

# Judicial review of inferior court proceedings – or, the ghost of prerogative writs in South African law

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“There is no procedure, other than in the form of an appeal, whereby the proceedings of the Supreme Court may be brought on review” – Rose-Innes *Judicial Review of Administrative Tribunals in South Africa* (1963) 11

## 1 Introduction

Superior courts in South Africa have statutory powers to review the proceedings of inferior courts within their jurisdiction. The proceedings of superior courts are not so reviewable. Thus it was held in *Gentiruco AG v Firestone SA (Pty) Ltd*<sup>1</sup> that it was common cause that the proceedings of the (then) supreme court “are not reviewable; the only remedy of an unsuccessful litigant is an appeal. The reason is that by statute only ‘the proceedings of inferior courts’ have been and are reviewable.”

The position is restated in *Vereniging van Bo-Grondse Mynamptenare van SA v President of the Industrial Court*: “Apart from the inherent power of the Supreme Court to review the proceedings of domestic tribunals other than courts of law, by statute only the proceedings of inferior courts have been and are reviewable by a Provincial or Local Division of the Supreme Court ....”<sup>2</sup>

The question as to the rationale of this statutory distinction between lower and higher courts has never been raised, let alone answered. Why should the proceedings of an inferior court be reviewable by a higher court, but the proceedings of a high court not be reviewable by a court higher in the hierarchy? Section 16(1) of the Namibian Supreme Court Act 15 of 1990, which confers upon the Namibian supreme court “jurisdiction to review the proceedings of the high court or any lower court”,<sup>3</sup> is indicative of the fact that there need not in principle be insuperable obstacles and objections to subjecting the proceedings of a high court to review.

Any quest for the answer to the question must have as its starting point the historical context within which the statutory provisions in question originally came into being.

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<sup>1</sup> 1972 1 SA 589 (A) 601E.

<sup>2</sup> 1983 1 SA 1143 (T) 1146D-F. See also *Ex parte Scott* (1909) 26 SC 520 522; *SA Technical Officials' Association v President of the Industrial Court* 1985 1 SA 597 (A) 611D.

<sup>3</sup> The use of the nomenclature “high court” and “supreme court” has not in South and Southern Africa been consistent through the years. “Supreme court” is often used to denote a superior court which at other times is called a “high court”. “Supreme court” is sometimes also used to denote a superior court which is higher in the hierarchy of courts than a “high court”. The position is usually clear from the context within which the terms occur.

## 2 Appeal and review

At the outset it is necessary to get clarity of the meaning in our jurisprudence of the words “review” and “appeal”.<sup>4</sup> Both are remedies whereby an unsuccessful litigant seeks relief from a court of higher resort;<sup>5</sup> but they are dissimilar remedies. The essence of the distinction between the two remedies is that review concerns the regularity and validity of the proceedings under review, whereas appeal concerns the correctness or otherwise of the decision being assailed on appeal.<sup>6</sup> An appeal is based upon the matters contained in the record, and the appellant is bound by the four corners of the record. In review proceedings the applicant may travel beyond the record and may rely on grounds which are not apparent from the record.<sup>7</sup> Where a ground for review is apparent from the record, the unsuccessful litigant may seek relief by way of appeal.<sup>8</sup>

In *Johannesburg Consolidated Investment Company v Johannesburg Town Council*<sup>9</sup> Innes CJ divided reviews into three broad categories. The first is the process by which, apart from appeal, the proceedings of lower courts are brought before a superior court in respect of grave irregularities or illegalities occurring in the course of the proceedings. The second category is the review at common law of the proceedings of quasi-judicial bodies; that is, where “a public body has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty.”<sup>10</sup> The third category of review is that where the “[l]egislature has from time to time conferred upon this Court or a Judge a power of review which in my opinion was meant to be far wider than the powers which it possesses under either of the review procedures to which I have alluded”.<sup>11</sup>

While this note is primarily concerned with the first category identified by Innes CJ, that is, the review of the proceedings of lower courts, it will be necessary to allude again to the second and third categories at a later stage.

<sup>4</sup> The word “review” is capable of different meanings according to the context in which it appears. It is sometimes used as synonymous with “appeal”: see *Kliprivier Licensing Board v Ebrahim* 1911 AD 458 and the authorities cited by Cilliers *et al* *Herbstein and Van Winsen The Civil Practice of the High Courts and the Supreme Court of Appeal* (2009) 1266 n 6. It should also be borne in mind that in other jurisdictions, the use and meaning of the words may be different from that in South Africa. For example, within the context of appeal proceedings a distinction is made in the English Civil Procedure Rules in rule 52.11(1) between “review” and “rehearing”, which means “that the decision of a judge hearing a first instance appeal takes on much greater importance than it did under former rules, as now most appeals will consist of a review rather than a rehearing” (Loughlin and Gerlis *Civil Procedure* (2004) 579). Part 54 of the English Civil Procedure Rules, which deals with “Judicial Review and Statutory Review” contains the procedural rules which govern the way in which the courts exercise their supervisory jurisdiction, by means of prerogative orders, over the proceedings and decisions of bodies performing public law duties and functions.

<sup>5</sup> *R v Keeves* 1926 AD 410 412; *Sita v Olivier NO* 1967 2 SA 442 (A) 447H-478A; the *Gentiruco* case (n 1) 602B-E.

<sup>6</sup> *Liberty Life Association of Africa v Kachelhoffer NO* 2001 3 SA 1094 (C) 1110H-1111A; *Ellis v Morgan*; *Ellis v Dessai* 1909 TS 576 581.

<sup>7</sup> *R v Bates and Reidy* 1902 TS 199 200-201; *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 114-115.

<sup>8</sup> See the *Gentiruco* case (n 1) 602C.

<sup>9</sup> (n 7) 114.

<sup>10</sup> (n 7) 115; see also *National Union of Textile Workers v Textile Workers Industrial Union (SA)* 1988 1 SA 925 (A) 938F-939A. On the impact of the Constitution of the Republic of South Africa, 1996 on this category of review, see *Roman v Williams NO* 1998 1 SA 270 (C) 281B-F; *Fazenda NO v Commissioner of Customs and Excise* 1999 3 SA 452 (T) 462H-463C; Hoexter *Administrative Law in South Africa* (2012) 23-29.

<sup>11</sup> (n 7) 116.

### 3 *The history of the statutory powers*

Statutory power to review the proceedings of inferior courts was for the first time conferred upon a superior court in South Africa (*viz* the supreme court of the Colony of the Cape of Good Hope) in the Charter of Justice of 1828. With colonial expansion into the interior of Southern Africa, the same statutory power, in the same wording, was conferred on the superior courts of the various colonies. With the establishment of a unified superior court in a unified South Africa, the statutory power of review was conferred on the unified court. This statutory history can be briefly stated.

The Charter of Justice of 1828<sup>12</sup> provides in article 32: “And we do further give and grant to the said Supreme Court full power, jurisdiction and authority, to review the proceedings of all inferior Courts of Justice within our said Colony, and, if necessary, to set aside or correct the same.”

The power so granted is repeated in section 4 of the Ordinance for regulating the Manner of Proceedings in Criminal Cases in the Cape:<sup>13</sup> “The Supreme Court has full Power, Jurisdiction and Authority, to review the Proceedings of all Inferior Courts of Justice within the Colony; and, if necessary, to set aside or correct the same.”

The “Supreme Court of the Colony of Natal” was established by section 4 of Law 10 of 1857, which made provision for the “Better Administration of Justice within the Colony of Natal”. Section 27 provides:

“The said Supreme Court, [*ie* the ‘Supreme Court of the Colony of Natal’] and every Circuit Court within the district in which such latter Court may be holden, shall have full power, authority, and jurisdiction to review the proceedings of all inferior Courts of Justice; and to exercise full supervision and control over all Magistrates, and, if necessary, to set aside or correct their proceedings.”

After the annexation of the two Boer Republics, the Orange Free State and the South African Republic (Transvaal), during the Anglo-Boer War of 1899-1902, similar powers of review were conferred upon the newly established superior courts of the Orange River Colony and the Transvaal. Section 25 of the Ordinance for the Administration of Justice in Superior Courts (Orange River Colony)<sup>14</sup> provides: “The High Court [established by section 1] shall have full power, jurisdiction and authority to review the proceedings of all inferior Courts of Justice within the Colony and if necessary to set aside or correct the same.”<sup>15</sup>

Section 18 of the Administration of Justice Proclamation (Transvaal)<sup>16</sup> provides: “The said Court [*ie* ‘The High Court of Transvaal’ established by section 1] shall have full power, jurisdiction and authority to review the proceedings of all inferior Courts of Justice within this Colony.”<sup>17</sup>

After the establishment of a unified superior court structure in South Africa, the power of review was conferred by the Supreme Court Act 59 of 1959. Section 19(1)(a)(ii) of the act provided that a provincial division of the supreme court shall have jurisdiction to review the proceedings of “all inferior courts” within its area of jurisdiction. In section 24 of the act, the grounds upon which “the proceedings of

<sup>12</sup> Constituted by Letters Patent of 24 Aug 1827.

<sup>13</sup> Ordinance 40 of 1828 (Cape).

<sup>14</sup> Ordinance 4 of 1902 (ORC).

<sup>15</sup> S 26 sets out the “grounds of review” in the same terms as in the Transvaal Law and ultimately in s 22 of the Superior Courts Act 10 of 2013.

<sup>16</sup> Proclamation 4 of 1902 (Transvaal).

<sup>17</sup> S 19 sets out the “grounds of review” in the same terms as in the Natal Law, and ultimately in s 22 of the Superior Courts Act 10 of 2013.

any inferior court may be brought under review before a provincial division” were set out. “Inferior court” was defined<sup>18</sup> as meaning “any court (other than the court of a division) which is required to keep a record of its proceedings”. Section 4(1) of the Magistrates’ Courts Act 32 of 1944 provides that every magistrate’s court shall be a court of record. A supreme court therefore had jurisdiction to review the proceedings of a magistrate’s court. In view of the statutory provisions as they stood, it was held that a maintenance court under the former Maintenance Act<sup>19</sup> and a children’s court under the former Children’s Act<sup>20</sup> were “inferior courts” which fell within the ambit of the definition.<sup>21</sup>

The Supreme Court Act 59 of 1959 was repealed and replaced by the Superior Courts Act 10 of 2013. Section 21 of the new act provides that the court of a division has the power (a) to hear and determine appeals from all magistrates’ courts within its area of jurisdiction; (b) to review the proceedings of all such courts.

Section 22(1) of the act sets out the grounds of review:

“22(1) The grounds upon which the proceedings of any Magistrates’ Court may be brought under review before a court of a Division are –

- (a) absence of jurisdiction on the part of the court;
- (b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
- (c) gross irregularity in the proceedings; and
- (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.”

It will be observed that the provisions of sections 21 and 22 of the Superior Courts Act 10 of 2013 are, but for one significant difference, similar to those of sections 19(1) (a)(ii) and 24 of the (now repealed) Supreme Court Act 59 of 1959. The difference is that in the 2013 act the words “magistrates’ courts” are used in place of the words “inferior courts”, which appear in the 1959 Act. “Magistrates’ Court” is defined<sup>22</sup> as meaning “any court established in terms of section 2 of the Magistrates’ Courts Act”.<sup>23</sup> The change marks a break with a statutory tradition that goes back to the First Charter of Justice of 1828 in which the review jurisdiction had consistently been conferred in respect of the proceedings of “inferior courts”. This means that under the 2013 act the proceedings of only magistrates’ courts, and no other courts, are subject to review.

After the former South West Africa had been entrusted to South Africa as a mandated territory by the League of Nations in 1919, the Administration of Justice Proclamation 21 of 1920 established the high court of South West Africa.<sup>24</sup> The Appellate Division Act 12 of 1920 granted the appellate division of the supreme court of South Africa jurisdiction to hear appeals against judgments of the high court. By virtue of the provisions of section 45 of the Supreme Court Act 59 of 1959 the judiciary of South West Africa was amalgamated with that of South Africa and the high court of South West Africa was constituted as the South West Africa

<sup>18</sup> s 1 of the Supreme Court Act 59 of 1959.

<sup>19</sup> Act 23 of 1963.

<sup>20</sup> Act 33 of 1960.

<sup>21</sup> *Holtzhausen v Linde* 1978 3 SA 27 (O) 31; *Nodala v The Magistrate, Umtata* 1992 2 SA 696 (Tk); *Ex parte Kommissaris van Kindersorg, Krugersdorp in re JB* 1973 2 SA 699 (T); *Young v Swanepoel* 1990 2 SA 54 (C).

<sup>22</sup> s 1 of the Superior Courts Act 10 of 2013.

<sup>23</sup> Act 32 of 1944.

<sup>24</sup> The Administration of Justice Proclamation 21 of 1919 also made the law “as existing and applied in the Province of the Cape of Good Hope at 1 January 1920” applicable in the territory.

provincial division of the supreme court of South Africa. In this way the review jurisdiction of a division as contained in section 19(1)(a)(ii) of the Supreme Court Act 59 of 1959 was made applicable to the high court of South West Africa.

#### 4 *The origin of the power of statutory review*

In *Ellis v Morgan; Ellis v Dessai* with reference to section 32 of the Charter of Justice, section 5 of the Ordinance for regulating the Manner of Proceeding in Criminal Cases in the Cape<sup>25</sup> and section 18 of the Administration of Justice Proclamation,<sup>26</sup> Mason J said:

“I have been unable to trace this remedy of review to any Roman Dutch source; it has many resemblances to the English writ of *certiorari*, which has been granted in cases of want of jurisdiction ... and the description of the powers of the Court of King’s Bench is not unlike that used in conferring the power of review upon this Supreme Court; see Stephen’s *Commentaries* (9th ed p 336). A common and somewhat analogue remedy against the proposed or actual exercise of the unauthorised jurisdiction by an inferior court is the writ of prohibition, by which any further proceedings in the matter are stayed. Both of these writs were dealt with in the King’s Bench.”<sup>27</sup>

Mason J is correct: the remedy of review in question does not have its source in the Roman-Dutch law and, in fact, derives from the prerogative writs (as they then were) of English law. The most important of the prerogative writs were habeas corpus, certiorari, prohibition and mandamus.<sup>28</sup> It was mainly by means of the prerogative writs that control of inferior courts was exercised.<sup>29</sup> Thus in *R v London County Council, Ex parte Entertainments Protection Association Ltd* it is said:

“The writ of *certiorari* is a very old and high prerogative writ drawn up for enabling the Court of King’s Bench to control the action of inferior Courts and to make it certain that they shall not exceed their jurisdiction; and therefore the writ of certiorari is intended to bring into the High Court the decision of the inferior tribunal, in order that the High Court may be certified whether the decision is within the jurisdiction of the inferior Court.”<sup>30</sup>

In 1938 the writs of certiorari, prohibition and mandamus were replaced<sup>31</sup> by orders of the same names; the change of designation reflected only a simplification of procedure; the substantive law remained the same.<sup>32</sup> In rule 54.2 of the current Civil Procedure Rules (CPR) the Latin terms for the prerogative orders are replaced with the terms “mandatory order” (*mandamus*), “prohibiting order” (*prohibitio*) and “quashing order” (*certiorari*). Rule 54.19 (1) and (2) provides that where the court makes a quashing order, the court may remit the matter to the decision-maker and direct it to reconsider the matter and reach a decision in accordance with the judgment of the court, or the court may, in so far as any enactment permits, substitute its own decision.

<sup>25</sup> Ordinance 40 of 1828 (Cape).

<sup>26</sup> Proclamation 4 of 1902 (Transvaal).

<sup>27</sup> (n 6) 583.

<sup>28</sup> On the historical origins of the prerogative writs, see Jenks “The prerogative writs in English Law” 1923 *Yale LJ* 253 and De Smith *Judicial Review of Administrative Action* (1973) 507.

<sup>29</sup> See Goodhart and Harbury (eds) *XIV Holdsworth A History of English Law* (1964) 245.

<sup>30</sup> 1931 2 KB 215 233.

<sup>31</sup> By the Administration of Justice (Miscellaneous Provisions) Act, 1938.

<sup>32</sup> De Smith (n 28) 507. De Smith points out that the Administration of Justice (Miscellaneous Provisions) Act, 1938 left *habeas corpus* untouched as a prerogative writ with the old procedure.

The derivation of the remedy of review in section 32 of the Charter of Justice from the prerogative writs is apparent from events leading up to the promulgation of the First Charter of Justice. The British were not impressed by the state of the administration of justice which they found at the Cape upon the second British occupation in 1806.<sup>33</sup> The Earl of Caledon endeavoured to resolve some of the problems by establishing circuit courts in 1811.<sup>34</sup> In 1821 the deputy colonial secretary, Ellis, submitted a strongly critical report.<sup>35</sup> Bigge, a former chief justice of Trinidad, and Colebrooke were appointed to look into the matter. In his report, dated 6 September 1826, Bigge recommended that the existing judicial machinery and procedural institutions be reshaped along English lines.<sup>36</sup> Though many of the details of Bigge's proposed structure of courts were not accepted, the proposal for the establishment of a supreme court of the Colony of Cape of Good Hope to replace the existing council of justice was accepted.

In his report, Bigge dealt with the creation of a court with appellate jurisdiction at the Cape (a recommendation which was not accepted) and then proceeded:

“As a further protection to the Inhabitants against any excess of Jurisdiction, Irregularity or error committed by the Judges and Magistrates of the County Courts,<sup>37</sup> a general Power of superintendence and control should be granted to the Judge of the Supreme Court and the Judges of the Lower Court collectively and to the Judge of the Court of the Eastern Province, and we recommend that a Clause should be inserted in the Charter, giving these Superior Courts a power to correct and quash the proceedings of the County Courts, the Courts of Requests and of the Resident Magistrates, and also to issue Writs of Mandamus and certiorari.”<sup>38</sup>

It is obvious that what Bigge had in mind was the introduction at the Cape of the prerogative writs of English law for the superintendence of the inferior courts – as indeed had been done under his aegis when the supreme court of the Colony of New South Wales was established in 1824.

Prior to his appointment to investigate the situation at the Cape, Bigge had been appointed special commissioner to examine the government of the Colony of New South Wales by Lord Bathurst, the secretary of state for war and the colonies. Many of the recommendations from a second report by Bigge were incorporated into the New South Wales Act, 1823,<sup>39</sup> which reformed the government and judicial system of the colony. By letters patent pursuant to the act, the so-called Third Charter of Justice was promulgated on 17 May 1824 and the supreme court of New South Wales thereby established. The supreme court was given the power to exercise a general supervisory function over inferior tribunals. This was achieved through the issue of writs of prohibition, *mandamus* and *certiorari*.<sup>40</sup>

Unlike the situation in respect of the supreme court of New South Wales, the prerogative writs were not as such introduced into the fabric of the supreme court

<sup>33</sup> Botha “The early influence of the English Law upon the Roman-Dutch Law in South Africa” 1923 *SALJ* 396-406.

<sup>34</sup> See Erasmus “Circuit courts in the Cape Colony during the Nineteenth Century – hazards and achievements” 2013 *Fundamina* 266 269-273.

<sup>35</sup> Theal *XIV Records of the Cape Colony, Copied for the Cape Government from the Manuscript Documents in the Public Record Office, London* (1897-1905) 183sq.

<sup>36</sup> “Report of JT Bigge to Earl Bathurst upon Courts of Justice” in Theal (n 35) vol XXVIII 1 sq.

<sup>37</sup> Bigge's recommendation for the establishment of county courts was not accepted. Instead, the courts of *landdroste* and *heemraden* that had been instituted by the Dutch were abolished and replaced by the courts of Resident Magistrates by Ordinance 33 of 1827.

<sup>38</sup> Theal (n 35) 29-30.

<sup>39</sup> Act 4 Geo. IV, c96.

<sup>40</sup> The paragraph is based upon <http://search.records.nsw.gov.au/agencies/23> (5-06-2014).

of the Colony of the Cape of Good Hope. The reason for this is to be found in the decision (i) not to accept Bigge's recommendation that the existing law at the Cape should be replaced by English law, and (ii) to retain the Roman-Dutch law as the common law of the Cape Colony. In a letter dated 5 August 1827<sup>41</sup> to Major-General Burke at the Cape, Viscount Goderich stated: "It has, therefore, been decided that the Courts to be instituted under the intended Charter shall commence their career by continuing to administer the ancient Law of the Settlement."<sup>42</sup>

It was accordingly provided in article 31 of the Charter of Justice of 1828 that the supreme court of the Colony shall have "full power authority and jurisdiction to apply judge and determine upon and according to the Laws now in force within Our said Colony".

In view of the decision to retain the Roman-Dutch law as the common law of the Cape Colony, certain typical features of English law could not be introduced into the Charter of Justice. Thus Viscount Goderich states in his letter of 5 August 1827: "It results from this determination that the Office of Chancellor, as a distinct Judicial Office will not be established by the Charter of Justice."<sup>43</sup>

Similarly, Bigge's recommendation that the superintendence of inferior tribunals be achieved through the prerogative writs of English law could not be accepted. But what was accepted was the recommendation that a clause be inserted in the Charter giving superior courts "a power to correct and quash the proceedings" of inferior tribunals.<sup>44</sup> This was achieved by article 32 of the Charter of Justice which conferred on the supreme court "full power, jurisdiction and authority, to review the proceedings of all inferior Courts of Justice within (the) Colony, and, if necessary, to set aside or correct the same".<sup>45</sup> By this provision, which was adopted by statutory provision in the Colonies of Natal, the Orange River Colony and the Transvaal, superior courts were in fact empowered to (*inter alia*) make orders of the nature envisaged by the prerogative writs (now prerogative orders) of prohibition (preventing an inferior tribunal from exceeding its authority); of *mandamus* (compelling performance of a public duty), and *certiorari* (review and quashing orders).

### 5 *The ghost of the prerogative writs*

Behind the scenes of the introduction in 1828 (and thereafter) of statutory review jurisdiction of judicial proceedings of inferior courts, there lurks the ghost of the ancient prerogative writs of English law which were issued by a *superior* court in exercising its supervisory jurisdiction over *inferior* courts. It was against this background of ancient prerogative writs that the supervisory jurisdiction of superior courts in South Africa over the proceedings of inferior courts within their jurisdiction came into being. This kind of review falls into the first category of review identified by Innes CJ in *Johannesburg Consolidated Investment Co v Johannesburg Town Council*,<sup>46</sup> in which the supervisory powers of a superior court are exercised by

<sup>41</sup> Theal (n 35) vol XXXII 254 256.

<sup>42</sup> All this is in accordance with the principle enunciated by Lord Mansfield in *Campbell v Hall* 1 Cowp 204 209; 98 ER 1045 1047 that "the laws of a conquered country continue in force, until they are altered by the conqueror".

<sup>43</sup> Theal (n 35) vol XXXII 256.

<sup>44</sup> See above, text to n 37.

<sup>45</sup> See above, text to n 12.

<sup>46</sup> (n 7) 114.

a “process by which, apart from appeal, the proceedings of inferior Courts of Justice, both Civil and Criminal, are brought before this Court in respect of grave irregularities or illegalities occurring during the course of such proceedings”.<sup>47</sup>

The special nature of the review jurisdiction thus created is apparent from the fact that it does not apply to proceedings in which a magistrate acts in an administrative capacity.<sup>48</sup> In *Rolobile v Harries NO*<sup>49</sup> it was held that before the review jurisdiction can be invoked it must be shown “beyond any reasonable doubt” that the proceedings in question “were of the nature of judicial proceedings”.<sup>50</sup>

The statutory review of the proceedings of inferior courts is not affected by the provisions of the Promotion of Administrative Justice Act 3 of 2000.<sup>51</sup> In terms of the act,<sup>52</sup> “administrative action” does not include the “judicial functions of a judicial officer referred to in section 166 of the Constitution”.<sup>53</sup>

The exclusion extends only to “judicial functions”.<sup>54</sup> Where a judicial officer performs functions which are not of a judicial nature, his actions may amount to administrative action as defined in the act and reviewable at common law;<sup>55</sup> that is, by way of the second category of review identified by Innes CJ.

Review of the proceedings of inferior courts has not escaped the impact of developments on the constitutional front in South Africa. Thus it has been held<sup>56</sup> that the high court has jurisdiction beyond the confines of the grounds of review set out in section 24 of the Supreme Court Act (now section 22 of the Superior Courts Act) to review the decision of an inferior court which is alleged to be an infringement of a fundamental right entrenched in the constitution. It was further held that this is a review of the third category identified by Innes CJ.

<sup>47</sup> The words cited are those of Innes CJ in *Johannesburg Consolidated Investment Co v Johannesburg Town Council* (n 7) 114. See also the *Kliprivier* case (n 4) 463; *ABSA Bank Ltd v De Villiers* 2010 2 All SA 99 (SCA) 104 (par 19).

<sup>48</sup> Many of the acts performed by magistrates are of an administrative rather than a judicial nature; see I *LAWSA* 2nd ed par 82.

<sup>49</sup> 1912 EDL 177 178; and see *Madlongwa v Herbst NO* 1912 EDL 96.

<sup>50</sup> In, eg, *National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP) there was extensive debate on the question whether a magistrate who makes a decision under s 87 of the National Credit Act 34 of 2005 performs a judicial or an administrative function. See also *Rutenberg v Magistrate, Wynberg* 1997 4 SA 735 (C).

<sup>51</sup> See IV *LAWSA* 3rd ed par 455; Hoexter (n 10) 240.

<sup>52</sup> s 1(ee).

<sup>53</sup> S 166 of the Constitution of the Republic of South Africa, 1996, refers to the constitutional court, the supreme court of appeal, the high courts, the magistrates’ courts and any other court established or recognised in terms of an act of parliament, including any court of a status similar to either the high court of South Africa or the magistrates’ courts.

<sup>54</sup> Hoexter (n 10) 240.

<sup>55</sup> See n 48 and 50 above. On the reviewability of administrative actions of a judge, see *Pretoria Portland Cement Co Ltd v Competition Commission* 2003 2 SA 385 (SCA). It is apparent from par 41 of the judgment that the actions of a judge may be subject to review only where the judge acts in a capacity which has nothing to do with his judicial duties, as where a judge acts a commissioner in a commission of enquiry, or where a personal attack (such as bias) is made on a judge. In such cases the judge should be given notice of the allegation and so be allowed the choice of intervening. In par 42 Schutz JA makes it clear that his remarks on the “non-reviewability of a Judge” do not apply to a magistrate, for a “magistrate is subject to review”.

<sup>56</sup> In *Magano v District Magistrate, Johannesburg (2)* 1994 4 SA 172 (W) 175E-177A; *Gerber v Voorsitter Komitee oor Amnestie van die Kommissie vir Waarheid en Versoening* 1998 2 SA 559 (T) 569H-J; *Davids v Van Straaten* 2005 4 SA 468 (C) 486B-D; Erasmus *Superior Court Practice* A1-69.

## 6 *Exorcising the ghost of prerogative writs*

Prior to independence in 1989, irregular conduct in the supreme court of South West Africa had to be raised by way of appeal to the appellate division of the supreme court of South Africa.<sup>57</sup> Article 79(1) of the Constitution of the Republic of Namibia 1990 sets out the judicial powers of the newly created supreme court of Namibia as the court of final resort. Article 79(2) of the constitution further empowers the supreme court to deal with “such other matters as may be authorised by Act of Parliament”. Shortly after independence, legislation giving the supreme court powers to review the proceedings of the high court was enacted.<sup>58</sup> Section 16 of the Namibian Supreme Court Act 15 of 1990 in subsections (1) and (2) provides:

- (1) In addition to any jurisdiction conferred upon it by this Act, the Supreme Court shall, subject to the provisions of section 20 have the jurisdiction to review the proceedings of the High Court or any lower court or any administrative tribunal or authority established by or under any law.
- (2) The jurisdiction referred to in subsection (1) may be exercised by the Supreme Court *mero motu* whenever it comes to the notice of the Supreme Court or any judge of that court that an irregularity has occurred in any proceedings referred to in that subsection, notwithstanding that such proceedings are not subject to an appeal or other proceedings before the Supreme Court: Provided that nothing in this section contained shall be construed as conferring upon any person any right to institute any such review proceedings in the Supreme Court as a court of first instance.<sup>59</sup>

The scope and ambit of the jurisdiction granted is strictly circumscribed. It was held in *S v Bushebi*<sup>60</sup> that the jurisdiction to review proceedings contemplated in section 16(1) are subject to the provisions of section 16(2), which narrows its scope to irregularities in those proceedings.<sup>61</sup> And a procedural irregularity becomes the subject of adjudication only when the supreme court, of its own accord, decides to exercise its review jurisdiction.<sup>62</sup> In other words, the decision of the court to invoke the review jurisdiction “is a threshold requirement for the admissibility of any application under the section to review and set aside or correct the impugned proceedings”.<sup>63</sup>

In *Christian v Metropolitan Life Namibia Retirement Annuity Fund* Maritz JA points out that the review jurisdiction vested in the supreme court by section 16 is “unique and extraordinary” and that “it does not exactly fit in the mould of any of the three categories of review defined by Innes CJ”.<sup>64</sup> The extended review jurisdiction is also unique in that it represents a break with a long-standing tradition. Perhaps it can be said that in Namibia the ghost of the ancient prerogative writs has been

<sup>57</sup> *Schroeder v Solomon* 2009 1 NR 1 (SC) 16B.

<sup>58</sup> The inherent powers conferred on the supreme court by the provisions of s 78(4) of the constitution do not include the power to review the proceedings of the high court. Maritz JA has suggested that this might well have been one of the reasons why s 16 was promulgated (the *Schroeder* case (n 57) 16C-D).

<sup>59</sup> The powers of review granted are considered in *S v Bushebi* 1998 NR 239 (SC); *Christian v Metropolitan Life Namibia Retirement Annuity Fund* 2008 2 NR 753 (SC); the *Schroeder* case (n 57); *Makapuli v Swabou Investment (Pty) Ltd* 2013 1 NR 238 (SC).

<sup>60</sup> (n 59) 242E-G.

<sup>61</sup> See also the *Christian* case (n 59) par 9.

<sup>62</sup> See *S v Strowitski* 2003 NR 145 (SC) 159H.

<sup>63</sup> the *Schroeder* case (n 57) par 11; see also the *Christian* case (n 59) par 10.

<sup>64</sup> (n 59) par 17.

exercised – or has the Namibian high court in this respect been demoted to the status of an inferior court?

## 7 Conclusion

At the outset the question was posed why in South African law the proceedings of inferior courts are reviewable by a higher court, but the proceedings of a high court are not so reviewable by a court higher in the hierarchy. The answer is to be found in neither logic nor reason. The power of a South African superior court to review the proceedings of inferior courts within its jurisdiction is an historical remnant of the supervisory powers of the high court in England, exercised by way of prerogative writs, over the proceedings of inferior tribunals. The supervisory power was introduced in modified form, without the prerogative writs, when the supreme court of the Colony of the Cape of Good Hope was in the First Charter of Justice of 1828 endowed with powers to review the proceedings of inferior courts in the Colony.

The limitation of the power of review to the proceedings of inferior courts has proved to be inherently sound. This is apparent from, firstly, the fact that in South Africa, the absence of powers of review of the proceedings of superior courts has not been experienced as a *lacuna* or deficiency. The courts seem to have been able to deal adequately with the grievances of unsuccessful litigants by way of appeal.<sup>65</sup> And secondly, when the Namibian legislature widened the power of review to cover the proceedings of high courts, it was found necessary to circumscribe the ambit of the power and to impose a strict threshold barrier.

Finally, all courts are subject to the overall authority of the constitution, and the right to a fair hearing which is entrenched in articles 34 and 35(3) “lies at the heart of the rule of law”.<sup>66</sup> The constitution ensures the fairness to which litigants are entitled in court proceedings.<sup>67</sup> The protection afforded by articles 34 and 35(3) is by way of appeal to the constitutional court and not by way of review. The constitutional court is not endowed with a general supervisory review jurisdiction over courts that are lower in the hierarchy.

<sup>65</sup> See the remarks of Trollip JA in the *Gentiruco* case (n 1) 602C-H; see further the authorities cited in Cilliers *et al* (n 4) 1266 n 6. Two recent developments afford an interesting contrast. In Namibia, the decision of a high court judge has been taken on *review* under s 16(1) of the Namibia Supreme Court Act 15 of 1990 on the ground that the judge upheld a ground of exception that was not raised nor addressed in the court by any of the parties (*Andrea Investments (Pty) Ltd v Namibian Port Authority* (case no SCR4/2013 pending). In South Africa, the supreme court of appeal on *appeal* set aside the order made by a high court judge on the ground that the judge had made his decision in the matter on the basis of an issue that had not been raised by the parties (*Fisher v Ramahlele* [2014] ZASCA 88 (4-06-2014) (unreported)).

<sup>66</sup> Yacoob J in *De Beer NO v North Central Local Council and South Central Local Council* 2001 11 BCLR 1109 (CC) par 11.

<sup>67</sup> *Lane and Fey NNO v Dabelstein* 2001 2 SA 1187 (CC) par 4 in which it is stated that s 34 embraces the right to fairness and not the correctness of the court proceedings to which litigants are entitled.

**SAMEVATTING****GEREGTELIKE HERSIENING VAN DIE VERRIGTINGE VAN LAER HOWE – OF, DIE SKIM VAN “PREROGATIVE WRITS” IN DIE SUID-AFRIKAANSE REG**

Hoër howe in Suid-Afrika het tradisioneel die bevoegdheid om die verrigtinge van laer howe in hersiening te neem. Die verrigtinge van ’n hoër hof is nie onderhewig aan hersiening nie, dog slegs aan appèl na ’n hof wat hoër in die hiërargie is. Geen rasionele grondslag bestaan vir hierdie onderskeid nie. In die Engelse reg het die hoër howe tradisioneel ’n toesighoudende bevoegdheid oor die verrigtinge van laer howe wat deur middel van die “prerogative writs” (tans “prerogative orders”) uitgeoefen word. Die vier belangrike “prerogative writs” is *habeas corpus*, *certiorari*, *prohibitio* en *mandamus*.

In sy verslag oor die vestiging van ’n nuwe hofstruktuur aan die Kaap het Bigge in 1826 aanbeveel dat daar ’n hooggeregshof geskep word met toesighoudende bevoegdheid oor die verrigtinge van laer howe deur middel van die “prerogative writs”. Aan hierdie aanbeveling is uitvoering gegee deur die skepping in die *Charter of Justice* van 1828 van die *supreme court of the Colony of Cape of Good Hope*. Aan die aanbeveling vir die invoering van die “prerogative writs” kon nie uitvoering gegee word nie vanweë die besluit om die Romeins-Hollandse reg aan die Kaap te behou. Daar is egter wel uitvoering gegee aan die aanbeveling dat die *supreme court* ’n toesighoudende bevoegdheid gegee word, en wel in artikel 32 van die *Charter of Justice* van 1828. Dit verleen aan die hof die bevoegdheid om die verrigtinge van alle laer howe in die Kaap in hersiening te kan neem. Hierdie hersieningsbevoegdheid is mettertyd opgeneem in die statutêre bepalinge waardeur hoër howe in die ander kolonies in Suider-Afrika geskep is. Na die totstandkoming van ’n eenvormige hofstruktuur in Suid-Afrika is die hersieningsbevoegdheid opgeneem in die Wet op die Hooggeregshof 59 van 1959 en in die Wet op Hoër Howe 10 van 2013. Die skim van die “prerogative writs” skuil agter al hierdie statutêre bepalinge.

In Namibië is afgewyk van die tradisie. In artikel 16(1) van die Namibiese *Supreme Court Act* 15 van 1990 word bevoegdheid aan die *supreme court* verleen om die verrigtinge van die *high court* in hersiening te neem. Die ervaring in die praktyk in Suid-Afrika toon geen behoefte aan die uitbreiding van die hersieningsbevoegdheid na die verrigtinge van die hoër howe nie.