REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2017/00102

In the matter between:

RONALD MOSEMENTALA SOMAEB **APPLICANT**

and

THE CHIEF JUSTICE **FIRST RESPONDENT**

PERMANENT SECRETARY OF THE JUDICIARY **SECOND RESPONDENT**

Neutral citation: *Somaeb v The Chief Justice* (HC-MD-CIV-MOT-GEN-2017/00102) [2018] NAHCMD 57 (7 March 2018)

Coram: ANGULA DJP
Heard: **24 October 2017**
Delivered: **7 March 2018**

Flynote: Applications – Jurisdiction of the High Court – Whether the High Court has the power to direct the Supreme Court to exercise its review jurisdiction in terms of section 16 of the Supreme Court Act, 1990 – Complying with the provisions of section 12 of the Supreme Court Act, 1990 – Section 12 prohibits the issuing of a summons or subpoena against the Chief Justice or any judge of the Supreme Court in any civil action except with the consent of the Chief Justice or the next senior judge – Applicant failed to obtain such consent – Application struck from the roll.

Summary: The applicant brought an application against the Chief Justice in his capacity as head of Judiciary – Section 12 of the Supreme Court Act, 1990 stipulates that no process shall be issued against the Chief Justice or any other judge of the Supreme Court except with the consent of the Chief Justice or in his absence the next available senior judge of the Supreme Court – Applicant failed to obtain such consent – Court held that without proof of such consent the application could not be considered by the court – Furthermore, that the exception *res judicata* applied and that the High Court has no jurisdiction to order the Supreme Court on how to regulate its proceedings – Application struck from the roll with costs.

ORDER

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1. Application is struck from the roll.

2. The applicant is ordered to pay the respondents' costs and such costs are to include the costs of two instructed counsel and one instructing counsel.

JUDGMENT

ANGULA DJP:

Introduction

[1] In this application, the applicant acted in person as a lay litigant. He sought an order, in the first place, directing the Chief Justice 'to deem it just and expedient that the applicant's application in the Supreme Court dated 2 March 2017, should be deemed to be an application brought pursuant to and in consequence of the Supreme Court having decision (power) to exercise its review jurisdiction in terms of section 16(1) and (2) of the Supreme Court Act, 1990'. In the second place, directing second respondent to deliver telephone calls records and cellphone calls records of the deputy registrar and assistant registrar of the Supreme Court between 7 (seven)

and 8 (eight) March 2016 to both the court and the applicant. In the third place, directing that the first order sought, operates as an interim interdict pending the hearing of the review application, which is, either pending before this court or the Supreme Court.

[2] It needs mentioning immediately mention that this court have no way to establish in which court the 'review application' is pending, nor was it indicated to the court by the parties, before which court the said review application, is pending.

The parties

[3] The applicant is Mr Ronald Mosementala Somaeb, a major male and whose full and further particulars are not stated in his pleadings.

[4] The first respondent Chief Justice of the Supreme Court of Namibia appointed as such in terms of Article 32(4)(*a)(aa)* of the Namibian Constitution, Act 1 of 1990. He is cited in this proceedings in his capacity as head of the Judiciary.

[5] The second respondent is the Permanent Secretary of the office of the judiciary cited in her capacity as such in terms of section 16(3) of the Office of the Judiciary Act, 2015.

Factual background.

[6] The factual background has been neatly summarised by counsel for the respondents in his heads of argument. I do not think I can do better than to use his summary to set out the background. Counsel summarised the factual background as follows.

[7] The applicant was an appellant in the Supreme Court of Namibia in case number SA 26/2014. The respondent in that matter was Standard Bank Namibia Ltd a public company with limited liability duly incorporated in accordance with the laws of the Republic of Namibia. In the court *a quo*, the applicant was then the defendant and Standard Bank was the plaintiff in an application for an order to eject the

applicant from a dwelling house situated at Erf No. 8446 Katutura, Windhoek, Namibia

[8] On 7 March 2016, the applicant inspected the appeal record and noticed that the legal representatives of Standard Bank did not file a power of attorney when their heads of arguments were lodged with the Registrar of the Supreme Court in terms of the rules.

[9] On 8 March 2016, the legal representative for Standard Bank lodged the requisite power of attorney with the Registrar of the Supreme Court. The applicant became concerned that the staff members of the Office of the Judiciary and the Supreme Court alerted the legal practitioners of Standard Bank, because the power of attorney, a fact he raised with both with Mr Libana, the assistant registrar, and Ms Tjahikika, the deputy chief registrar. He then filed a complaint about what he alleged was a one-sided contact or communication between the staff members of the Office of the Judiciary, Supreme Court, and the legal practitioners for Standard Bank.

[10] On 14 March 2016, the legal practitioners for Standard Bank filed an application before the Supreme Court, seeking condonation for their failure to have lodged a power of attorney simultaneously with the filing of the heads of argument. When the matter was called for hearing on 16 March 2016, the applicant informed the court that he required additional time to file an answering affidavit in regard of Standard Bank's application for condonation. The matter was then postponed to 30 March 2016 and applicant was given five days within which to file in answering affidavit.

[11] The applicant filed his answering affidavit on 24 March 2016 and the legal practitioner for Standard Bank filed replying papers on 29 March 2016. Both applications for condonation and the main application were head on 30 March 2016 where after the Supreme Court reserved judgment.

[12] The applicant remained unhappy with the decision of the Supreme Court ordering him to file his answering affidavit within five days from 16 March 2016 and raised the matter with the Supreme Court both before and subsequent to arguments having been heard on 30 March 2016.

[13] During on or about February 2017, the applicant and Standard Bank were informed that the judgment of the Supreme Court would be delivered on 27 February 2017 at 10 o'clock. On 24 February 2017, applicant filed a notice stating that in the absence of a reply to his letter (presumably his letter dated 1 November 2016 addressed to the Supreme Court) it was unacceptable that the judgment of the Supreme Court should be delivered.

[14] On 27 February 2017, applicant delivered a notice which he termed 'Notice of proceedings in terms of article 81 of the Namibian Constitution'.

[15] The Supreme Court delivered its judgment on 27 February 2017, granting the condonation application of Standard Bank and dismissing applicant's application for condonation.

[16] The present application flows directly from the applicant's persistent discontent with the manner in which the Supreme Court dealt with the appeal in case number SA 16/2014.

Application for recusal

[17] Before this court and at the commencement of proceedings, the applicant filed an application that myself, as the presiding judge, should recuse myself because the Chief Justice, who is the first respondent in the present matter, in terms of article 78(7) of the Namibian Constitution, supervises the Judiciary and exercises responsibility over the Judiciary and over the presiding judge. The applicant therefore argued that as a result of such a relationship between the presiding judge and the Chief Justice, the presiding judge would be biased against the applicant and should therefore recuse himself from the adjudication of the matter as he would not be impartial because of his alleged aforesaid relationship with the Chief Justice.

[18] After considering the application for recusal and the arguments advanced on behalf of the parties, the court dismissed the application, holding that the application was meritless. The court then ordered the matter to proceed. Apparently not happy with the ruling by the court regarding the recusal application, the applicant excused

himself and indicated to the court that he was not going to participate in further proceedings before this court. The proceedings then continued without the applicant's participation, but he remained in attendance. It needs mentioning that the applicant behaved himself in the most disrespectful manner towards the court. It would suffices to say, this is an example not worth emulating.

Points *in limine* raised by the respondents

[19] The first respondent raised a number of points *in limine*. The first point is that section 16 of the Supreme Court Act, 1990 vests the power in the Supreme Court 'to review the proceedings of the High Court, lower courts and any administrative tribunal, authority established or instituted by or under any law'. However section 16 does not vest the High Court with the power to review the decision of the Supreme Court; that respondents in this matter were cited in their official capacities. It follows therefore, so the argument went, that section 16 does not vest jurisdiction in the Supreme Court to review its own decisions.

[20] The next *point limine* raised on behalf of the respondents is that of *res judicata.* In this connection it was contended on behalf of the respondents that prayer 2 of the applicant's notice of motion relates to the events of 8th to 9th March 2016, which are set out in the preceding paragraphs and therefore this alleged improper contact between the officials in the office of the Registrar of the Supreme Court and the legal practitioner of Standard Bank, as regard to the failure by the legal practitioners of Standard Bank to lodge a power of attorney with the registrar when Standard Bank's heads of argument were filed, that that matter has already been decided by the Supreme Court in its judgment of 27 February 2017.

[21] The next point *in limine* raised on behalf of the respondents is that of the non-joinder of Standard Bank. In this regard it is alleged by the respondent, that Standard Bank has a direct and substantial interest in the relief sought in prayers 1 and 2 of the notice of motion relating to the delivery of the telephone calls records and the interim interdict, respectively. Standard Bank should have therefore been joined and that failure to join it to these proceedings was fatal.

[22] The further *point in limine* raised on behalf of the respondents is that the application papers being an application initiating fresh proceedings were not served by the Deputy-Sheriff and no proof of such service was provided. Furthermore in paragraph 7 of the notice of motion, the time period to file any notice of intention to oppose was until 31 March 2017. That, on calculation of the time period requirements stipulated by the Rules of the High Court, the time given fell short of the time period requirements as set out in the notice of motion. This is, it is argued, because in terms of rule 65(5)(*b*), the period for filing of the notice to oppose by the respondents must not be less than five days after service and in respect of the Government the time period must not be less than 15 days. It is therefore contended that the notice of motion in the present matter was fatally defective and should be set aside.

[23] The final point *in limine* raised on behalf of the respondents is that the applicant has failed to comply with the provisions of section 12 of the Supreme Court Act, 1990, which prohibits the issuing of a summons or subpoena against the Chief Justice or any judge of the Supreme Court in any civil action except with the consent of the Chief Justice or in his absence where summons or subpoenas is directed against him, the next available senior judge of the Supreme Court.

[24] In the view, I take with regards to the points *in limine* raised by the respondent I need not to consider all the points *in limine* raised by the respondents. If I find that one or two points is well taken then I do not need to consider the remainder of the points *in limine*. In my view, the most important consideration is whether all the parties are properly before court. It is therefore necessary to first determine whether the applicant has obtained consent from the most senior judge of the Supreme Court before instituting these proceedings against the first respondent, the Chief Justice, pursuant to the provisions of section 12 of Supreme Court Act, 1990.

[25] In their article titled: *Defending the Absurd: The Iconoclast's Guide to section 47(1) of Act of the Superior Courts Act No 10 of 2013 authors: H McCreath and R Koen* discussed the provisions of section 47(1) of the South African Superior Courts which is similar to our section 12 of the Supreme Court Act, 1990[1]. It reads:

[1] http://dx.doi.org/10.4314/pelj.v17i5.02.

‘Notwithstanding any other law, no civil proceedings by way of summons or notice of motion may be instituted against any judge of a Superior Court, and no subpoena in respect of civil proceedings may be served on any judge of a Superior Court, except with the consent of the head of that court or, in the case of a head of court or the Chief Justice, with the consent of the Chief Justice or the President of the Supreme Court of Appeal, as the case may be.’

[26] I found the article insightful as it provides the rationale behind the enactment of the section. Under the heading ‘*Judicial Immunity from Suit*’ the author’s state that the doctrine prescribes that in certain circumstances, legal proceedings may not be brought against judges without leave. The authors referred to an article by Von Huelsen in the SALJ 2000 714, where he mentioned that in addition to South Africa, only Botswana and Namibia are two other jurisdictions which also rely on the doctrine. The authors point out further that the immunity provided by the doctrine does not pertain to the suit itself in that it does not comprise a substantive bar to civil litigation against the judges for their excesses. Rather the immunity in question is a procedural mechanism for protecting the judiciary against meritless lawsuits.

[27] The procedure normally followed was outlined by Ngoepe JP in *N v Lukoto.*[2] The learned Judge-President explained how such applications are traditionally dealt with and the reasons therefor. He said: ‘Normally, it is the Judge-President who would receive such an application, and consider it in Chambers. This mechanism would quietly dispose of patently frivolous claims which might unjustifiably damage the reputation of a Judge. Where there appears to be at least an arguable case, the Judge-President would approach the Judge concerned. In appropriate circumstances, the Judge-President might even urge the Judge to oblige; for example, where there is a clear debt against the Judge. The Judge-President would impress on the Judge concerned that those who are the ultimate enforcers of the law must themselves make every endeavour to observe it; also of importance is to avoid the appearance of a Judge as a litigant in court, particularly in the lower courts. Where there seems to be an arguable case against the Judge but the latter remains recalcitrant, the Judge-President would give the Judge the opportunity to oppose the application for leave to sue him or her. The matter may then be disposed of in

[2] 2007 SA (3) 569 (T) para 4.

Chambers or in an open court, depending on the intensity of the opposition. Once an applicant shows good cause, leave would be granted'.

[28] Majiedt J in the matter of *Winston Nagan v The Honorable Judge-President John Hlophe*[3] explained the consideration present in granting leave to sue a judge in the following words:

'[10] An important consideration in deciding whether to grant permission to sue a Judge would, in my view, be the interests of justice and the constitutional founding values of openness and transparency. Generally speaking, litigants ought to be able to enforce unreservedly their constitutional rights to, for example, dignity, and access to courts and of equality before the law. These rights should be enforceable even against judicial officers performing judicial functions, **provided that there is at least an arguable case made out by such litigants against the judicial officer concerned**. To hold otherwise would be to undermine the spirit and ethos of our Constitution. The constitutional rights enunciated above are all potentially at stake here insofar as the Applicant is concerned. Conversely and most certainly no less importantly, Judges too enjoy the protection which the Constitution affords them in section 165(2), namely to "apply the law impartially, without **fear,** favour or prejudice".' (Emphasis supplied)

Non-compliance with section 12(1) the Supreme Court Act

[29] It is not in dispute that the applicant had not obtained the prescribed statutory permission from the next Senior Judge of the Supreme Court, after the Chief Justice, in terms of section 12 of the Supreme Court, 1990 when he instituted the present application against the Chief Justice. In the absence of such proof of consent or permission, it is the considered view of this court that it is precluded from considering the application serving before it.

[30] Finally, in any event, even if the requisite consent had been granted and quite apart from the principle of *exception res judicata*, which, in the view of the court, is well taken and applicable to the present matter, this court, being subordinated to the Supreme Court, has no jurisdiction or power to order the Supreme Court how to regulate its proceedings.

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[3] Case Number 1006/08 Delivered 19 March 2009.

[31] Under the circumstances the court makes the following order:

1. The application is struck from the roll.

2. The applicant is ordered to pay the respondents' costs such costs to include the costs of two instructed counsel and one instructing counsel.

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H Angula

Deputy-Judge President

APPEARANCES

APPLICANT:	R M SOMAEB In person
RESPONDENTS:	R TÖTEMEYER SC (with him G NARIB) Instructed by Government Attorney, Windhoek