



REPORTABLE

CASE NO: SCR 1/2023

IN THE SUPREME COURT OF NAMIBIA

In the matters between:

NAMIBIA WATER CORPORATION LIMITED

APPLICANT

and

KUIRI FANUAL TJIPANGANDJARA

RESPONDENT

Coram: DAMASEB DCJ, HOFF JA and PRINSLOO AJA

Heard: 15 November 2023

Delivered: 22 November 2023

Summary: On 18 July 2023, this court invoked its review jurisdiction in terms of s 16 of the Supreme Court Act 16 of 1990 at the request of the applicant (Namwater). The court *a quo* dismissed a special plea that it lacked jurisdiction. Dissatisfied with that order, Namwater brought an application in terms of Rule 115 of the High Court Rules for leave to appeal against the High Court's assumption of jurisdiction.

At the hearing of the application for leave to appeal the respondent (Mr Tjipangandjara) through his counsel abandoned a point *in limine* on the fact that the leave to appeal was not brought in terms of Rule 65 (on notice of motion supported by

affidavit). The court proceeded to adjudicate the leave to appeal and reserved judgment.

The court *a quo* held that the application for leave to appeal under Rule 115 had to comply with Rule 65 – on notice of motion supported by affidavit. That conclusion was contrary to established precedent holding the contrary. Furthermore, in its written reasons the court *a quo* failed to explain why it departed from binding authority – neither did the court *a quo* afford the applicant the opportunity to address it on the outcome-determinative issue – in breach of Art. 12(1)(a) of the Namibian Constitution. The point was abandoned in any event. It is against that order and judgment that Namwater seeks the review and setting aside of the orders and judgment of the court *a quo*.

Held that, precedent is the lifeblood of the common law. Chaos and uncertainty will inevitably result if judges of the High Court ignore precedent. It is trite that judges of the High Court are bound by previous decisions of that court (including their own) unless (a) it can be distinguished (b) it was arrived at *per in curium* or (c) it is clearly wrong and failing the above this court is satisfied that the managing judge committed an irregularity.

This court was left to make a determination on whether an application for leave to appeal should be made on notice of motion supported by affidavit.

Held that, an application for leave to appeal is almost invariably heard by the same judge against whose order leave to appeal is sought. This court does not see the necessity to entertain an application for leave to appeal by way of a full-blown application in terms of Rule 65 and as a result the position in *Hollard Insurance Company of Namibia v Minister of Finance* (HC-MD-CIV-MOT-REV-2018/00127) [2020] NAHCMD 247 (24 June 2020) is approved. The court *a quo*'s judgment of 6 April 2023 is reviewed, set aside and remitted the matter to managing judge to give judgment on application for leave to appeal which was already argued.

REVIEW JUDGMENT

DAMASEB DCJ (HOFF JA and PRINSLOO AJA concurring):

Introduction

[1] In contested proceedings in the High Court (*Tjipangandjara v Namwater Corporation Ltd* (HC-MD-CIV-ACT-CON-2021/04068)) involving the applicant (Namwater) and the respondent who at the time was an employee of Namwater (Mr Tjipangandjara) – the High Court (hereafter the managing judge) on 27 January 2023 dismissed Namwater’s special plea that it lacked jurisdiction. Dissatisfied with that order, Namwater brought an application in terms of Rule 115 of the High Court Rules for leave to appeal against the High Court’s assumption of jurisdiction.

[2] On 6 April 2023 the managing judge made the following order concerning Namwater’s application for leave to appeal:

- ‘1. The application for leave to appeal is struck from the role (sic) due to non-compliance with the rules relating to applications.
2. Costs are awarded to the plaintiff.’

Context

[3] When Namwater brought the application for leave to appeal, it was opposed by Mr Tjipangandjara on procedural grounds and on the merits. Mr Tjipangandjara had asserted *in limine* that the application for leave to appeal was defective because it was not brought on notice of motion supported by affidavit in terms of Rule 65. It is apparent from the record of proceedings of 23 March 2023 before the managing judge that before the hearing Mr Tjipangandjara's counsel abandoned the *in limine* objection.

[4] That indeed the *in limine* objection was so abandoned was placed on record by Namwater's counsel without any objection by Mr Tjipangandjara's counsel. The reason the objection was abandoned became apparent when Namwater's counsel informed the managing judge, in the presence of Mr Tjipangandjara's counsel, that the *in limine* objection had no merit because the contrary was in fact decided on Rule 115 by the managing judge in the matter of *Elias v Bank of Namibia* (HC-MD-LAB-APP-AAA-2020/00043) [2020] NALCMD 30 (16 October 2020) (hereafter *Elias*).

[5] Counsel for the parties then proceeded to argue the merits of the application for leave to appeal. It is apparent from the record that no legal argument took place before the managing judge as regards the *in limine* objection raised but abandoned on behalf of Mr Tjipangandjara. After argument, the managing judge postponed the matter to 6 April 2023 for her ruling. On that date the managing judge gave her reasoned ruling striking off the application for leave to appeal.

Request for review

[6] Aggrieved by the outcome, Namwater, by notice to Mr Tjipangandjara, petitioned the Chief Justice to invoke the Supreme Court's review jurisdiction in terms of s 16 of the Supreme Court Act 15 of 1990. The reasons advanced are more fully set out below and need not be canvassed here.

[7] On 18 July 2023, the Supreme Court invoked its review jurisdiction and directed Namwater to bring a review application on notice of motion 'by not later than 7 August 2023' by notice to the managing judge and Mr Tjipangandjara. The grounds upon which that was done are materially the same as those set out in the next section.

The review application

[8] Namwater's review application was delivered on 8 August 2023 – one day late. In a condonation application filed on behalf of Namwater by its legal practitioner of record, it is explained that the deadline of 7 August was missed because of reasons beyond the control of the practitioner who bore responsibility for the conduct of the matter. I have considered the explanation offered and am satisfied that it is *bona fide* and that condonation should be granted for delivering the review later than 7 August 2023.

[9] In the affidavit in support of the notice of motion for review, it is alleged on behalf of Namwater that at the hearing of the application for leave to appeal, counsel then appearing for Namwater handed up to the managing judge a copy of her own

decision in *Elias* and a copy of Geier J's judgment in *Hollard*¹ – both judgments laying down that it is not a requirement for a Rule 115 application to be brought on notice of motion supported by affidavit 'because the evidence and the issues of law upon which applications for leave to appeal are premised are already before court'.

[10] The deponent states that it is an irregularity for the managing judge to have considered herself not bound by [Mr Tjipangandjara's] abandonment of the point *in limine*. The other irregularity, it is stated, is the managing judge's failure in her written reasons to 'explain her shift from her earlier reliance on' Geier J's judgment in *Hollard* and, contrary to Art.12(1)(a) failing to afford Namwater the right to a fair trial by affording it an opportunity to address her on the issue on which she struck off from the roll the application for leave to appeal.

[11] According to Namwater, the irregularity has occasioned it prejudice and that the learned judge's decision has created confusion on the proper approach to Rule 115 which needs to be corrected by the Supreme Court. It is said that if Namwater accepts the managing judge's decision it will bear unnecessary additional costs by seeking leave to appeal by way of notice of motion supported by affidavit.

[12] In the event the Supreme Court invokes its s 16 review jurisdiction, Namwater seeks:

¹ *Hollard Insurance Company of Namibia v Minister of Finance* (HC-MD-CIV-MOT-REV-2018/00127) [2020] NAHCMD 247 (24 June 2020).

'the review and setting aside of the court a quo's judgment and order of 06 April 2023, and the referral of the matter back to the managing judge (within the timeframe applicable to the disposal of applications for leave to appeal in the court a quo) to determine [Namwater's] application for leave to appeal on the submissions before her as appearing in the parties' heads of argument and the transcribed record of the proceedings'.

[13] Mr Tjipangandjara did not oppose the review application and the managing judge elected not to file of record any response to the averments made in the affidavit in support of the review application.

Submissions

[14] At the hearing of the review application Namwater was represented by Mr Narib assisted by Mr Muhongo. Counsel for Namwater's main contention is that the managing judge committed an irregularity by deciding a point abandoned on behalf of Mr Tjipanganjara and, in any event, without affording Namwater the opportunity to make representations to the court on the issue.

[15] That criticism is supported by ample authority of this court: *Kauesa v Minister of Home Affairs and Others* 1995 NR 175 (SC); *Namibia Plains Farming and Tourism v Valencia Uranium* 2011 (2) NR 469 (SC) 483. Since the managing judge acted contrary to this Court's authority binding upon her, she committed an irregularity to the extent that it denied Namwater the right to a fair trial guaranteed by Art. 12(1)(a) of the Namibian Constitution. It bears mention that because Mr Tjipangandjara abandoned the procedural objection, counsel for Namwater did not address the court

on that issue which turned out to be outcome-determinative. That was most prejudicial to Namwater.

[16] The further irregularity relied upon by Namwater is that the managing judge erred by departing from established High Court precedent² (including by the same judge³) holding the contrary. In *Elias*⁴ the same judge whose decision is now on review commented:

‘I am therefore not convinced that the requirement to file an affidavit in support of an application as required by rule 65 is correctly applied in matters where leave to appeal is sought and therefore agree with the sentiments expressed by Geier J in *Hollard Insurance Company of Namibia v Minister of Finance*⁵’.

[17] Precedent is the lifeblood of the common law.⁶ Chaos and uncertainty will inevitably result if judges of the High Court ignore precedent. It is trite that judges of the High Court are bound by previous decisions of that court (including their own) unless (a) it can be distinguished (b) it was arrived at *per in curium* or (c) it is clearly wrong. Namwater has established in the review that both her judgment in *Elias* and that by Geier J in *Hollard* were brought to the attention of the managing judge, yet in her judgment striking the application for leave to appeal the managing judge does not engage with those judgments and to explain why she chose not to follow them. That is an irregularity.

² *Hollard, ibid.*

³ *Elias*, para 6.

⁴ *Ibid.*

⁵ *Hollard, ibid.*

⁶ *Digashu v GRN, Seiler-Lilles v GRN (SA 7-2022 and SA 6-2022) [2023] NASC (16 May 2023).*

[18] On behalf of Namwater, Mr Narib submitted that should we find that the managing judge committed reviewable irregularities, we should review and set aside her order and remit the matter to her to give a ruling on the application for leave to appeal as the matter was already argued.

[19] For all of the reasons I have given above, I am satisfied that Namwater has made out the case that the managing judge committed an irregularity. What remains to consider is whether the basis on which the application for leave to appeal was struck off from the roll is correct in law.

[20] Because there are now conflicting High Court decisions on the proper approach to Rule 115, it is necessary, as urged by Mr Narib, for this court to settle the matter. I agree that it is in the interest of the proper administration of justice that this Court not only review and set aside the decision by the managing judge but to authoritatively settle the proper approach to Rule 115. I turn to that issue next.

Managing judge's interpretation of Rule 115

[21] Rule 115 reads:

- '(1) When leave to appeal from a judgment or order of the court is required the person seeking leave to appeal may, on a statement of the grounds for the leave to appeal, request for leave to appeal at the time of the judgment or order.
- (2) When leave to appeal from a judgment or order of the court is required and it has not been requested at the time of the judgment or order, application for

such leave must be made together with the grounds for the leave to appeal within 15 days after the date of the order appealed against.

- (3) If the reasons or the full reasons for the court's judgment or order are given on a later date than the date of the judgment or order, the application may be made within 15 days after the later date and the court may, on good cause shown, extend the period of 15 days. . . .'

[22] According to the managing judge, Rule 115 creates two opportunities for when leave to appeal may be brought:

'a. The first opportunity is at the time of delivery of the judgment or order. At this stage, the applicant merely has to request a statement of the grounds for leave to appeal. Nothing more is required than a request on a statement of the grounds at this stage.

b. If leave is not requested at the time of the judgment, the applicant must bring an application for such leave together with the grounds for the leave to appeal within 15 days of the order being appealed.'

[23] Because Namwater, in support of its application for leave to appeal, had filed only a statement of the grounds of appeal unsupported by affidavit, the managing judge concluded that the application was a nullity. According to the managing judge, a statement of the grounds for leave to appeal is only sufficient at the time of the judgment and that after that, a proper application must be filed within 15 days of the court order. The court *a quo* held that it is peremptory that such an application should be brought in terms of Rule 65.

[24] This approach differs from that taken by Geier J in *Hollard*.⁷ In *Hollard* Geier J was referred to *Namibia Water Corporation Ltd v Tjipangandjara* (LCA 16 & 17/2017) [2019] NALCMD 33 (21 November 2019) where a different judge of the High Court held that an application under Rule 115 must comply with Rule 65. According to Geier J in *Hollard* on that case:

‘It was submitted that the judgment was clearly wrong, that it was not consistent with Rule 115, which regulates leave to appeal and were, plainly, no evidence is required on affidavit for purposes of securing leave to appeal. The evidence on which such an application may permissibly rely is already before court. Indeed, so it was submitted further, this was directly contrary to the logic of appeals and for the determination of the relevant issues against which leave should be granted or refused and that such issues were to be argued and determined on matters extraneous to the record to which an appeal court, (in principle), is confined. Here it was further relevant that leave to appeal may be sought immediately after judgment (without the need to file any process) and thus that all these aspects clearly demonstrate that the Namibia Water Corporation judgment was wrong.’

[25] In *Elias* the managing judge followed Geier J’s approach in *Hollard* as I already demonstrated.

The proper approach to Rule 115

[26] Should an application for leave to appeal be made on notice of motion supported by affidavit? The issue thus defined has resulted in a binary approach in a trilogy of High Court judgments: (*Namibia Water Corporation Ltd v Tjipangandjara* (LCA 16 & 17/2017) [2019] NALCMD 33 (21 November 2019) – hereafter Namwater

⁷ *Hollard*, para 7.

Corporation (2017), *Hollard and Elias. Namibia Water Corporation* (2017) was followed by the managing judge in the case now under review although disapproved by Geier J in *Hollard*.

Disposal

[27] In interpreting the Rules of Court, the court is enjoined to have regard to the overriding objective. Rule 1 (3) states:

‘The overriding objective of these rules is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable . . .’

[28] In terms of Rule 17(1):

‘The court must seek to give effect to the overriding objective referred to in rule 1 when it exercises any power given to it under these rules or in interpreting any other rule of procedure or practice direction applicable in the court.’ (My underlining for emphasis).

[29] Namibia’s civil justice system has changed – with the emphasis now on the speedy disposal of cases with minimum costs to the parties. This court confirmed as much in *Arangies & another v Unitrans Namibia (Pty) Ltd*⁸ and stressed the fundamental purpose of judicial case management as being to avoid unnecessary delays in the finalisation of cases. As Rule 17 (1) makes clear, all rules of court must

⁸ *Arangies & another v Unitrans Namibia (PTY) LTD & another* (1 of 2018) 2018 NASC 401 (27 July 2018) paras 9 -11.

be interpreted in a way that gives effect to the overriding objective. That includes Rule 115.

[30] I do not find anything in the wording of Rule 115 – or indeed in public policy – why an application for leave to appeal should be on notice of motion supported by affidavit. We already cautioned against the dogmatic approach that where the word ‘application’ is used, it must be given the same meaning that it bears in contradistinction to action proceedings in our civil procedure process: *Swakop Uranium (Pty) Ltd v McLaren Ian Robert & another*⁹. That formulaic approach is what Geier J correctly disapproved in *Hollard*.

[31] Apart from stating the obvious – ie that leave to appeal may arise at two different stages – the managing judge does not explain why different considerations should apply at either. It is common ground that the jurisdiction plea was adjudicated and dismissed by the managing judge. It may have been arguable if leave to appeal served before a different judge who had not decided the issue for which leave to appeal is sought and for that reason might have required some elucidation of the history of the matter.

[32] It is not immediately apparent to me what the applicant for leave to appeal is expected to say in such an affidavit. It would have been helpful if the managing judge said something about that. In my view, the interpretation given to Rule 115 by the

⁹ *Swakop Uranium (Pty) Ltd v McLaren Ian Robert & another* (SA 64-2020) 2022 NASC (21 November 2022) paras 31-33.

managing judge does not promote the overriding objective. If anything, it is inimical to it.

[33] Almost invariably, an application for leave to appeal is heard by the same judge against whose order leave to appeal is sought. Where a judge has given judgment and a party wishes to seek leave to appeal against it the judge in question must hear such an application. It is only if that judge loses jurisdiction by no longer being a judge of the High Court or becomes otherwise unavailable that an application for leave to appeal may be heard by another judge. What then is the pressing need for such a judge to entertain an application for leave to appeal by way of a full-blown application in terms of Rule 65? I cannot see any.

[34] The reasoning in *Hollard* and *Elias* on the proper approach to Rule 115 is thus to be preferred.

[35] The managing judge erred in holding that an application for leave to appeal must be brought on notice of motion supported by affidavit. The consequent order striking off from the roll Namwater's application for leave to appeal should therefore be set aside.

Costs

[36] Namwater did not ask for costs and accordingly I do not make such an order.

Order

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

1. The applicant's non-compliance with Direction 1(c) issued on 18 July 2023 is hereby condoned.
2. The order of the court *a quo* of 6 April 2023 under Case Number: HC-MD-CIV-ACT-CON-2021/04068, is reviewed and set aside.
3. The matter is remitted to the managing judge for her to give judgment on the applicant's application for leave to appeal in terms of Rule 115 of the High Court Rules.
4. There is no order as to costs.

DAMASEB DCJ

HOFF JA

PRINSLOO AJA

APPEARANCES

APPELLANT:

G Narib assisted by T Muhongo

Instructed by ENSafrica | Namibia

RESPONDENT:

No appearance