accept as I must, because of both previous judgments of this court, that one cannot enquire into the legality or otherwise of the actions of the Botswana authorities, that the *Mushwena* judgment is the one that applied the legal position correctly and hence that its conclusion was the one that was in line with the law as applied to the facts.

[118] In conclusion and in passing on this aspect. The evidence in the *Munuma* judgment indicates that Botswana intended to deport the applicant. Hence if the applicant was handed back to the Botswana Police and the judgment explained to them, they would

have been able to arrange with the Namibian Police to return to the Namibian side of the border and conveyed the applicant to this location and hand him over to the Namibian Police. Such handover would then be fully compliant with the *Munuma* judgment. This in my view demonstrates the artificiality of categorising the actions by the Namibian Police as being in breach of international law.

[119] Despite the fact that I am of the view that applicant was correctly dealt with when it came to the jurisdiction issue, I cannot wish away the fact that because of the two judgments a stark disparity was created between the treatment meted out to two similarly placed individuals. Does the fact that Fortuna smiled upon Mr Samuele mean that one must accept that what happened to applicant was simply bad luck? The facts in both cases are such as to demand that applicant and Mr Samuele should be treated similarly. To do otherwise would be a grave injustice to applicant. On this basis and because of the exceptional run-up to the position this court finds itself with two conflicting judgments and treating this matter on its facts I reluctantly agree to the order proposed even though I am of the view that the ratio underlying it is flawed. To do otherwise would put legal principle above justice. That this can lead to grave injustices was already recognised in Roman Times. Lord Denning,<sup>37</sup> with reference to Seneca, relates the latter's story as follows:

'Piso sentenced a soldier to death for the murder of Gaius. He ordered a centurion to execute the sentence. When the soldier was about to be executed, Gaius came forward himself alive and well. The centurion reported it to Piso. He sentenced all three to death. The soldier because he had already been sentenced. The centurion for disobeying orders. And Gaius for being the cause of the death of two innocent

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<sup>37</sup> Lord Denning: *The Family Story* at 172

men. Piso excused it by the plea, *Fiat justitia, ruat coelum* – Let justice be done, though the heavens should fall.'

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**FRANK AJA**

**APPEARANCES**

APPLICANT

G Nyoni

Instructed by

Directorate of Legal Aid, Windhoek

RESPONDENT

L Campher

of Office of the Prosecutor-General,  
Windhoek