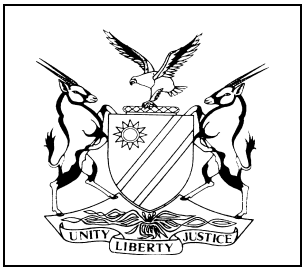


Reportable

SUMMARY

CASE NO.: A 176/2007

HAMWAAMA AND OTHERS

v

ATTORNEY-GENERAL

Heard on: 2008 July 2008

Delivered on: 2008 July 31

HOFF, J *et* PARKER, J

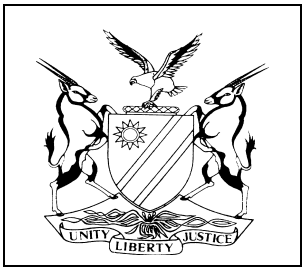
Criminal procedure - Appeal – Leave to appeal – Constitutionality of s 316 (6), (7), and (9) of the Criminal Procedures Act, 1977 (Act No. 51 of 1977) – Section not inconsistent with Articles 12 (a), (c), and (e) and 10 of Namibian Constitution.

Constitutional law - Human rights – Right to fair trial in terms of Article 12 (a), (c) and (e) of the Constitution – Court holding that unlike the South African Constitution (1996) Namibian Constitution does not expressly provide for constitutional right to appeal – A persons' right to appeal rather regulated by the Criminal Procedure Act – Court holding that leave provisions in the Criminal Procedure Act (particularly s 316

(6), (7), and (9) of the Act) in line with fair trial provisions under the Constitution – Furthermore, leave provisions (particularly s 316 (6), (7) and (9)) not inconsistent with Article 12 of the Constitution.

Constitutional law- Human rights – Right to equality and freedom from discrimination in terms of Article 10 of the Namibian Constitution – Court holding that leave provisions in Criminal Procedure Act (particularly s 316 (6), (7), and (9) of the Act) not inconsistent with Article 10 0f Namibian Constitution.

International human rights Law - International Covenant of Civil and Political Rights (ICCPR) – Fair trial provisions under Article 14 thereof – Court holding that absence of oral submissions when petition to Chief Justice is considered does not infringe principle of fair hearing under ICCPR – Additionally, in-chamber consideration of petition by three judges do not infringe public hearing requirements under ICCPR, so long as procedure is fair.



CASE NO.: A 176/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between

TUHAFENI HELMUTH HAMWAAMA	**1st Applicant**
THOMAS HEITA	**2nd Applicant**
KAIN MCNAB	**3rd Applicant**
FREDIS KAVALE	**4th Applicant**
and	
ATTORNEY-GENERAL OF NAMIBIA	**1st Respondent**
MINISTER OF JUSTICE	**2nd Respondent**
PROSECUTOR-GENERAL OF NAMIBIA	**3rd Respondent**

CORAM: **HOFF, J *et* PARKER, J**

Heard on: 2008 July 25

Delivered on: 2008 July 31

JUDGMENT:

PARKER, J.:

[1] The application filed by Hamwaama (1st applicant), Heita (2nd applicant) and McNab (3rd applicant) on 13 August 2007 is entitled "Application to the High Court of Namibia to challenge constitutionality of s 316 (6), (7), (9) (a) of the Criminal Procedure Act of 1977". In the application the applicants pray for orders in the following terms (hereunder set out verbatim):

> (1) Granting the applicants an order of enforcement or protecting the applicants' fundamental rights and freedoms guaranteed by the Constitution Articles 10, 12, (1) (a), (c), (e) and 138 (c).
>
> (2) Declaring the in-chambers consideration and refusal decision of the applicants' petitions for leave to appeal to the Supreme Court of Namibia in terms of Section 316 (6), (7) and (9) (a) of the Criminal Procedure Act, Act 51 of 1977, to be null and void and setting aside the refusal decision of 19 July 2000 and 14 March 2005.
>
> (3) Declaring the following parts of the Criminal Procedure Act, Act 51 of 1977, Section 316 (6), (7) and (9) (a) to be unconstitutional and in conflict with the constitution of Namibia and setting aside the subsections in question.
>
> (4) Granting the applicants an order for a fair and public hearing and prosecuting their appeals against their trial proceedings, conviction and sentence to the finality in the Supreme Court of Namibia.
>
> (5) That the Honourable Supreme Court of Namibia be directed that the applicants' appeals be dealt with in a reasonable time as a matter or urgency.

[2] On the court file is a handwritten note by Kavale (4th applicant), entitled "Application to challenge the unconstitutionality (constitutionality) of section 316 (7) (a) of the Criminal Procedure Act, Act 51 of 1977". The 4th applicant sets out what he terms grounds for challenging the constitutionality of s 316 (7) (a) of the CPA. He had applied that he be joined as an applicant: the rest of the applicants had no objection, and we accepted the application because his constitutional challenge is the same as that of the first three applicants'. It must be made abundantly clear that we are considering the 4th applicant's so-called 'application" solely because the only aspect of the handwritten note that makes a modicum of sense and therefore merits any consideration appears to be the same as the constitutional challenge mounted by the first three applicants, as I have said above. For this reason, we think it is prudent and efficacious to consolidate the 4th

applicant's so-called "application" with that of the 1st, 2nd, and 3rd applicants' application so that we can determine the constitutional challenge against the subsections of s 316 of the CPA, cited below, and put the matter to rest as far as this Court is concerned. It is also noted that the applicants informed the Court that they had appointed the 1st applicant to speak on their behalf in making oral submissions during the hearing of the application.

[3] Before going into the merits of the case, we must consider the 3rd respondent's application to condone the late filing of the 3rd respondent's answering affidavit and the late filing of the respondents' counsel's heads of argument. We find that the 1st, 2nd, and 3rd applicants have filed answering (i.e. replying) affidavit to the 3rd respondent's answering affidavit. They have also filed supplementary heads of argument. Therefore we do not see that any prejudice has been occasioned to the 1st, 2nd and 3rd applicants by the late filing of the 3rd respondent's answering affidavit and the respondents' counsel's heads of argument. We also accept as reasonable the explanation given for the late filing of these processes. In any case, the applicants informed the Court that they had no objection to the Court granting the application for condonation. The result is that we grant the application for condonation. We now proceed to deal with the constitutional challenge.

[4] It behoves us at the outset to make the following determination in respect of some of the relief sought by the 1st, 2nd and 3rd applicants. We will come to a similar unmeritorious contention by the 4th applicant later. As to prayer 1; this Court cannot grant an order *in vacuo* for the "enforcement or protecting the applicants' fundamental rights and freedoms guaranteed by the Constitution Articles 10, 12, (1) (a) (c), (e) and 138 (c)." The applicants do not say in what way the 1st, 2nd and 3rd respondents have violated those

rights. In other words, it is not clear to us what action the respondents have taken in respect of the applicants that has violated their constitutionally guaranteed human rights. *A fortiori*, it is equally not clear as to the nature of the order that the applicants seek in prayer (1). In short, prayer (1) is too amorphous to determine; and this Court cannot grant an order that is hypothetical and abstract. (See *Jacob Alexander v The Minister of Justice and others* Case No.: A210/2007 (Unreported).) The relief sought in prayer (1) is therefore refused.

[5] With regard to prayers 2 and 5, considering the hierarchical structure of the courts in Namibia in terms of the law and the Constitution, this Court is a lower court in contrapositive to the Supreme Court. For this reason - and we accept Ms Katjipuka's submission - it is absolutely legally impossible in terms of the Namibian Constitution for this Court to question, let alone, set aside a decision of the Supreme Court; or issue any directions to the Supreme Court. Thus, with regard to the present matter, the decision of the Supreme Court to refuse the applicants' petition to the Chief Justice is final in terms of s 316 (9) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (the CPA); and that is the law, as pronounced by the Supreme Court in *S v Strowitzki* 2003 NR 145 (SC), "until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent court." (*Strowitzki* supra at 161D) Prayers 2 and 3, too, are accordingly refused.

[6] With regard to the 4th applicant; he refers to "South African Judicial matters amendment Bill". We must note it here immediately that South Africa's Bill does not in any way concern Namibia; so we take no cognizance of that Bill. The 4th applicant also contends that the CPA was amended in South Africa and so the amendment should apply

in Namibia in virtue of Article 144 of the Namibian Constitution. With respect, his contention has not even a semblance of merit whatsoever. He does not say when the amendment was passed, and whether the amendment applied to Namibia before 21 March 1990. By a parity of reasoning, his reference to "*S v Ntuli* 1996 (1) SACR 94 (CC)" cannot assist him. *Ntuli* is absolutely irrelevant to the matter at hand because that case dealt with s 309 (4) (a) of the CPA, which concerned Judge's certificate; and that is not the concern of s 316 of CPA, which is the subject matter of the present application. Indeed, this Court relied on *Ntuli* in *S v Ganeb* 20012 NR 294 when the Court was considering the constitutionality or otherwise of s 309 (4) (a). For these reasons, we take no cognizance of 1st applicant's wide assertions in this regard.

[7] The applicants have brought the present application to also ask this Court to declare s 316 (6), (7) and (9) (the leave provisions) unconstitutional, as we have intimated previously. Accordingly, it remains to deal with prayers (3) and (4), which we shall do in due course. In our opinion, a determination of prayer (3) will dispose of prayer (4) as well because, in a way, prayer (4) is related to prayer (3), although prayer 4 is not formulated elegantly.

[8] As we understand the applicants, the applicants' contend that subsections (6), (7), and (9) of s 316 of the CPA are inconsistent with the Constitution, particularly Article 12 (a), (c), and (e), and Article 10 thereof. They also argue that these subsections are offensive of Article 14 (5) of the International Covenant on Civil and Political Rights (ICCPR), to which Namibia is a State Party. Article 14 (5) provides:

> Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal *according to law*. (My emphasis)

[9] Section 316 should perforce be read with s 315 of the CPA. These sections of the CPA afford a right of appeal against conviction and sentence to any person convicted of a crime and sentenced by the High Court only if the person has been granted leave to appeal by the High Court. Thus, s 315 provides that appeals against conviction or sentence by the High Court are not competent as of right and are available only as provided for in ss 316-319 of the CPA.

[10] Section 315 provides:

> (1) In respect of appeals and questions of law reserved in connection with criminal cases heard by the High Court of Namibia the court of appeal shall be the Supreme Court of Namibia.
>
> (2) An appeal referred to in subsection (1) shall lie to the Supreme Court of Namibia only as provided in sections 316 to 319 inclusive, and not as a right.

And s 316, inasmuch as it is relevant to the present application, provides:

> (1) An accused convicted of any offence before the High Court of Namibia may, within a period of fourteen days of the passing of any sentence as a result of such conviction or within such extended period as may on application (in this section referred to as an application for condonation) on good cause be allowed; apply to the judge who presided at the trial or, if that judge is not available, to any other judge of that court for leave to appeal against his or her conviction or against any sentence or order following thereon (in this section referred to as an application for leave to appeal), and an accused convicted of an offence before such court on a plea of guilty may, within the same period, apply for leave to appeal against any sentence or any order following thereon.
>
> (6) If an application under subsection (1) for condonation or leave to appeal is refused or if in any application for leave to appeal an application for leave to call further evidence is refused, the accused may, within a period of twenty-one days of such refusal, or within such extended period as may on good cause be allowed, by petition addressed to the Chief Justice submit his application for condonation or for leave to appeal or his application for leave to call further evidence, or all such applications, as the case may be, to the Appellate Division, at the same time giving written notice that this has been done to

> the registrar of the provincial or local division (other than a circuit court) within whose area of jurisdiction the trial took place, and of which the judge who presided at the trial was a member when he so presided, and such registrar shall forward to the Appellate Division a copy of the application or applications in question and of the reasons for refusing such application or applications.
>
> (7) The petition shall be considered in chambers by three judges of the Appellate Division designated by the Chief Justice.
>
> (9) The decision of the Appellate Division or of the judges thereof considering the petition, as the case may be, to grant or refuse any application, shall be final.

I must mention in parentheses that in Namibia subsection (9) has no paragraph (a) or any paragraph at all, as contended by the applicants.

[11] Having had their leave to appeal against conviction and sentence refused by this Court, the 1st, 2nd and 3rd applicants petitioned the Chief Justice for leave to appeal. Their petition was considered by three judges of the Supreme Court "according to law" and refused on 19 July 2000. The 4th applicant's petition suffered a similar fate on 14 March 2004. These are the main, relevant facts in the present matter, and they are not in dispute. Consequently, in my view the question this Court is called upon to determine is primarily a matter of constitutional law; and that is the manner in which we approach this case.

[12] We now turn to the grounds of the challenge based on Article 12, particularly paragraphs (a), (c), and (e) thereof. In this regard, it must be borne in mind that unlike the South African Constitution – and this is significant – the Namibian Constitution, in its fair trial provisions under Article 12 thereof, does not provide for a constitutionally guaranteed right to appeal: rather in Namibia "the right of appeal is given to everybody in terms of the Criminal Procedure Act." (*Ganeb* supra at 303G) This constitutional and legal fact is lost on the applicants, we must say. Indeed, it has been said that the position is in accord with the fair trial provisions of Article 12 of the Namibian Constitution,

because "[t]he concept of fair or unfair trial does not cease to be relevant until *all channels* open to an accused have been exhausted." (*Ganeb* supra at 298I) Thus, in terms of Namibian law the "all channels" that are open to every person are those contained in ss 315-319 of the CPA.

[13] In *Ganeb* supra at 305H-306B, this Court approved the decision by the South African Constitutional Court in *S v Rens* 1996 (1) SACR 105 (CC) that s 316, read with s 315 (4), of the CPA is not inconsistent with s 25 (3) (h) of South Africa's Interim Constitution, which reads:

> 25 (3) Every accused person shall have the right to a fair trial, which shall include the right –
>
> (h) to have recourse by way of appeal or review to a higher Court than the court of first instance…

Identical provisions are found in s 35 (3) (o) of the South African Constitution, 1996. Section 35 (3) provides:

> E very accused person has a right to a fair trial, which includes the right:
>
> (o) of appeal to, or review by, a higher court.

[14] The Constitutional Court in *Rens* supra held at 111i-112c that,

> [25] The doors of the appeal Court are not closed to a person convicted in the Supreme Court, and in my view, the requirements of fairness are satisfied. It cannot be in the interests of justice and fairness to allow unmeritorious and vexatious issues of procedures, law or fact to be placed before three judges of the appellate tribunal sitting in open Court to rehear oral arguments. The rolls would be clogged by hopeless cases, thus prejudicing the speedy resolution of those cases where there is sufficient substance to justify an appeal.
>
> [26] In my view the petition procedure which is available to every accused whose application for leave to appeal has been refused by the Supreme Court in which he or she

> was convicted, allows such accused recourse to a higher Court to review, in a broad and not a technical sense, the judgment of the trial court. The procedure involves *a reassessment of the disputed issues* by two Judges of he higher Court, and provides a framework for that reassessment, which ensures that *an informed decision* is made by them as to the prospects of success. (Emphasis added)

[15] "It is true", stated Madala, J, who wrote the unanimous decision of the Constitutional Court in *Rens* supra at 111f, "that the reassessment of the case usually lacks full oral arguments or a full rehearing of the matter, but this does not in itself mean that the procedure is not fair, or that it does not constitute resort to a higher Court within the meaning of s 25 (3) (h)." We respectfully accept that the *Rens* decision represents good law, and so we adopt it, as did Mtambanengwe, J in *Ganeb* supra. The *Rens* decision has consistently been followed by the same Constitutional Court itself, e.g. in *Mphahlele v First National Bank of SA Ltd* 1992 (2) SA 667 (CC). In this regard Goldstone, J stated in *Mphahlele* supra at 672B that "it is not in the public interest to clog the rolls of such Courts by allowing 'unmeritorious and vexatious issues of procedure, law or fact' to be placed before them."

[16] As Chaskalson P correctly stated in *S v Pennington and another* 1999 (2) SACR 329 at 346b-d, the settled practice of our courts has always been for appeals to be heard in public. Applications for leave to appeal are not ordinarily heard in open court, though a hearing may be called if the application raises issues on which it is considered desirable to hear oral argument. In most cases, however, the applications are *dealt with in chambers* and are either granted or refused on the basis of the judgment of the Court *a quo* and the reasons advanced in the application in support of the submission that such judgment was wrong. There are sound practical reasons for this. If such matters had to

be dealt with in open court, the court rolls would be clogged and the result would be additional expense and delays.

[17] It is apropos to state that the leave provisions are not unique to Namibia: they are a part of the criminal procedures of other democratic societies. (See *Mphahlele* supra; *Rens* supra.) In *Monnell and Morris v United Kingdom* ((1987) 10 EHRR 205) the European Court of Human Rights held that an application for leave to appeal did not necessarily call for the hearing of oral argument at a public hearing or the personal appearance of the accused before the higher Court, and that an accused who had been denied leave to appeal without such a hearing, could not contend for that reason alone that there had been a denial of the right to a fair public hearing by an independent tribunal. The trial had been conducted in public and this was sufficient in the circumstances to meet the requirements of Article 6 (1) of the European Convention for the Protection of Human Rights, which provides that:

> 'in the determination … of any criminal charge against him, everyone is entitled to a fair and public hearing …'.

[18] In his authoritative work, *The International Law of Human Rights* (1995), at p 278, Professor Paul Sieghart writes that it does not necessarily follow that the absence of inviting parties to make oral submissions in a court constitutes an infringement of the "fair hearing" requirements under international human rights instruments. The learned author also states at p 280 of his work that public proceedings may not always be necessary and a form of *in camera* procedure satisfies the "public hearing" requirement under international human rights instruments, so long as the procedure is fair. From what

we have said previously about the procedure under the leave provisions, we therefore conclude also that the leave provisions are not inconsistent with Article 14 of the ICCPR.

[19] The applicants sought to reply on *Elifas Gurirab v The State* Case No.: SA 18/2004 (Unreported) that the Chief Justice made an about-turn in including Gurirab in the appeal that was heard in respect of the other appellants after Gurirab's petition to the Chief Justice had been refused. *Gurirab* is of no real assistance on the point under consideration. Gurirab had petitioned the Chief Justice for leave to appeal against sentence only in respect of attempted murder. The appeal that was heard involved conviction; and after the Supreme Court had found that the conviction on attempted murder by the court *a quo* was wrong, that Court replaced the conviction on attempted murder with that of conviction on murder. Having done so, the Supreme Court was obliged to sentence Gurirab accordingly. Therefore the Chief Justice did not make any about-turn on the petition that was in respect of sentence for attempted murder and which was refused.

[20] In this regard, the applicants submitted that they are not convinced that the learned judges of the Supreme Court could read 645 pages and 19 pages of State witnesses in chambers within eight hours. The fact that the applicants who are not judges of the Supreme Court cannot read 664 pages within eight hours does not mean that nobody, including Supreme Court judges, can do that. This, with respect, is a puerile argument, bordering on the contemptuous; and it cannot by any stretch of legal imagination assist the applicants. Besides, to require the Supreme Court to listen to argument and give reasoned judgments in applications for leave to appeal, which have no substance, or even

to give reasoned judgments in such matters without hearing oral argument, would defeat the purpose of the requirement that 'leave' be obtained. Such matters can and should be disposed of summarily. (See *Mphahlele* supra at 672F.)

[21] In view of all these considerations, the Courts in South Africa (including the Constitutional Court) have found that s 316, read with s 315 (4), of the CPA is not inconsistent with s 35 (3) (o) which, as I have set out above, provides for a constitutionally guaranteed right to appeal or review. Relying on the dicta in the South African cases, which we accept as the correct statement of the law, and *Ganeb* supra, which was a decision of this Court, albeit *obite*r, we have come to the inexorable conclusion that the leave provisions are not inconsistent with the fair trial provisions of Article 12 of the Constitution. The result is that the constitutional challenge based on the fair trial provisions of Article 12 of the Namibian Constitution and Article 14 of the ICCPR is groundless, and cannot therefore succeed.

[22] From the authorities, as we have shown above, it is clear that the underlying purpose of the leave provisions is to protect the higher Court from the burden of having to deal with appeals in which there is no prospect of success. (See *Rens* supra.) In our opinion, that is a legitimate and rational purpose.

[23] Furthermore, inherent in the meaning of the word discrimination in Article 10 of the Constitution is an element of unjust or unfair treatment brought about principally by unjustified and illegitimate unequal treatment. (See *Müller v The President of the Republic of Namibia* 1999 NR 190 (SC).) The leave provisions require that *anyone without exception* who is convicted of an offence must obtain leave to appeal against the

conviction or sentence and not as a right. That being the case, we fail to see the unequal treatment that the applicants have suffered when the leave provisions apply to all persons, and they are for legitimate and rational purpose. Thus, in our opinion, as long as all persons appealing from or to a particular Court are subject to the same procedures, as provided by the leave provisions, the requirement of equality before the law is met.

[24] The applicants submitted further that "questions for leave to appeal in chambers, only paves the way to institutionalized oppression against the poor, illiterate, laymen and former disadvantaged people." The argument is, with respect, groundless. As I have said, the leave provisions apply equally to all convicted persons petitioning the Chief Justice. The three Supreme Court judges who consider petitions put before them apply the same rules and principles to all petitions put before them; whether a petition comes from an individual or the Prosecutor-General, and regardless of the individual petitioner's socio-economic status or racial or ethnic background. There is no evidence before us tending to show that the opposite is the case.

[25] Furthermore, in our opinion, it is not unequal treatment within the meaning of Article 10 of the Constitution that the appeal provisions in civil matters are different from those of criminal matters. It is an irrefragable fact that civil proceedings and procedures are different from criminal proceedings and procedures; and what is more, the two are subject to fundamentally different substantive laws.

[26] For all the above reasons, we are not persuaded that the leave provisions violate the applicants' anti-discrimination and equality before the law rights under Article 10 of

the Constitution. Accordingly, we find that the constitutional challenge based on Article 10 of the Constitution, too, cannot also succeed: it has no merit whatsoever.

[27] It follows as a matter of course that we also refuse to grant prayers 3 and 4.

[28] In the result, we conclude that the leave provisions of the CPA are not inconsistent with the Namibian Constitution; they are constitutional.

[29] The order therefore is that the application is dismissed.

_____

Parker, J

I agree.

_____

Hoff, J

ON BEHALF OF THE APPLICANTS:	In person
ON BEHALF OF THE RESPONDENTS:	Ms U. Katjipuka
Instructed by:	The Government-Attorney