CASE NO: SCR 2/2023

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MINISTER OF AGRICULTURE, WATER AND LAND REFORM	**First Applicant**
GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**Second Applicant**
ATTORNEY-GENERAL OF THE REPUBLIC OF NAMIBIA	**Third Applicant**
HANGO NAMBINGA N.O.	**Fourth Applicant**
and	
JOB SHIPULULO AMUPANDA	**First Respondent**
MEAT BOARD OF NAMIBIA	**Second Respondent**
DIETHELM METZGER	**Third Respondent**
ANDRE XAVIER COMPION	**Fourth Respondent**
NAMIBIA AGRICULTURAL UNION	**Fifth Respondent**

Coram: SMUTS JA, HOFF JA and FRANK AJA

Heard: **8 February 2024**

Delivered: **18 March 2024**

Summary: This is a review application in terms of s 16 of the Supreme Court Act 15 of 1990, stemming from an action instituted by the first respondent (Mr Amupanda) in the court *a quo* to remove the Veterinary Cordon Fence (the fence or the Red Line) which stretches across the country from east to west. This fence separates the country into two parts, namely: the area to the north of it, where historically and currently, agricultural activities are carried out on communal land and the area to the south of it where agricultural activities are carried out on communal areas and on individually owned land and where historically, European settlement occurred during the country's colonisation. Mr Amupanda contends that the use of the fence and the veterinary controls associated with it were not instituted in terms of any law; that the fence is unconstitutional and that any confiscation of red meat at the fence (coming from north of the fence) by officials is unlawful. Mr Amupanda seeks an order that the fence be removed within 90 days. The Government maintains that the fence is still necessary to prevent animal diseases from spreading to the area south of the fence and to preserve lucrative overseas markets for animal products emanating from the area south of the fence until a practical mechanism or manner can be found to move the Red Line north partially or up to the border with Angola or to abolish it whilst also ensuring the animal health situation is such that the markets for animal products outside Namibia is not jeopardised.

At the end of August 2023, Mr Amupanda launched an application for a protective costs order in terms of rule 20 of the Rules of the High Court. He averred that he 'will not be able to proceed to trial in this matter seeing that the costs are likely to be astronomical and beyond his pockets'; that 'the costs are likely to go into millions' and that 'if there is no protective costs order, my meagre estate will be completely wiped out'.

The Minister of Agriculture, Water and Land Reform (the Minister) filed an opposing affidavit on behalf of the Government parties in opposition to this application. The Minister took issue with the manner in which Mr Amupanda dealt with his financial resources and the likely costs of the litigation (ie the itemised statement of account to establish the likely costs involved; not providing a full statement of his monthly income and expenditure supported by documentary evidence; an explanation as to why he could not obtain legal aid; for not providing a disclosure of resources of the Affirmative

Repositioning Movement of which he is the driving force and the full disclosure of any contributions made by parties supporting him in his stance with regard to the removal of the Red Line). Similar issues are also raised on behalf of the Meat Board of Namibia (the Meat Board) in opposition to the application. The Minister and the Meat Board submitted that in view of the paucity of the information as to his financial position when he clearly had a lot more to disclose resulted in him not meeting the requirements set out in rule 20(1)(c) of the Rules of the High Court and that his application had to be dismissed on this basis alone.

In its findings, the court *a quo* agreed with the Minister and the Meat Board's contention that Mr Amupanda did not fully disclose his financial position and has not met the requirements set out in rule 20(1)(c). The court *a quo* further found that – because of the financial situation presented by Mr Amupanda – it was not in the position to arrive at a conclusion as to whether or not it is just and fair that a protective costs order be granted in favour of Mr Amupanda. That the conclusion the court has arrived at would ordinarily have one result which is the refusal and dismissal of the application for a protective costs order. However, considering the purpose of rule 20 – the court *a quo* found that a person who has an arguable case that involves a matter of public interest must not, for fear of an adverse costs order, be deterred from pursuing a claim. Consequently, the court made an order granting Mr Amupanda leave to supplement his papers and to place a more detailed application before the court for it to properly assess his financial resources and the amount of costs that are likely to be involved in this matter. It is this decision that the applicants (and the Meat Board) contend that the court *a quo* committed an irregularity when it made its order, and thus invoked this Court's review jurisdiction to have the court *a quo*'s order reviewed and set aside.

The issue before this Court is whether the court *a quo* acted irregularly when it made its order, and if so, what remedy should be granted to the current applicants. The nature of the review application is limited to the requirements stipulated in rule 20(1)(c) and the consequences of a failure to adhere to such stipulations. The judge *a quo* in his response to this review application stated that the orders he made 'are rooted in the inherent powers which the High Court has to regulate the process'.

Held that, the consequence of omitting to satisfy the necessary requirements in respect of a relief sought normally leads to the dismissal of an application with a concomitant adverse costs order. The court *a quo* correctly recognised this in the judgment *a quo*.

Held that, the reliance by the judge *a quo* on the inherent jurisdiction of a court to deviate from the normal order that he should have made subsequent to his finding that Mr Amupanda did not comply with the requisites of rule 20(1)(c) was irregular and the order he made will therefore be set aside as it constitutes an irregularity in the proceedings.

Held that, it is clear that the judge *a quo* did not want to close the door of the court to Mr Amupanda, an order in line with rule 67(2) of the Rules of the High Court with an appropriate costs order would have been the correct course.

It thus follows that the order of the court *a quo* is reviewed and set aside.

REVIEW JUDGMENT

FRANK AJA (SMUTS JA and HOFF JA concurring):

Introduction

[1] First respondent (Mr Amupanda) instituted an action in the High Court to, in essence, get rid of the Veterinary Cordon Fence (the fence or the Red Line) which stretches across the country from east to west and is separating the country into two parts, namely the area to the north of this fence where historically and currently, agricultural activities are carried out on communal land and the area to the south of the fence where agricultural activities are carried out in communal areas and on individually owned land and where historically, European settlement occurred during the period of this country's colonisation. Mr Amupanda avers that the use of the fence

and the veterinary controls associated with it was not instituted in terms of any law; is in any event unconstitutional and that any confiscation of red meat at the fence by officials is unlawful and seeks an order that the fence be removed within 90 days.

[2] Persons moving from the north of the fence to the south thereof are not allowed to transport animal products across the fence without permits. The crossing points through the fence are manned by officials of the Directorate of Veterinary Services situate within the Ministry of Agriculture, Water and Land Reform who seek to ensure that the vehicles and persons crossing the fence do not transport animal products unlawfully across the fence and have the power to search persons and vehicles and to seize animal products unlawfully sought to be conveyed through the fence.

[3] The Veterinary Cordon Fence is locally also referred to as the Red Line and was installed by the German colonial authorities towards the end of the 19th century to prevent animal diseases spreading to the south of the country.[1] It has been in place since then. The retention of the fence post Namibia's independence has been politically contentious and whereas the government and its spokespersons have indicated that steps would be taken to remove it, this has not yet happened.[2]

[4] The Government maintains that the Veterinary Cordon Fence is still necessary to prevent animal diseases from spreading to the area south of the fence and to preserve lucrative overseas markets for animal products emanating from the area

[1] The red line originated as a security measure of the colonial administration which designated certain areas north of the Red Line where security measures, with the concomitant limitation of civil rights, were put in place. As the Red Line eventually coincided with the Veterinary Cordon Fence, the two concepts were also eventually used interchangeably.

[2] The distinguishing features relevant to the northern and southern side of the Red Line has fallen by the wayside with the advent of Namibia's Independence. The Red Line is thus currently only a Veterinary Cordon Fence.

south of the fence until a practical mechanism or manner can be found to move the Red Line north partially or up to the border with Angola or to abolish it whilst also ensuring the animal health situation so that the outside market for Namibian animal products is not jeopardised.

[5] All the Government parties cited as applicants in this application were cited as defendants in the action. Fourth applicant Mr Nambinga was the official of the Directorate of Veterinary Services who confiscated meat in possession of Mr Amupanda when he sought to cross the fence. The respondents in this application other than Mr Amupanda are persons or entities who also feature as parties in the action proceedings. The Meat Board of Namibia (the Meat Board) was added as a party to the action proceedings instituted by Mr Amupanda by way of an amendment to the original summons whereas the other respondents joined the proceedings subsequent to the institution of the action and upon applications allowing them to do so.

[6] At the end of August 2023, Mr Amupanda launched an application for a protective costs order and averred, among others, that ‘I will not be able to proceed to trial in this matter seeing the costs are likely to be astronomical and beyond my pockets’; that ‘the costs are likely to go into millions’ and ‘if there is no protective costs order, my meagre estate will be completely wiped out . . .’.

[7] The court *a quo* dealt with the issue of the financial means and the cost implications of the litigation instituted by Mr Amupanda as follows:

'[49] In the present matter, Mr Amupanda simply states that he is a natural person without the necessary financial means to advance this case and as such further the interest of justice. He says that he does not have access to resources sufficient enough to achieve equality of forces (as opposed to the defendants). He furthermore simply states that the costs involved in this matter will be "messy" and will definitely run into millions of Namibia Dollars. These are not facts but are unsubstantiated bold statements and conclusions, the basis on which they were arrived at not having been stated.

[50] I do, therefore, agree with the Minister and Meat Board's contention that because Mr Amupanda has not fully disclosed his financial position to this court, he has not met the requirements set out in the rule 20(1)(c). Looking at the financial situation presented by Mr Amupanda, I am not in the position to arrive at a conclusion as to whether or not it is just and fair that I grant a protective costs order in his favour and what conditions I must impose if I indeed grant the protective costs order.

[51] The conclusion that I have arrived at, namely that Mr Amupanda has not satisfied the requirements imposed by rule 20(1)(c), would ordinarily have one and only one result namely the refusal and dismissal of Mr Amupanda's application for a protective cost order.

[52] I earlier stated that the Deputy Chief Justice in his work *Court-Managed Civil Procedure of the High Court of Namibia Law, Procedure and Practice* – argued that the purpose of rule 20 is that a person who has an arguable case that involves a matter of public interest must not, for fear of an adverse costs order, be deterred from pursuing a claim.

[53] I am therefore inclined to assist Mr Amupanda in this regard. I will grant him leave to supplement his papers and to place more detailed information before the court for the court to properly assess his financial resources and the amount of costs that are likely to be involved in this matter.'[3]

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[3] *Amupanda v Minister of Agriculture, Water and Land Reform* (HC-MD-CIV-ACT-OTH-2021/02075) [2023] NAHCMD 547 (5 September 2023).

[8] In line with what is stated in respect of lack of information relating to the potential costs of the intended action and the financial position of Mr Amupanda, the court *a quo* then made the following order:

> '[54] Having considered the arguments presented and the papers before me, as well as the applicable law, I make the following order:
>
> 1. The plaintiff is granted leave to approach this court on the same papers, duly amplified, on the aspect of his financial resources and the amount of the costs that are likely to be involved in this matter.
>
> 2. For the purposes of paragraph 1 of this order, the plaintiff must, if so advised, file his amplified papers by not later than 12 September 2023.
>
> 3. The defendants may, if so advised, reply to the plaintiff's amplified papers by not later than 23 September 2023.
>
> 4. The matter is postponed to 26 September 2023 at 08h30 for a status hearing to consider the way forward.'

[9] It is clear that the judge *a quo* views the order as a postponement of the matter to allow Mr Amupanda to rectify the defects identified by a certain time, if he so wishes. It follows from the judgment in which it was found that he complied with the other requisites spelled out in rule 20, that Mr Amupanda is advised to address the issues mentioned in prayer 1 of the order or face the dismissal of his application at the next status hearing referred to in para 4 of the order should he not supplement his application.

[10] In the current application, issue is taken with the above decision of the court *a quo* on the basis that, it was never indicated by counsel acting on behalf of Mr

Amupanda that he should be granted leave to file further affidavits in respect of the matters mentioned in the order despite the point of this lack of particularity being taken in the answering affidavits of the current applicants and argued at the hearing. This according to the submissions of the current applicants left the court *a quo* with no option but to refuse the application for a protective costs order with costs. According to the current applicants, the court *a quo* acted irregularly when it made its order and the order must be reviewed and set aside. None of the parties concerned were forewarned of the possibility of such an order by the judge *a quo* so that they could make submissions in this regard.

[11] The review turns on the question as to whether the court *a quo* acted irregularly when it made its order aforesaid, and if so, what remedy should be granted to the current applicants. It should be noted that Mr Amupanda has not entered the fray in respect of this application and thus abides by the decision of this Court.

Proceedings in the court *a quo*

[12] Rule 20 of the High Court Rules reads as follows:

> '20. (1) On an application by a party and served on any other party the court may, on such conditions as it thinks fit, make a protective costs order at any stage of the proceedings if the court is satisfied that –
>
> (a) the issues raised in the case are of general public importance and it is a first impression case;
>
> (b) the public interest requires that those issues be resolved; and

(c) having regard to the financial resources of the applicant or applicants and the respondent or respondents and to the amount of costs that are likely to be involved it is fair and just to make the order, as long as the conduct of the applicant in the case is not frivolous or vexatious.

(2) A protective costs order may –

(a) prescribe in advance that there will be no order as to costs in the substantive proceedings whatever the outcome of the case;

(b) prescribe in advance that there will be no adverse costs order against the party requesting the protective costs order in case that party is unsuccessful in the substantive proceedings; or

(c) cap the maximum liability for costs against the party requesting the protective costs order in the event that that party is unsuccessful in the substantive proceedings.

(3) If a litigant covered by a protective costs order refuses an offer of settlement and fails in the event to be awarded more than the offered amount or remedy, the protective costs order does apply only with respect to the proceedings up to the date of the offer of settlement.

(4) The court may make any award regarding costs that it considers fit in respect of an application for a protective costs order under this rule.'

[13] Because of the limited nature of the review application it is only necessary to consider the requirements stipulated in rule 20(1)(c) and the consequences of the failure to adhere to such stipulations. I have already quoted in the introduction to this judgment the kind of general statements made in this regard in the founding affidavit by Mr Amupanda and the comments of the judge *a quo* in respect thereof.

[14] The Minister of Agriculture, Water and Land Reform (the Minister) filed an opposing affidavit on behalf of the Government parties (inclusive of Mr Nambinga) in opposition to the application for a protective costs order. In this affidavit, issue is taken with the manner in which Mr Amupanda dealt with his financial resources and the likely costs of the litigation. Mr Amupanda is criticised for not providing an itemised statement of account to establish the likely costs involved; not providing a full statement of his assets and liabilities supported by documentary evidence; not providing a full statement of his monthly income and expenditure supported by documentary evidence; an explanation as to why he could not obtain legal aid; for not providing a disclosure of resources of the Affirmative Repositioning Movement of which he is the driving force and the full disclosure of any contributions made by parties supporting him in his stance with regard to the removal of the Red Line.

[15] In an affidavit of the chief executive officer of the Meat Board in opposition to the founding affidavit of Mr Amupanda, a similar issue is raised on behalf of the Meat Board and the matter is taken further. Investigations by the Meat Board established that Mr Amupanda owned immovable property and a Ford pick-up truck, held at least five bank accounts with Bank Windhoek of which three are savings accounts, and is a member of several close corporations one of which receives fishing quotas from the Government. Ten close corporations are listed in which Mr Amupanda has interests ranging from seven per cent to 100 per cent. Mr Amupanda further has a Toyota pick-up which is used in respect of his agricultural interests north of the Red Line. The Meat Board also took issue with the fact that Mr Amupanda did not disclose his income from his employment at the University of Namibia (UNAM) as a senior lecturer and as counsellor of the City of Windhoek.

[16] Both the Minister and the Meat Board submitted that in view of the paucity of the information as to his financial position when he clearly had a lot more to disclose resulted in him not meeting the requirements set in rule 20(1)(c) and that his application had to be dismissed on this basis alone. Needless to say this aspect featured in the heads of argument and the oral argument presented on behalf of the Governmental parties and the Meat Board.

[17] I should mention here that Mr Amupanda elected not to file a replying affidavit in the rule 20 application so there is no response from him to the contentions of the Minister and the Meat Board set out above. In the heads of argument filed on behalf of Mr Amupanda the issue is likewise skirted around and not addressed at all. Counsel for Mr Amupanda accepted 'that we could have done more' when it came to the disclosure of his financial affairs but submitted that in the context of the case he had done enough. He stated in his founding affidavit in the rule 20 application that he is employed as a senior lecturer at UNAM and serving as a counsellor of the City of Windhoek, that he owns a vehicle and immovable property, that the cost of the litigation would run into millions and that the Government and the Meat Board are better resourced than him. On questioning from the court counsel for Mr Amupanda accepted that he could have furnished more information about his financial matters but submitted that in the context of the application sufficient information was supplied for the court to decide the application. Counsel for Mr Amupanda also suggested that as this was the first time an application in terms of rule 20 was heard in the court *a quo*, it was not clear what level of detail was required when it came to the compliance with the requirements stipulated in rule 20(1)(c). Why the issue was not dealt with in reply when it was squarely raised in the opposing affidavits or why leave was not sought

from the court to file a further affidavit in this regard when it became clear that this information would be needed remains unknown.

[18] It is in the above circumstances that the applicants (and the Meat Board) contend that the judge *a quo* committed an irregularity when he gave the order he did. The judge *a quo* in his response to the review application stated that the orders he made 'are rooted in the inherent powers which the High Court has to regulate the process'.

Irregularity in the proceedings

[19] Section 16 of the Supreme Court Act 15 of 1990 provides for reviews of proceedings in the High Court where an irregularity in the proceedings occur in that court. The question to determine thus is whether the order of the court *a quo* amounted to an irregularity in the proceedings.[4]

[20] As is pointed out in the judgment *a quo*, Mr Amupanda's application failed to address the issues mentioned in rule 20(1)(c) adequately and fully and he was accordingly not entitled to the relief sought on the papers presented to the court *a quo*.

[21] This omission to satisfy the necessary requirements in respect of the relief that is sought normally leads to the dismissal of an application with a concomitant adverse costs order. This was also recognised in the judgment *a quo*.

[4] Section 16(1) and (2) of the Supreme Court Act 15 of 1990.

[22] As pointed out on behalf of counsel for the applicants and the Meat Board, the order was granted despite the fact that Mr Amupanda was given sufficient warning of their reliance on his non-compliance with rule 20(1)(c). He chose not to file a replying affidavit to deal with the relevant allegations in this regard nor did he seek leave to file a further affidavit to address the issues at any stage after the answering affidavits were filed or even at the hearing of the matter when his counsel was questioned on this aspect by the presiding judge. The application could even have been withdrawn subsequent to the filing of the answering affidavits and a new application filed which complied with the requirements of rule 20(1)(c).[5] In short, it was accepted that the application had to be dealt with on the papers as it stood and this is what the judge *a quo* should have done.

[23] It is submitted on behalf of the applicants that the pleadings were closed and that the matter had to be dealt with on the basis thereof as there was no approach whatsoever on behalf of Mr Amupanda to file a further affidavit to address the shortcomings in his case and in respect whereof they would be entitled to respond to and make submissions to the court. It is submitted that to have allowed Mr Amupanda to amplify his application to address the non-compliance with rule 20(1)(c) without hearing them in this regard constituted an irregularity.[6] So did the granting of the order in circumstances when it was not requested or argued on behalf of any of the parties.[7]

[24] Counsel for the applicants and for the Meat Board further pointed out that where the rules of court provided for situations, an exercise of inherent jurisdiction

[5] *Nghidimbwa v Swapo Party of Namibia & others* 2017 (4) NR 1107 (HC) and *Fischer v Seelenbinder & another* 2017 (4) NR 1214 (HC) paras 17–21.
[6] *Bank Windhoek Ltd v Mofuka & another* 2018 (2) 503 (SC) para 15.
[7] *Nghidimbwa v Swapo Party of Namibia & others* 2017 (4) NR 1107 (HC).

contrary to such rules would be irregular and not be regarded as a proper exercise of judicial discretion. The discretion a judge has pursuant to the inherent powers vested in the High Court to determine its own process can only be utilised when the existing rules and procedures do not meet the circumstances in a specific case, ie where there is a lacuna in the law or the rules.[8]

[25] I agree with counsel for the applicants and the Meat Board that the reliance by the judge *a quo* on the inherent jurisdiction of a court to deviate from the normal order that he should have made subsequent to his finding that Mr Amupanda did not comply with the requisites and without affording them the opportunity to address him on the order he contemplated making was irregular as the position he found himself in was covered by the rules of the High Court as I point out below.

[26] It follows that the reliance on the exercise of the inherent power of the court to make the order that was made amounted to an irregularity and the order will therefore be set aside as it constitutes an irregularity in the proceedings.

Effect of the irregularity

[27] From the reading of the judgment and the resultant order, it is clear that the judge *a quo* did not want to close the door on Mr Amupanda when it came to a protective costs order which would have been the case had he done what counsel for the applicants and the Meat Board submit was the inevitable result of his finding.[9] As pointed out by the judge *a quo*, he was given insufficient information with regard to the financial position to conclude 'whether or not it is just and fair that I grant a protective

[8] *S v Strowitzki* 2003 NR 145 (SC) at 159I–161D.
[9] *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 563D–G.

costs order in his favour and what conditions I must impose' should such order be granted. The provisions of rule 20(1)(c) were not met by Mr Amupanda. To enable Mr Amupanda to approach the court again for a protective costs order he would have to give an order that would effectively amount to an order for absolution from the instance on the papers placed before him.[10]

[28] There was no need for the judge *a quo* to rely on any inherent jurisdiction of the court to determine its own process as the Rules of the High Court make express provision for such an order. When it was raised by this Court it became clear that none of the parties nor the judge *a quo* had regard to it. This rule was not referred to by any of the counsel involved nor by the judge *a quo*. Rule 67(2) reads as follows:

> '(2) After hearing an application the court may make no order, except an order for costs, if any, but may grant leave to the applicant to renew the application on the same papers, supplemented by such further affidavits as the case may require or allow.'

[29] As this rule did not feature at the hearing *a quo* the parties were given an opportunity to file further written submissions in respect of the application of rule 67(2) to the original proceedings (application for a protective costs order) and in this Court. Both parties availed themselves of this opportunity and, although not for the same reasons, submit the rule does not find application on the following broad premises. Firstly, as this is a review application and not an appeal, this Court should not invoke rule 67(2) but simply set aside the original order and refer the matter back to the court *a quo* to be determined afresh. Secondly, that on the facts where the applicant *a quo*

[10] *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 563D-G, *Sewnarain v Budha & others* 1979 (2) 353 (N) at 356A-E and *Damont NO v Van Zyl* 1962 (4) SA 47 (C) at 52E–H.

failed to comply with rule 20(1)(c) and despite being forewarned in the answering affidavits and in the heads of argument of the respondents *a quo* about this non-compliance, did not file a replying affidavit or sought leave to file a further affidavit to deal with the financial position adequately he should not have been given a further opportunity by the judge *a quo* to rectify this failure. On behalf of both parties it is submitted that to apply rule 67(2) in these circumstances would open the flood gates to applications to apply this rule where the law relating to the filing of further affidavits and the number and sets of affidavits in applications are settled. The fear expressed on behalf of the applicants is that rule 67(2) would be used to circumvent the tried and tested procedures relating to adjudicating applications. In other words, the rule would be abused to avoid the settled procedure applicable to the filing of further affidavits in application proceedings. Thirdly, that the applicants did not have the opportunity to object in the court *a quo* to the use of rule 67(2) on the facts of the matter. Hence, this Court should not invoke the rule as they are entitled to raise it in the court *a quo* prior to the decision afresh in the matter. Counsel for the Meat Board even went as far as suggesting that where a court *a quo* intends invoking this rule in an application, the parties to such application have a right to object to such approach by way of filing further affidavits on this aspect. It needs to be noted that whereas the further submissions deal with the above-mentioned principled approach there is no suggestion that the considerations mentioned above and taken into account by the judge *a quo* were in any material manner flawed save for the submission that the counter arguments as to why the applicants should not have been given a further opportunity to comply with the requirements of rule 20(1)(c) should have outweighed the considerations in favour of granting applicant the opportunity to file further affidavits.

[30] In my view, the submissions on behalf of the applicants are not persuasive. Whereas it is correct that it is a review application and that in the ordinary course an irregular proceeding is simply set aside and not corrected, is not an inevitable result. In terms of s 20 of the Supreme Court Act, the court has the power to '. . . make such order which in its opinion are in the circumstances of each case just or expedient' and may '. . . give any judgment or make any order which the circumstances may require'. It is essentially a question of fairness to the parties and where this Court is in as good a position to decide the matter as a court *a quo* it should not balk at making a decision which is 'just or expedient' or 'which the circumstances may require'.[11]

[31] It is correct that the applicants should have been forewarned by the judge *a quo* that he was considering the order he intended and that he eventually gave as an option open to him so as to hear the parties as this approach was not raised in the papers or in argument. This is the irregularity in proceedings which necessitates the setting aside of the order. The parties have now had this opportunity and the question that arises is whether we can make a decision on the papers in this regard. I have no hesitation in finding that we are in as good a position to determine the matter as the court *a quo* was or would be if the matter is referred back to it. It is clearly in the interests of the parties that the application for a protective costs order be finalised as the trial (which no doubt will be an expensive exercise if it continues) is pending. Whereas it is correct that the application for a protective costs order was launched with a lackadaisical approach to the requirements of rule 20(1)(c), it must be borne in mind that this was a first when it came to such applications and that it was abundantly clear from the papers that the complete financial position relevant to the exercise of

[11] *Livestock and Meat Industries Control Board v Garda* 1961 (1) SA 342 (A) at 349 and *Theron en andere v Ring van Wellington van die N.G. Sendingkerk in Suid-Afrika en andere* 1976 (2) SA 1 (A) at 31B–E.

the discretion whether to grant (albeit conditionally) or refuse the application was not placed before the court *a quo.* I deal with this aspect in more detail below.

[32] The fact that the applicants will not have the opportunity to raise their objections to the invocation of rule 67(2) in the court *a quo* if the matter is not referred back to the court *a quo* for determination afresh is in my view not of any importance. As pointed out above everything that was placed before the court *a quo* is also before this Court which is in a position to deal with the matter and the applicants were provided the opportunity to make submissions with respect to the invocation or otherwise of rule 67(2) in the present circumstances. They are in the same position as all parties in matters where this Court deals with issues as a court of first instance.

[33] As pointed out above, it is a matter of fairness to the parties that the matter be dealt with expeditiously so that this trial – if it is to proceed – can continue to its conclusion. None of the parties can be prejudiced by such approach. The prejudice suffered by Mr Amupanda as alleged on behalf of the Meat Board because he is not a party to this review is illusional. He decided to abide by the decision of this Court and furthermore, even if a rule 67(2) order is made, he will be able to decide whether he wants to proceed with this application or withdraw it. The prejudice to the applicants in this review is in my view not the type of prejudice that needs consideration. If rule 67(2) is invoked, Mr Amupanda may renew his application supplemented by further affidavit(s) and the applicants (and the Meat Board) will have the opportunity to respond thereto and a full picture will be put before the court *a quo* so as to enable it to come to a decision based on all the relevant facts apposite to such decision. If the application is then dismissed, the final decision will be *res judicata* and will be based

on all the facts and not, as argued by counsel for the applicants, on an application where the full financial position is not disclosed. If Mr Amupanda is not prepared to set out his full financial position, he will not proceed with his application and that will be the end of the matter. The prejudice suffered by the applicants is that they are not getting a final judgment based on incomplete facts which would be *res judicata*. This final judgment will be on the basis of a failure to disclose material facts in a rule 20(1)(c) application where it is known that such information exists, is in the possession of the parties but was not provided as Mr Amupanda was of the view that what he furnished was sufficient for the purpose in a first application of this kind. In my view, this prejudice is exactly what the court *a quo* attempted to avoid in the circumstances of this case where it is clear that the legal costs involved in the trial will be substantial and where the other requirements stipulated in rule 20 were established. I cannot fault the court *a quo* in this regard. As will become evident below I am of the view that this is a case where an appropriate order would be one where an order akin to an absolution from the instance in a trial matter was warranted. This is exactly what rule 67(2) caters for.

[34] When one is a party to an application one must realise that one of the outcomes of such an application can be the invocation of rule 67(2) by the judge hearing the application. This is explicitly provided for in terms of the rule. There is no basis to suggest that when the presiding judge raises this possibility that the parties must be granted leave to file further affidavits in this regard only. The fact that rule 67(2) may be invoked is a risk inherent in the adjudication of any application and a party may raise this at any stage of the proceedings. If it is not raised by a party the presiding judge may raise it. The only qualification is that when the presiding judge

intends raising it he or she must forewarn the parties so that they can address him or her with regard to the appropriateness of invoking this rule on the peculiar facts of the matter in front of him or her. The decision to invoke rule 67(2) is decided on the papers as they are when the application is made (‘after hearing an application’). The submission that a further round of affidavits should be allowed when a court ‘or a party’ intends on relying on rule 67(2) is without merit and contrary to the process leading up to the hearing and determination of applications. This is a risk inherent in the launching of any application.

[35] When one considers the dearth of authority in respect of rule 67(2) and its predecessor (rule 6(6) in this country and in South Africa) it is clear that the courts have used it sparingly and the visions of abuse of this rule to circumvent other rules relating to applications seems to me to be more imaginary then real. As will become evident from what is stated below when regard is had to the authority this rule, properly applied, is of limited application, and I am confident the courts will be able to deal with any attempt to abuse it.

[36] *Mahlangu v De Jager*[12] is a case where this rule was applied in the following circumstances:

> ‘The application was submitted to the Court in an inept manner. Essential allegations are absent from the papers. The prayers are inappropriate to the relief to which applicant may be entitled. I am not convinced that the issues have been fully canvassed and that all the relevant facts have been placed before the Court by either party. Accordingly, I ought not close the door to a properly motivated application by the

[12] *Mahlangu v De Jager* 1996 (3) SA 235 (LCC).

applicant for relief under s 12(1) of the Act by dismissing the application at this stage. Instead, I will follow the route open to me under Rule 6(6) of the Uniform Rules.' [13]

[37] In *Mahlangu*, the question of costs was dealt with as follows:

'. . . I am of the view that, on proper exercise of my discretion, a costs award in favour of respondent is justified in this case. The applicant's founding affidavit failed to deal with a number of aspects which the clear provisions of the Act required him to deal with. These defects have resulted in an order under Rule 6(6) and the applicant is now left with the opportunity of once more bringing the respondent before the Court to oppose a renewed application. In relation to the proceedings to which this costs order relates, the respondent may justifiably complain that he has unjustly been compelled to defend litigation.'[14]

[38] When regard is had to rule 67(2) it seems to me that most of the criticism raised by the applicants and the Meat Board in their review application to this Court is without merit. The court *a quo* dealt with the application that was placed before it. There was no request on behalf of Mr Amupanda to place further facts before the court with regard to his financial position. As the requisites of rule 20(1)(c) were not met, Mr Amupanda could thus, on the papers before court, not obtain a protective costs order. It was however clear from what was put before court by the parties, that the issue of Mr Amupanda's financial position and the potential costs of the ongoing litigation were not fully addressed by any of the parties. In these circumstances the court *a quo* would have been fully entitled to not close the doors to a properly motivated application which would be in compliance with rule 20 and for this purpose it meant that the full facts relating to the financial implications of the intended action would have to be addressed. In essence, having found that what was put before the court *a quo* was not sufficient because it is clear that the full picture with respect to the financial

[13] *Mahlangu* at 245G.
[14] *Mahlangu* at 247F–G.

implications was not disclosed clearly justified an order which, in law, amounted to an order of absolution from the instance, ie an order as contemplated in rule 67(2).

[39] The irregularity occurred because the judge *a quo* seemed to not have regard to rule 67(2) when he made his decision, but instead the inherent jurisdiction of the court to regulate its own process. As already indicated, this was an irregular use of such power and furthermore so was the omission to not allow the parties to make representations as to the proposed order the judge *a quo* intended making.

[40] Rule 20(1)(c) stipulates its requirements in general terms. It is not clear as to what exactly in respect of detailed information is required. A list of requirements as spelled out by the applicants would, in my view, not be required in every case. The Meat Board takes issue in respect of assets not disclosed to say full disclosure had not been made and which by implication may impact the decision of the court. Counsel for Mr Amupanda pointed out that this is the first time an application in terms of rule 20 had been made and submitted that Mr Amupanda could have stated more but what he did disclose was enough for the purpose of the application. In addition, it is clear that with the action being defended by a number of defendants (some utilising senior counsel) that the costs will be substantial and an adverse costs order would be potentially ruinous to any normal salary earner such as a senior lecturer (even if he is in addition to this a city counsellor). It is so that Mr Amupanda has property and other interests but the point is that a full picture relating to his finances or the projected costs in respect of litigation was not placed before the court *a quo.* This can be attributed to the fact that it was a first application in terms of rule 20 and Mr Amupanda was of the view that he had placed sufficient material before that court. What could not be said

with certainty is that if a full picture was placed before court, Mr Amupanda would not be granted a protective costs order. In these circumstances it was thus not appropriate to dismiss the application and hence close this avenue to Mr Amupanda.[15]

[41] It follows that an order in line with rule 67(2) would have been appropriate and the effect of the order given under the mistaken view that it could be granted pursuant to court's inherent power to regulate that process was not necessarily prejudicial to the applicants. It seems that the only prejudice suffered is that there was no costs order given against Mr Amupanda.

[42] The next question that arises is what would be the appropriate costs order. In my view a costs order adverse to Mr Amupanda was justified for the reasons articulated in *Mahlangu* and quoted above in para 36. Here it must be borne in mind that the non-compliance with rule 20(1)(c) in the sense that not a full picture of Mr Amupanda's financial affairs was thought necessary by him, although not stipulating the detail of what must be disclosed, clearly intended that more should have been given than what was given by Mr Amupanda and cannot excuse the non-disclosure of his interests in the close corporations mentioned in the opposing affidavit of the Meat Board. Whether the parties opposing the protective costs order should be granted the costs of two instructed counsel is a more difficult question but in view of the fact that it was important that the parameters of rule 20 be established and that a protective costs order could have a substantial effect on those opposing such order should they not be successful in their opposition, the use of two instructed counsel cannot be said to be unreasonable and hence should be provided for in the costs order for the same

[15] *Mahlangu* at 245G–H and *Damont NO v Van Zyl* at 52E–H.

reasons it is not apposite to cap the fees as provided for in rule 32(11) of the Rules of the High Court. As far as the review launched in this Court is concerned Mr Amupanda did not oppose it and the irregularity that occurred in the court a *quo* was not caused by him or on his behalf and in the circumstances I am of the view that no order as to costs would be an appropriate costs order.

[43] In the result, I make the following orders:

(a) The order of the court *a quo* is reviewed and set aside and replaced by the following orders:

‘(i) No order is made on any of the prayers contained in the applicant’s notice of motion.

(ii) The applicant is granted leave to renew the application on notice to the respondents, on the same papers supplemented by such further affidavits as the case may require.

(iii) The applicant is ordered to pay the costs of the parties opposing the application inclusive of the costs of one instructing and two instructed counsel where utilised which costs shall not be limited in terms of rule 32(11).’

(b) As far as the costs of the review application to this Court is concerned no order of costs is made.

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FRANK AJA

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SMUTS JA

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HOFF JA

APPEARANCES

APPLICANTS:	H Steyn (with him M Boonzaier) Instructed by Government Attorney
FIRST RESPONDENT:	No appearance
SECOND RESPONDENT:	R Heathcote (with him A Van Vuuren) Instructed by Theunissen, Louw & Partners