



REPORTABLE

CASE NO.: SA 43/2017

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

NAMIBIA FINANCIAL EXCHANGE (PTY) LTD

Appellant

and

THE CHIEF EXECUTIVE OFFICER OF THE

NAMIBIA FINANCIAL INSTITUTIONS

SUPERVISORY AUTHORITY AND REGISTRAR

OF STOCK EXCHANGES

First Respondent

THE NAMIBIA FINANCIAL INSTITUTIONS

SUPERVISORY AUTHORITY

Second Respondent

Coram: DAMASEB DCJ, MAINGA JA, and NKABINDE AJA

Heard: 10 June 2019

Delivered: 31 July 2019

Summary: This is an appeal against the order of the High Court upholding an objection by the respondents (NAMFISA) that it was irregular in terms of High Court rule 61 for the appellant (NFE) to seek relief against an administrative body in terms

of rule 65 (the general applications rule) and not rule 76 (the review rule). Proceeding under the general applications rule, NFE sought relief against NAMFISA principally for a declarator and *mandamus* relative to a failed application to be registered as a stock exchange. NAMFISA objected to the relief on grounds that it was irregular as it should have been brought in terms of the review rule.

The court *a quo* upheld the objection and struck NFE's application from the roll, with costs. The court below reasoned that rule 76 aims to delineate separate procedures for the various forms of applications taking into account the nature, scope and purpose of a specified form of application that comes to the court and that it was therefore the intention of the rule maker that each application be dealt with accordingly. The court *a quo* concluded that rule 76(1) obligates, in peremptory terms, that every application to challenge administrative action must be brought under the review rule and that failure to do so renders the application a nullity.

On appeal, two issues were to be determined: firstly, whether a party seeking relief against an administrative body is compelled to proceed under the review rule and secondly, whether the court *a quo*'s judgement and order upholding the rule 61 objection are appealable.

On the first issue, the court distinguished the purpose of separate rules for POCA applications and election disputes which do not fall within the normal jurisdiction of the High Court and held that since the provisions of rule 76 are not couched in peremptory terms, the review rule exists for the benefit of an applicant who has the right to waive it. Accordingly, and in conformity with the long standing common law position on the review rule, the court held that it is not peremptory and does not attract nullity if not used in challenging administrative decision-making and that to deploy rule 61 sanctions if not used would be denying an applicant a right it otherwise enjoys. Accordingly, there is no reason that a principle now firmly embedded in our common law should be changed.

On the question of appealability of the order of the court *a quo*, court followed the long established line of cases that an order that does not finally dispose of the rights

of the parties or does not dispose of a substantial part of the dispute between the parties is

not appealable. Court on appeal further noting the exception that an order that is not interlocutory and does not have any of the three attributes may nonetheless be appealable if the effect of the court's finding is final and definitive of the rights of the parties and thus not susceptible of alteration by the court of first instance. Highlighting the effect of the decision rather than its form, court on appeal held that NFE in proceeding under the general applications rule invoked a procedural avenue open to it which the High Court incorrectly closed not only to it but to all future litigants similarly situated.

Court held that order made by the court *a quo* is not procedural *simpliciter* and involves the denial of a right to make an election among procedural avenues open to a litigant; that an authoritative interpretation of a statutory provision met the criterion of finality, could not be altered by the High Court and, therefore, appealable.

Appeal succeeds, order of the High Court set aside and matter remitted to High Court for further case management.

APPEAL JUDGMENT

DAMASEB DCJ (MAINGA JA and NKABINDE AJA concurring):

Introduction

[1] The new Rules of the High Court of Namibia were promulgated following the enactment of the High Court Amendment Act¹ in terms of Article 56 of the Namibian Constitution (Constitution) for the conduct of proceedings and to give effect to fair trial as entrenched in Article 12(1) of the Constitution. The overriding objective of these rules is to facilitate the resolution of the 'real issues' in dispute between the

¹ High Court Amendment Act 12 of 2013 which came into operation on 4 February 2014.

parties in a just, speedy, efficient and cost effective manner by, among others, 'limiting

interlocutory proceedings' to what is strictly necessary for the achievement of fair disposal of cases and in recognition of the fact that 'judicial time and resources' are limited.²

[2] Namibian and South African courts have held in a long line of cases³ that rule 53⁴ of the Rules of the High Court of Namibia (the rules of court), with its equivalent under the South African Uniform Rules of Court, exists for the benefit of an applicant seeking judicial review and that such an applicant has an election whether to make use of that rule or to proceed in any other manner. The case before us raises the question whether that line of authority is sound in the wake of the coming into force of the new rules of the High Court of Namibia.

[3] We have before us an appeal against an order of the High Court upholding an objection by first and second respondents (NAMFISA), that it was irregular⁵ for appellant (NFE) to seek relief against NAMFISA⁶ in terms of rule 65 (the general applications rule) and not rule 76 (the review rule).⁷

2 See rule 1 (2) of the rules of the High Court of Namibia.

3 *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) at 662F-663D and *Motaung v Mukubela & another NNO; Motaung v Mothiba NO* 1975 (1) SA 618(O) at 625C-626A; *Federal Convention of Namibia v Speaker, National Assembly & others* 1991 NR 69 (HC) at 84E and G-I; *New Era Investment (Pty) Ltd v Roads Authority* 2017 (4) NR 1160 at 1163F-G para 6 and 1166E-F para 19.

4 Since replaced by rule 76 under the new High Court rules which came into force 16 April 2014, published as GN 4 of 2014.

5 The objection was launched in terms of rule 61, which provides in subrule (1) that 'A party to a cause or matter in which an irregular step or proceeding has been taken by any other party may within 10 days after becoming aware of the irregularity, apply to the managing judge to set aside the step or proceeding. . .'

6 Which is an administrative body as contemplated in Article 18 of the Constitution and having the duty to act fairly and reasonably in terms of that Article.

7 All references to the rules are to the Rules of the High Court of Namibia.

[4] Two issues arise for decision in the appeal. The first is whether a party seeking relief against an administrative body is compelled to proceed under the review rule. The second is whether the court *a quo*'s judgment and order upholding the rule 61 objection are appealable.

The pleadings

[5] NFE had applied to NAMFISA for registration as Namibia's second stock exchange.⁸ The application was considered incomplete and that prompted the first respondent (since deceased) in his capacity as the Chief Executive Officer of NAMFISA to advise NFE in writing that its application for registration as a stock exchange was declined. The NAMFISA letter to NFE dated 9 September 2014 reads thus:

**'RE: NAMIBIA FINANCIAL EXCHANGE (PTY) LTD ("NAMFIN-X")
APPLICATION**

Reference is made to your application for the issuance of a stock exchange license and our request for outstanding information and or documentation in letters dated 21 November 2012, 23 April 2013 and 05 August 2013.

1. Section 8 of the Stock Exchanges Control Act 1985, (Act No. 1 of 1985) (hereafter referred to as the "Act") provides that the Registrar may, after consideration of any objections under section 7(5)(c) of the Act, issue the applicant a license to carry on the business of a stock exchange, if he is satisfied that:

⁸ In terms of the Stock Exchanges Control Act, 1 of 1985.

1. The interests of the public will be served by the issue of the license;
2. At least two members of the applicant will carry on the business as buyers and sellers of listed securities independently of and in competition with one another;
3. The applicant has sufficient financial resources for the proper exercise or carrying out the powers and duties conferred upon or assigned to a stock exchange by or under the Act; and
4. The proposed rules of the applicant comply with the requirements of the Act.

After a thorough assessment of your application, the Registrar found that the information provided in terms of the above requirements is not sufficient and thus declines your application on the following grounds:

a) Details of Members

NAMFIN-X did not furnish the Registrar with details of at least two members who will carry on the business as buyers and sellers of listed securities as required in terms of section 8(b) of the Act. The details of these two members are a prerequisite for the issuance of a stock exchange licence by the Registrar.

b) Financial Resources

In terms of point 1.3 above, and as is required under section 8(c) of the Act, the applicant should have sufficient financial resources to carry out the powers and duties conferred upon it. The Registrar is of the view that the Share Capital of N\$70,000-00 as indicated in your application is not sufficient to conduct a business of this nature.

c) Proposed Rules

The assessment of the proposed Rules of NAMFIN-X revealed that certain provisions of the Act were not included in the proposed rules of NAMFIN-X, i.e.:

- i. The managing director of a member of NAMFIN-X, which is a corporate body, and at least 50 percent of the directors of a member are Namibian citizens resident in Namibia as stipulated in terms of section 12(1)(a)(ii) (bb) of the Act; and
- ii. The President of NAMFIN-X, during his terms of office, may be remunerated by the committee and does not himself buy and sell securities on behalf of other persons as required in terms of section 12(1) (m) of the Act.

If NAMFIN-X wishes to re-submit the application for a stock exchange licence; please ensure that you adhere to the requirements as laid out in the Act or as may be determined by the Registrar.'

[6] Subsequent to this letter, a chain of communication ensued between NFE and NAMFISA whose tenor was that NFE sought further clarification from NAMFISA about the respects in which its application was not compliant and what it needed to do to have its application approved. NAMFISA in reply detailed what it considered to be the defects in the application and the provisions of the relevant legislation which NFE must comply with. What is apparent from the correspondence is that NFE took the view that it had complied with the law and that it was entitled to be granted a stock exchange licence. NAMFISA on the other hand took the view - when the parties could not reach common ground on what should happen next in relation to the application - that its letter of 9 September 2014 rendered it *functus officio* in that it had, by that letter, taken a final decision refusing NFE's application.

[7] Aggrieved that NAMFISA did not grant it a stock exchange licence, NFE launched an application in the High Court in terms of the general applications rule, seeking the following relief:

1. Declaring unlawful the actions and decisions of the First and/or Second Respondents in arriving at the decision conveyed to the Applicant in a letter dated 9 September 2014, refusing to grant a license to the Applicant to operate a stock exchange.
2. That a Rule *Nisi* be issued calling upon the First and/or Second Respondents and all interested parties to show cause (if any) on a date and time to be determined by the Registrar of the above Honourable Court, why:
 1. the First and/or the Second Respondents should not be compelled to award a license to operate a stock exchange to the Applicant;
 2. alternatively to prayer 2.1, the First and/or the Second Respondents should not be compelled to consider the application submitted by the Applicant on 8 May 2012 for a license to operate a stock exchange (together with all substantiating information submitted by the Applicant since 8 May 2012), in conformity to all the substantive and procedural conditions laid down by the Stock Exchanges Act, 1985 and any other applicable law;
 3. without detracting from the generality of prayer 2.2, compelling the First and/or Second Respondents to indicate to the Applicant -
 - 3.1. In accordance with the Stock Exchanges Act, 1985 or any other law which requirements of those laws the Applicant must comply with in order to be granted a license to operate a stock exchange;
 - 3.2. What comprises sufficient financial resources that the Applicant must have for the proper exercise or carrying out the powers and duties conferred upon or assigned to a stock exchange by or under the Stock Exchanges Act or any other law.

Correspondence after service of application on NAMFISA

[8] It bears mention that after being served with NFE's application, NAMFISA's legal practitioners of record wrote a letter putting NFE on notice that the relief sought was in the nature of a review and ought to have been brought in terms of the review rule. NFE's legal practitioners replied that it was not a review, but an application for a *declarator* and a *mandamus*. The disagreement persisted and resulted in the rule 61 application.

[9] NAMFISA gave notice of irregular proceedings in terms of rule 61 and sought the following relief:

- '1. That the application . . . constitutes an irregular proceeding as envisaged in terms of Rule 61 read with Rules 76 and 77. . .
2. That the purported application be struck and set aside.
3. In the alternative to prayer 2, that the applicant be ordered to amend its notice of motion to comply with Rule 76 read with Rule 77. . .'

[10] In so far as it is relevant to the present appeal, NAMFISA relied on the following grounds:

'The application was brought in terms of Rule 65. . . whilst it appears *ex facie* the notice of motion and the affidavit filed in support thereof, that the application itself is a review application which must be brought in terms of Rule 76 read with Rule 77. . . in that:

- 3.1. the relief sought in prayers 1-2 of the application requires the court to review, set aside and correct a decision taken by [NAMFISA] and in the alternative to prayer 2.1, the applicant seeks an order in terms of which the matter is referred back to [NAMFISA] for a decision;
- 3.2 [NAMFISA is an] administrative [body] and the decision which the applicant seeks to have declared unlawful, is an administrative decision;

- 3.3 It is apparent from the . . . allegations in the founding affidavit that the applicant in fact seeks an order reviewing and correcting the decision of [NAMFISA], alternatively to have the matter referred back to [NAMFISA] to take a decision in accordance with the requirements of just and fair administrative action’.

[11] In support of the rule 61 objection, NAMFISA alleged that it was prejudiced by the alleged irregularity and, specifically, NFE’s failure to comply with the rules of court

by not bringing the application in terms of the review rule read with rule 77⁹ in that (and again insofar as it is relevant to the appeal):

- ‘2. The complete record of the decision to be reviewed is not placed before the court as would have been the case had the applicant complied with Rule 76(2)(b) and as such the court is not provided with all the relevant facts in order to consider the matter properly.
3. [NAMFISA] are afforded significantly less time within which to answer to the application, which application is made up of more than 993 pages of which the annexures comprise the bulk of the documents. The irregularities were pointed out to the applicant in a letter. In the response on behalf of the applicant, [NAMFISA] were simply informed that the application is not a review and a complete application was served.’

9 Rule 77 reads: **Opposition to review application**

(1) If the person referred to in rule 76(1) or any party affected desires to oppose the granting of the order prayed in the application he or she must –

- (a) within five days after receipt by him or her of the application or any amendment thereof deliver notice to the applicant that he or she intends so to oppose and must in such notice appoint an address within a flexible radius at which he or she will accept notice and service of all process in those proceedings; and
- (b) within 20 days after the expiry of the time referred to in rule 76(9), deliver any affidavits he or she may desire in answer to the allegations made by the applicant.

(2) The applicant has the rights and obligations in regard to replying affidavits set out in rule 65.

(3) The set down of applications in terms of rule 65 applies with necessary modifications required by the context to the set down of review proceedings brought in terms of this rule.

[12] The court *a quo* upheld the rule 61 application and struck NFE's application from the roll, with costs. It made the following order:

- (a) The rule 61 application is granted.
- (b) The application under Case No 2016/00233 is struck and set aside.
- (c) The applicant, i.e. Namibia Financial Exchange (Pty) Ltd, is ordered to pay costs of the rule 61 application, and the costs shall include costs of one instructing counsel and two instructed counsel.'

[13] It is against that order that NFE appeals with leave of this Court after the High Court refused it leave.

The High Court's approach

[14] In his reasons for upholding the rule 61 objection, the learned judge *a quo* commenced by characterising the NFE application as one 'to review certain decision (sic) of [NAMFISA]'. Turning to the rule 61 application, he said that 'it turns solely on the interpretation and application of rule 76 (1)'.

[15] In defining the issue to be decided, the judge below noted that what he had to decide was whether NFE was 'entitled to proceed under rule 76, so that if [it] instituted proceedings under rule 65, as [NFE] did in the instant proceeding, then [its] application was doomed to fail at the starting blocks, rendering it a nullity. That is the contention of [NAMFISA] in the instant proceeding'.

[16] In an effort to ascertain the intention of the rule maker, the judge below reasoned that the general applications rule 'regulates all applications' while the review rule governs 'all proceedings to bring under review the decision or proceedings of an . . . administrative body or administrative official'. The judge recognised though that the review rule did not contain the words 'must', 'shall' or 'may' which would give an indication of peremptoriness or permissiveness. As he put it:

'The verb 'are' is used rather in the main clause' All proceedings . . . are by way of . . .' (My underlining).

[17] The High Court reasoned that the above underlined words are to be given 'their literal meaning in total context'. The context being, as I understand the learned judge, that the new High Court Rules make provision separately for Election applications under rule 78 and for applications in terms of the Prevention of Organised Crime Act¹⁰ (POCA) under rule 79.

[18] The judge concluded that the language used in rule 76(1) 'is of an imperative nature' and held that:

[10] The purpose behind rule 76(1) is clear, if regard is had to rule 65, rule 78 and rule 79. It seeks to delineate separate procedures for the various forms of applications which come before the High Court, and has decided to make separate rules for the different forms of applications; and in that behalf, the rule maker has made rules for (a) every application other than a review application (b) an election application, and (c) an application under POCA, for example. To bring all (a), (b) and (c) applications under rule 65 would

¹⁰ Act No 29 of 2004.

undoubtedly go against the intention of the rule maker and defeat the purpose of making separate rules for the different forms of applications that come before the court. That could never have been the intention of the rule maker. It should be remembered that the contents of the separate rules for the separate forms of applications are carefully crafted so as to take into account the nature, scope and purpose of a specified form of application that comes to the court. Ueitele J put it this way in *Inspector General of Namibia Police and Another v Dausab-Tjiueza* 2015 (3) NR 720 (HC), para 19: 'The differences between rule 65 and rule 76 are not simply incidental and minor; they are diverse and substantial'. Another crucial consideration we must not

overlook is that rule 76(1), in material part and for our present purposes, concerns all proceedings 'to bring under review the decisions or proceedings of an administrative body or an administrative official', that is, every administrative-law review'.

[11] . . .

[12] We should not lose sight of the fact that while the chapeau of rule 53 of the repealed rules is equivalent to the chapeau of subrule (1) of rule 76 and subrule (1) of rule 6 of repealed rules is equivalent to subrule (1) of rule 65, there is no rule in the repealed rules which is equivalent to rule 78 and 79, standing apart from rule 6.' (Footnote(s) omitted.)

[19] The High Court took the view that 'it is clear that there is a strong indication – in the absence of any considerations pointing to the contrary conclusion – that the maker of rule 76(1) intended disobedience to be visited with nullity'. Much reliance was placed on *The Inspector General of the Namibian Police and Another v Dausab-Tjiueza*¹¹ because in that case the High Court held that the 'proceedings under rule 65 procedure to review the decision of the Inspector General of the Namibian Police by the applicant was irregular.' The Court stated that on the principle of *stare decisis*,

¹¹ *The Inspector General of the Namibian Police & another v Ilde Martha Dausab-Tjiueza* 2015 (3) NR 720 (HC). The much reliance in decision (*Dausab-Tjiueza*) is manifest in the reasoning of the High Court in paragraphs 14, 15, 16 and 17 of its judgment.

it was bound by the decision in *Dausab-Tjiueza* unless it was satisfied that it was wrongly decided.

[20] The High Court concluded that the case law on the repealed review rule 53(1) was not of assistance in the interpretation of the review rule, holding that:

'In my judgment, therefore, rule 76(1) should be understood to be prescribing in peremptory terms that every application to review the administrative action of an administrative body or official must be brought under rule 76, failure to do that renders the application a nullity, that is, disobedience must be visited with nullity'. (Emphasis supplied.)

The Appeal

[21] NFE takes issue with being required to seek an order of review and the setting aside of the decision-making when that is not the relief it seeks. On appeal, Mr Maleka, SC for NFE argued that what his client seeks is a *declarator* coupled with a *mandamus* requiring NAMFISA to take a decision based on the information placed at its disposal by NFE. Counsel disputed NAMFISA's stance that review relief was the appropriate remedy because, according to NAMFISA, the letter of 9 September 2014 made clear that the application was refused and that nothing further needed to be decided.

[22] According to Mr Maleka, the decision of 9 September was, at best, inchoate in view of the following: Even after its CEO's letter of 9 September 2014, NAMFISA continued to engage in correspondence with NFE, even inviting it to furnish further information for it to consider the application. The argument made on behalf of NFE is that, by *that* conduct, NAMFISA led NFE to assume that a decision on its

application will be made if it furnished additional information sought by NAMFISA. Therefore, given that the decision-making was not completed, NFE was entitled to a form of relief which required NAMFISA to take a decision (good or bad) as none had been taken. Accordingly, there was no decision to be 'reviewed and or set aside' in the language of rule 76(1).

[23] In what appears to be a *volte face* if one has regard to the rule 61 objection¹² (and how the respondents' case was understood by the judge *a quo*¹³), Mr Coleman for NAMFISA submitted on appeal that the peculiar circumstances of the case required that NFE seek relief in terms of the review rule. According to counsel, the following facts and circumstances obliged NFE to invoke the review rule:

- (a) The fact that the functionary who conveyed the refusal of the application is deceased;
- (b) The voluminous nature of the annexures to the application and its attendant complexity;
- (c) The short service (of 14 days) afforded to the respondents to file an answering affidavit instead of the 21 days allowed under the review rule.

¹² *Vide* para [9]-[11] above.

¹³ See para [14] above.

[24] Mr. Coleman submitted that by upholding the rule 61 objection to NFE's application, the High Court exercised a discretion with which this court should not interfere.

The new rule framework

[25] Rule 65 governs general applications and it states in relevant part as follows:

'Requirements in respect of an application

65. (1) Every application must be brought on notice of motion supported by affidavit as to the facts on which the applicant relies for relief and every application initiating new proceedings, not forming part of an existing cause or matter, commences with the issue of the notice of motion signed by the registrar, date stamped with the official stamp and uniquely numbered for identification purposes.'

[26] Rule 76 governs administrative law reviews and it states in relevant part as follows:

'Review application

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

[27] It is important to immediately compare the review rule in its current form to the repealed rule 53(1). It reads thus:

'Reviews

53. (1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected...' (My underlining)

[28] It must be apparent that barring the underlined words, the new review rule 76(1) reads identical to the repealed rule 53(1). The question is whether rule 76 of the new rules of court has changed to the extent found by the High Court so as to compel an applicant challenging administrative decision-making to proceed under it.

Is rule 76 preemptory?

[29] In the view I take of the matter, whether the relief sought by NFE amounts to a review within the meaning of the review rule or whether it is a *declarator* with a *mandamus*, is immaterial to the outcome of the appeal. In fact, I will assume for present purposes that what NFE seeks is in the nature of a review as contemplated in the review rule.

[30] For NAMFISA to prevail we have to find, as a matter of law, that a party seeking judicial review is required to avail itself of the facility of the review rule. In that case, we would be undoing the long line of authority to the contrary I referred to previously. It is no surprise, therefore, that Mr Coleman suggested that perhaps the time has come for us to do so. But has it?

[31] In coming to the conclusion it did, what seems to have swayed the High Court is the insertion in the new rules of separate provisions for election disputes (rule 78) and for POCA (rule 79) applications. It is noteworthy that the court below appeared to accept that, barring that fact, there was nothing in the texts of the general applications rule and the review rule that precluded a review to be brought under the former. In the words of the learned judge *a quo*:

‘The rule maker of rule 53 may not have intended to restrict an application seeking review to rule 53. But where the rule maker of the present rules of court has gone to great lengths to provide separate rules for certain separate forms of applications, e.g review of administrative action of administrative bodies and officials, it would be wrong to paint rule 53 (of the repealed rules of court) and rule 76 (of the present rules of court) with the same brush and treat them as equivalent in their interpretation and application’.

[32] I consider *that* to be a very significant observation. It makes clear that had the rule maker not inserted separate rules for election disputes and POCA proceedings, rule 76 in its current formulation stood on no different footing than the repealed rule 53. That conclusion is not without consequence in the interpretation of rule 76.

[33] There is good reason why POCA and election disputes require special treatment. They are governed by specific Acts of Parliament which vest extraordinary jurisdiction in the High Court and have idiosyncrasies which a rule maker would be justified to accord special treatment.

[34] Election disputes do not fall within the ordinary jurisdiction of the High Court. Part 2 of the Electoral Act¹⁴ creates an Electoral Court to deal with election disputes, including setting time limits¹⁵ within which certain steps must be taken. It bears mention that the inclusion of a specific rule governing election disputes came against the backdrop of a confusion created in the repealed Electoral Act¹⁶ making it uncertain whether election disputes were to be ventilated through motion or action proceedings.¹⁷ In fact, rule 78¹⁸ governing election disputes has since been expunged from the ordinary rules of the High Court and now constitute stand-alone rules dealing only with election disputes.¹⁹

[35] Section 90 of POCA requires the Judge President to make rules regulating the conduct of proceedings contemplated in Chapters 5 and 6. As it is, rule 79(2) incorporates by reference the general applications rule in respect of POCA applications and, to take into account the special circumstances of such applications, adds that, in addition to the general applications rule, POCA proceedings must comply with 'the provisions that apply to specific applications referred to in the relevant sections of the POCA'. It is clear, therefore, that although mentioned in a separate rule from general applications, the latter actually applies wholesale to POCA proceedings.

14 Act No 5 of 2014.

15 For example, s 168(4) requires that an appeal to the Electoral Court be heard, considered and summarily determined upon written submissions within three days.

16 Act No. 24 of 1992.

17 See *Rally for Democracy and Progress v Electoral Commission* 2013(2) NR 390 at 424 para 229 and at 425 para 230.

18 Repealed on 7 November 2014 by GN 227 of 2014.

19 See the Rules of Electoral Court published on 7 November 2014 in GN 228 of 2014.

[36] The significance that the High Court found in the inclusion in the new rules of rules 78 and 79 is, therefore, not supported by the scheme of the rules of court.

[37] Had the High Court taken the above into account it would have been compelled to find that the inclusion of rules 78 and 79 did not significantly change the scheme of the review rule in its current manifestation.

Importance of retaining the common law on the review rule

[38] I will briefly highlight the principles of the common law that have served us well when it comes to the review rule and deserving of retention. The first is what I have already stated, that the review rule exists for the benefit of an applicant who has the right to waive it.²⁰ The election not to proceed under the review rule can have adverse consequences for an applicant if the absence of the record leaves the court in doubt as to whether the applicant has made out the case for review.²¹ It is undesirable to straightjacket an applicant to the use of the review rule as there might

20 *South African Football Association v Stanton Woodrush (Pty) Ltd t/a Smidt & Sons and Another* 2003 (3) SA 313 (SCA) at 319F-I and 320A-B, para 5 where the SCA said the following: '[5] Since the present proceedings are primarily review proceedings, SAFA should have utilised the provisions of Uniform Rule 53. SAFA chose not to do so. A failure to follow Rule 53 in reviewing a decision of an administrative organ is not necessarily irregular because the Rule exists principally in the interests of an applicant, and an applicant can waive procedural rights. An applicant is not, however, entitled, by electing to disregard the provisions of the Rule, to impinge upon the procedural rights of a respondent. If, as is the usual case, the proceedings are between the applicant and the organ of State involved, the latter can always, in answer to an ordinary application, supply the record of the proceedings and the reasons for its decision. On the other hand, as in this instance, if the rights of another member of the public are involved, and the organ of State, hiding behind a parapet of silence, adopts a supine attitude towards the matter since the order sought will not affect it (no costs were sought against the Registrar if the latter were to remain inactive), the position is materially different. Stanton was entitled to have the full record before the Court and to have the Registrar's reasons for the impugned decisions available. As a respondent in an ordinary application it does not have those rights.' (Footnotes omitted.)

21 *New Era Investment (Pty) Ltd*, at 1166E-F, para 19.

well be good reason why other procedural avenues are preferable;²² for example where disputes of fact are unavoidable or where the applicant needs the testimony of a person who does not wish to depose to an affidavit and requires to be compelled by way of *subpoena* to give relevant evidence in an action proceeding.²³ The applicant's election not to utilise the review rule should not impinge on the right of a third party to have access to the record.²⁴ In the latter respect, such a third party will be entitled to the production of the record of proceedings regardless of the election of the applicant whose procedural rights will be subservient to those of the third party. Should an applicant

elect not to call for it as contemplated in the review rule, the administrative body whose decision is being challenged may choose to produce the record of proceedings as part of its case.

Disposal

[39] Significantly, and as recognised by the court below, the review rule steers clear of using words ordinarily understood to convey peremptory nuance and nullity for disobedience. One would have assumed, in view of the existing body of case law on the repealed review rule, that the rule maker would have used a language which was stronger and clearer, if what was intended was that all challenges to administrative decision-making must be by means of the review rule.

[40] The review rule as formulated in the new rule 76 has not brought about a significant change as understood by the court a *quo*. I therefore come to the

²² *IBB Military Equipment v Namibia Airports Company* 2017 (4) NR 1194 at 1208E-F, para 57.

²³ *Federal Convention of Namibia v Speaker, National Assembly* at 84E and G-I.

²⁴ SAFA at 310F-G.

conclusion that not only is it not a requirement for a review applicant to proceed under rule 76, but there is no reason that a principle now firmly embedded in our common law should be changed. The High Court therefore misdirected itself in concluding that an applicant seeking review is compelled to proceed under the review rule and that the failure to do so amounts to a nullity.

[41] Mr Coleman's submission that the court below exercised a discretion in upholding the rule 61 objection implies that a court is expected, when faced with a situation such as the present to, on case by case basis, determine whether the general applications rule is the appropriate avenue to challenge administrative decision-making. It would be incongruous to, on the one hand, recognise an applicant's right to

elect whether or not to make use of the review rule and, on the other, suggest that the election could well be the subject of disapproval by the court. In any event, the argument has no merit. The High Court cannot be said to have exercised any discretion because it held that it was, on the principle of *stare decisis*, bound by the decision in *Dausab-Tjiueza*.

[42] Moreover, this case is distinguishable from *Dausab-Tjiueza*: In that case, a police officer holding the rank of Sergeant Class 1 challenged, on review in terms of rule 65, the decision of the Inspector General to transfer her from the Drug Law Enforcement Unit at Gobabis to Corridor 13 Police Station. She sought an order reviewing and correcting or setting aside the decision to transfer her. The Court granted the order by default, setting aside the decision to transfer her. On rescission,

the High Court held that the proceedings should have been brought in terms of rule 76 and the Inspector General should have been called upon to file the record of the proceedings sought to be corrected or set aside together with the reasons for the decision.

[43] Unquestionably, NFE did not seek to review and set aside the decision of NAMFISA. The relief sought by NFE is, first, a declaratory order – declaring the actions and decision of the first and second respondents unlawful; second, a *mandamus* calling upon those respondents to show cause why they should not be compelled to award a license to operate a stock exchange to NFE; alternatively, why they should not be compelled to consider the application submitted on 8 May 2012 for a license to operate a stock exchange and, thirdly, an order compelling them to indicate to NFE

the law under the Act or any other law NFE must comply with in order to be granted such a license and what comprises sufficient resources that NFE must have for the proper exercise or carrying out the powers and duties in terms of the Act or any other law. Evidently, the relief sought by NFE is a far cry from that sought in *Dausab-Tjiueza*.

[44] Although the court enjoys a discretion in the second of the two-stage inquiry involved in an application for irregular proceedings,²⁵ the issue before us is whether the judge *a quo* had the discretion to require an applicant for review to proceed either under the general applications rule or the review rule. If, as I find it does, the

²⁵ *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd* 2012 (2) NR 671 (SC) at 704D-F, para 115.

review rule exists for the benefit of an applicant, it would be otiose to deploy rule 61 to invoke prejudice to deny an applicant a right it otherwise enjoys.

Prejudice irrelevant

[45] It seems to be NAMFISA's case that had NFE used the review rule as opposed to the general applications rule, it would have had a longer period to file its opposing papers. That is not a good point because it is based on the premise that NFE was under an obligation to make use of the review rule. I have already found that NFE was not under such obligation. If NAMFISA was of the view that because of the complexity of the case it required more time to file its answering affidavit, the managing judge could have been asked in terms of rule 55(1)²⁶ to extend the time for doing so.

Is the High Court's order appealable?

[46] We still have to be satisfied that the order made by the High Court is appealable. It is trite that an order that does not finally dispose of the rights of the parties or does not dispose of a substantial part of the dispute between the parties is not appealable.²⁷ It is also settled that if the order of the High Court is merely procedural and the High Court did not determine the merits of the dispute, it is not appealable because of the rule against piecemeal appeals.²⁸

²⁶ It states that 'The court or managing judge may, on application on notice to every party on good cause shown, make an order extending or shortening a time prescribed by these rules or by an order of court for doing an act or taking a step in connection with proceedings of any nature whatsoever, on such terms as the court or managing judge considers suitable or appropriate.'

²⁷ *Di Savino v Nedbank Namibia Ltd* 2017(3) NR 880 (SC) at 891G-895; *Shetu Trading v Tender Board of Namibia* 2012 (1) NR 162 (SC) at 174D-176C.

²⁸ *Knouwds NO (in his capacity as Provisional Liquidator of Avid Investment Corporation (Pty) Ltd) v Josea & another* 2010 (2) NR 754 (SC) at 759I-J, para 13.

[47] In the main submissions, Mr Coleman for NAMFISA submitted that the High Court correctly set aside the notice of motion and removed the application from the roll as being irregular; that the merits were not considered; that the application was not dismissed and that the matter is therefore not appealable. This suggested formulation of the order of the High Court is, in my view, contrived. Setting an application aside and removing a matter from the roll are distinct legal concepts. As I understand the respondents' interlocutory application, it was intended to cause NFE to start the process *de novo* in terms of rule 76 in a manner that would have frustrated the very objective of the rules of court: to facilitate the expeditious and inexpensive resolution of the real issues in dispute between the parties. Unfortunately, almost three years after the main application was brought, the real issues in dispute between the parties remain unresolved. This manner of conducting proceedings is inimical to the aims and objectives of the rules of court and cannot be countenanced.

[48] In the further submissions following the further directions issued by the Court, Mr Coleman submitted that the order of the court below was confined to a procedural matter and could, as in *Knouws v NO Josea & Another*,²⁹ be cured by NFE relaunching its application in terms of the review rule.

[49] *Knouws* concerned the discharge on the return date by the High Court of a provisional sequestration of a company on the ground that there was failure of service contrary to the rules of court. That order was appealed to the Supreme Court.

²⁹ 2010(2) NR 754 (SC).

[50] On the premise that the High Court misdirected itself, the Supreme Court was invited by the appellant to hear the merits of the sequestration order, arguing that because the finding of the court *a quo* resulted in the discharge of the provisional sequestration order, the appellant was entitled to argue the merits. The request was refused and this court confined itself to the question of non-service of the application which was the only issue decided by the judge *a quo*. Strydom AJA pointed out that determining the merits of the sequestration order would embroil the court in issues as a court of first instance, without the benefit of a pronouncement on those issues by the High Court.

[51] The refusal to entertain the merits of the appeal led the *Knouws* Court to consider whether the impugned High Court order was appealable at all. Strydom AJA (at 759C-D) restated the triad of attributes for an appealable order: (1) it must be final, (2) it must be definitive of the rights of the parties or (3) it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceeding.

[52] It was acknowledged³⁰ (relying on *Moch v Nedtravel Ltd t/a American Express Travel Service*³¹) that an order that is not interlocutory and does not have any of the three attributes may nonetheless be appealable if the effect of the court's finding is final and definitive of the rights of the parties and thus not susceptible to alteration by the court of first instance.

³⁰ *Knouws* at 759G-H, para 12.

³¹ 1996 (3) SA 1 (A).

[53] As regards the order appealed, Strydom AJA held that it was neither final nor definitive of the rights of the parties nor did it have the effect of disposing of substantial portion of the relief claimed in the main proceedings. The basis on which the court *a quo* discharged the provisional order was procedural in nature and could be corrected by the appellant relaunching the application. The issue of *res judicata* also did not arise as the order did not finally dispose of the rights of the parties.³²

[54] *Knouws* makes clear that in determining the appealability of an order the emphasis is on the effect of the decision rather than its form.³³ The court struck the appeal from the roll on the basis that, although characterised as a dismissal, the order was not final in nature and therefore not appealable since the appellant could restart the matter by correcting the defect of non-service. It is not insignificant that, in the present case, the High Court explicitly held that the failure by NFE to bring the application under rule 76 'renders the application a nullity, that is, disobedience [that] must be visited with nullity.'³⁴ In the order, the Court 'struck and set aside' the

application. The Court did not 'set aside the notice of motion and [remove] the application from the roll' as suggested by Mr Coleman in his main submissions. In my view, the effect of the order of the High Court, having found that the application was a nullity, was that no application remained extant after the pronouncement. NFE, if it did not appeal the decision, would have been obliged to start the process *de novo* in terms of rule 76, in accordance with the judgment *a quo*.³⁵

32 Compare *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A).

33 Compare *Wellington Court Shareblock v Johannesburg City Council; Agar Properties (Pty) Ltd v Johannesburg City Council* 1995 (3) SA 827 (A) at 834A.

34 High Court judgment at para 14.

35 This Court, in *Willem Petrus Swart v Koos Brandt*, case no SA17/20002 had occasion to remark about the issue of voidness and nullity. It quoted the Macfoy Case, that:

'If an act is void, then it is in law a nullity. It is not only bad. There is no need for an order of the Court to set it aside. It is automatically null and void without ado, though sometimes

[55] *Knouws* establishes an important principle. If a court's order relates to a purely procedural issue unrelated to the merits, it is not appealable. In addition, if all that is required of the party against whom the order is made is to put right the procedural defect, an appeal is not the appropriate remedy.

[56] The present facts are distinguishable from *Knouws*. In *Knouws*, service was a necessary step to the prosecution of the claim.

[57] In the present case the appellant is being required to do what is not necessary for the prosecution of the claim. If this court does not interfere, NFE will have to ask for the record, seek an order to review and set aside an incipient decision when what it seeks is, in the first place, declaratory relief and, secondly, an order compelling the first and second respondents, *inter alia*, to take a decision which could well be the

subject of further litigation. The concern about piecemeal appeals which motivated the *Knouws* Court not to interfere therefore finds no application on our facts.

[58] In *Knouws*, the aggrieved party's non-compliance was curable. In the present case there was no non-compliance. NFE invoked a procedural avenue open to it which the High Court incorrectly closed not only to it but to all future litigants similarly situated. The order made by the court a *quo* is therefore not procedural *simpliciter* as it involves the denial of a right recognised at common law to make an election among procedural avenues open to it as a litigant.

convenient to have the court declare it to be so. An every proceeding which is founded on it is also bad and incurable bad. You cannot put something on nothing and expect it to stay there. It will collapse.'

[59] Besides, the High Court's conclusion on the rule 61 objection was dependent on the interpretation of the review rule in its current formulation. This court has held that although the objection related to a procedural matter is not determinative of the merits, an authoritative interpretation of a statutory provision met the criterion of finality and, therefore, appealable.

[60] In *Prosecutor-General v Taapopi*,³⁶ an appeal was noted against the refusal of a *rule nisi* and dismissal of an application for a property preservation order on the basis that the PG did not comply with the seven-day notice requirement contemplated in rule 51(2) read with reg. 7(b) to the POCA regulations. It was contended on behalf of the respondent that the order of the court *a quo* was not appealable in that the merits of the case had not been dealt with by the court *a quo*. The PG's case however was that the decision had a final effect and therefore appealable.

[61] The High Court's conclusion was based on its interpretation of s 51(1)(2) of the POCA. Mokgoro AJA held that the interpretive decision was final and could not be altered by the High Court and was therefore appealable.

[62] It will be recalled that the court below engaged in the interpretation of rule 76 and came to the conclusion that it was peremptory. That interpretive decision was not only erroneous but it is unalterable by the court *a quo*. The order is therefore appealable. The appeal must therefore succeed.

³⁶ 2017 (3) NR 627 (SC) at 637E-F.

Costs

[63] NFE has achieved success and is therefore entitled to its costs, both in the High Court and on appeal. The rule 61 application was an interlocutory proceeding as contemplated in rule 32 and costs are limited in terms of rule 32(11) to N\$20 000. The rule makes clear that the limit applies whether or not instructing and instructed counsel are engaged. Mr Maleka has asked that we grant costs of one instructing and two instructed counsel in both the High Court and on appeal. Although I have no difficulty granting such an order in respect of the appeal, I see no good reason why that must be so in respect of the High Court where the intent clearly is to limit costs as much as possible. A simple order granting costs for the High Court proceedings will suffice.

[64] NFE's heads of argument are in excess of 40 pages contrary to rule 17(7)(k) of the Rules of the Supreme Court, which directs that heads of argument must not exceed 40 pages unless the court directs otherwise. NFE did not obtain the court's permission to file heads of argument in excess of what the rule requires. That deserves

censure for the reasons we explained in *Minister of Finance and Another v Hollard Insurance and Others*.³⁷

Order

[65] I therefore make the following order:

³⁷ (P 8/2018)[2019] NASC (28 May 2019) at para 123.

3. The appeal succeeds and the judgment and order of the High Court are hereby set aside and substituted for the following order:
 - '1. The rule 61 application is dismissed.
 2. The applicant shall bear the respondents' costs, jointly and severally, the one paying the other to be absolved.'
4. The matter is remitted to the High Court for the Deputy Judge President to place it before a managing judge for further directions and finalisation.
3. The first and second respondents shall bear the costs of the appeal, jointly and severally, the one paying the other to be absolved, to include the costs of one instructing and two instructed counsel.
4. The appellant's costs in respect of the heads of argument only shall be limited to 90% of the taxed costs.

MAINGA JA

NKABINDE AJA

APPEARANCES

APPELLANT:

V Maleka, SC (with him G Narib)

Instructed by De Silva Inc.

1ST & 2ND RESPONDENTS:

G Coleman (with him S Bock)

Instructed by AngulaCo Inc.