REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2022/00125

In the matter between:

HENDRIK CHRISTIAN T/A HOPE FINANCIAL SERVICES **APPLICANT**

and

THE HONOURABLE JUSTICE BOAS USIKU **RESPONDENT**

Neutral citation: *Hendrik Christian t/a Hope Financial Services v Usiku* (HC-MD-CIV-MOT-GEN-2022/00125) [2022] NAHCMD 56 (16 February 2023)

Coram: RAKOW J
Heard: **28 November 2022**
Delivered: **16 February 2023**

Flynote: Section 21 of the High Court Act – No process to be issued against judge except with consent of court – Section 1 of the High Court Act defines summons – Any summons whereby civil proceedings are commenced, and includes any rule *nisi* or notice of motion.

Summary: This is an application on notice of motion seeking certain relief against the Honourable Justice Boas Usiku. The matter was earmarked to appear before myself for being inactive for more than six months. The applicant appeared and

explained that he was waiting for a reply from Justice Usiku, when the court raised the issue, as to whether the applicant has the necessary permission to litigate against a judge of the High Court.

Held – that the word 'summons' in s 21 of the High Court Act, means any summons whereby civil proceedings are commenced, and includes any rule *nisi* or notice of motion

Held – that the applicant therefore needs permission of a court to institute proceedings against a judge of the High Court.

Held – that the purpose of the permission requirement is to protect judges against unmeritorious claims arising from execution of their judicial functions and prevention of improper interruptions of their courts' functioning.

Held – that the applicant indeed needs permission from the High Court to institute such litigation.

ORDER

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1. The applicant does not have the necessary permission to proceed with litigation against Justice Usiku and the matter is struck from the roll in terms of rule 132(10) and regarded as finalised.

JUDGMENT

RAKOW J

Introduction:

[1] This matter comes before me as an application on notice of motion seeking certain relief against the Honourable Justice Boas Usiku. It prays for the following relief:

'(i) Ordering that the Respondent is guilty of contempt of Supreme Court Judgment in Case No.SA 36/2016;

(ii) Ordering that the Respondent is in direct contempt of the provisions of the Legal Practitioners Act of 1995;

(iii) Ordering that the Respondent conducted judicial process in Case No. I 2232/2007, in breach of the judicial oath;

(iv) Ordering that the Respondent lost subject matter jurisdication, resultantly the orders granted by him since 4 December 2019 are void, of no legal force or affect;

(v) Ordering that the Respondent is personally liable for unnecessary costs incurred in Case No. I2232/2007 by the Applicant since 4 December 2019 until present, such to be determined by an actuary;

(vi) Further and/ or alternative relief;'

[2] The matter was earmarked to appear before myself for being inactive for more than six months. Initially the applicant appeared and explained that he was waiting for a reply from Justice Usiku, when the court raised the issue *mero moto* as to whether the applicant has the necessary permission to litigate against a judge of the High Court.

Background

[3] The applicant explains that he has been involved with a legal battle against the Namibia Financial Institution Supervisory Authority (Namfisa) since August 2007. This matter proceeded in the High Court, and the outcome in the High Court was eventually appealed against successfully by the applicant, to the Supreme Court. The Supreme Court declared the rescission judgement (of the High Court) as null and void and set it aside, declared all proceedings pursuant to the recission of judgement null and void and set it aside and substituted the default judgement order of the High Court with the following order:

'(a) The application for default Judgement is dismissed with no order as to costs.

(b) The matter is remitted to the High Court to be placed under judicial case management for the determination of the future conduct in the case.'

[4] It then seems that the matter was remitted to Justice Usiku to deal with the further judicial case management. It then transpired that the applicant raised an issue before Justice Usiku *in limine* regarding the fact that the deponent of the first defendant's answering affidavit is not authorized to oppose the said application. He

then brought an application to strike out the said affidavit. This application was dismissed by Justice Usiku and the said dismissal gave rise to the current proceedings.

The application

[5] The allegation made by the applicant is that the respondent is guilty of contempt of the decision of the Supreme Court and he therefore seeks the relief as set out in paragraph one of this judgement.

[6] During the initial proceedings, the court enquired from the applicant as to whether he has the required permission to institute these proceedings against Justice Usiku. Initially the applicant pointed out that these proceedings are raised as motion proceedings and that such permission is only needed when a summons or subpoena is issued against a judge. The relevant section in the High Court Act, 16 of 1990 reads as follows:

'**No process to be issued against judge except with consent of court**

21. (1) Notwithstanding anything to the contrary in any law contained, no summons or subpoena against any judge of the High Court shall in any civil action be issued out of any court except with the consent of the High Court. '

[7] Although it is true, the court pointed out that the definition of a summons includes as per section 1 of the said act:

'any summons whereby civil proceedings are commenced, and includes any rule *nisi* or notice of motion the object of which is to require the appearance before the court of any person against whom relief is sought in such proceedings or of any person having an interest in resisting the grant of such relief.'

[8] And as such includes proceedings commenced on notice of motion.

[9] According to s 21 of the High Court Act, 16 of 1990 the applicant therefore needs permission of a court to institute proceedings against a judge of the High Court, which Justice Usiku in this instance is. The court then invited the applicant to

file heads of argument and address the court should he wish to do so, regarding this aspect.

Arguments of the applicant

[10] The applicant agrees that the wording of s 21(1) and s 21(2) of the High Court Act is quite clear and that s 21(2) is clearly linked to s 21(1) and is therefore not ambiguous. The understanding of "civil summons" as per the definition is however not as clear. The applicant further argued that section 21(2) deals only with a judge who is to appear in a civil action and one knows that in motion proceedings it is not necessary for a person to appear, and therefore section 21(1) and (2) remedies the situation by referring to situations where one deals specifically with a summons or subpoena.

[11] He further argues that if the section is interpreted to mean that prior permission is needed from a court before instituting action, such interpretation would visit the applicant with a harsh outcome and then the principle as quoted from the matter *Principal Immigration Officer v Bhula*[1] where the principle that a court will interpret the paragraphs so as to render an interpretation least harsh to the affected person, found application. And as such, the court is invited to find that s 21(1) and s 21(2) of the High Court Act should not be applied in the current application.

[12] It was further argued that these provisions is infringing on the fundamental rights as guaranteed under Article 18 of the Constitution of Namibia which determines that all persons should be equal before the law.

Discussion

[1] *Principal Immigration Officer v Bhula* 1931 AD 345.

[13] When interpreting legislation, the principles of interpretation of statutes are trite. In the matter of *Commissioner, South African Revenue Services v United Manganese of Kalahari (Pty) Ltd* [2] it was summarised as follows:

'It is an objective unitary process where consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. The approach is as applicable to taxing statutes as to any other statute. The inevitable point of departure is the language used in the provision under consideration.'

[14] When interpreting the applicable provisions of the High Court Act, one is led by the actual wording used in the legislation as well as the intention of the legislator. In this instance, the legislature clearly explained under the definitions in s 1 of the High Court Act what should be understood under the words civil summons to mean 'any summons whereby civil proceedings are commenced, and includes any rule *nisi* or notice of motion the object of which is to require the appearance before the court of any person against whom relief is sought in such proceedings or of any person having an interest in resisting the grant of such relief.'

[15] Section 47(1) of the South African Superior Courts Act, 10 of 2013 deals with proceedings being instituted against a judge of the superior courts and requires the permission of the head of the said court for the institution of such proceedings. In *NP v LP*[3] Mbenenge JP pointed out what the purpose of such a clause is and said that the:

'Aims of consent requirement being to protect judges against unmeritorious claims arising from execution of their judicial functions and prevention of improper interruptions of their courts' functioning'.

[16] He further proceeded and discussed what should be considered when faced with such a request. He pointed out that:

'(T)he court has to determine whether good cause has been shown in an application to institute proceedings against a judge. What constitutes 'good cause' will depend on the facts and circumstances of each case. The approach of the courts has always been to

[2] *Commissioner, South African Revenue Services v United Manganese of Kalahari* (Pty) Ltd 2020 (4) SA 428 (SCA) (82 SATC 444; [2020] ZASCA 16) para 8
[3] *NP v LP 2021* (4) SA 559 (ECG)

refrain from adopting an exhaustive definition of 'good cause' in order not to abridge or fetter in any way the wide discretion implied by these words. Relying on *Torwood Properties (Pty) Ltd v South African Reserve Bank*[4] the court in *Engelbrecht* [5] went further to mention that in the context of an application for consent to sue a judge the court has to consider whether on the facts before it an arguable case calling for an answer by the judge is made out and whether it is fair, just and equitable between the parties to grant or refuse consent.'

[17] The purpose of the protection provided to judges by the South African legislation was further explained in *Engelbrecht v Khumalo*[6]. Judge President Mlambo explained it as follows:

'Section 47(1) is the mechanism through which the institution of legal proceedings against judges is regulated and plays what I regard as a gate- keeping role. In essence the section seeks to insulate judges from unwarranted and ill-conceived legal proceedings aimed at them. The need to protect judges from unwanted litigation is not difficult to fathom. The core function of judges is the adjudication of disputes involving competing interests daily. The judgments they hand down as well as the statements they make in court and in their judgments invariably displease some litigants and sometimes their legal representatives.

[4] It is integral to the adjudication function of judges that they should be free from any fear of repercussions for doing their work. It is necessary therefore that judges be protected from the ever present threat of legal proceedings directed at them arising from the execution of their official responsibilities. This is necessary to ensure that they adjudicate disputes unhindered and that they do so 'without fear, favour or prejudice.' This was aptly stated by Ngoepe JP in *Soller v President of the Republic of South Africa*[7] as follows —

'The oath which judges take upon assumption of office requires of them to adjudicate matters fearlessly. This they can only do if protected against non-meritorious actions. Judges should not, in the execution of their judicial functions, be inhibited by fear of being dragged to Court unnecessarily over their judgments. Such a threat could have a chilling effect on the execution of their duties. Furthermore, judges should rather spend time hearing matters than defending themselves against endless unfounded civil claims. The very nature of the duty of a judge is such that it would open them to such litigation: a judge's task is to resolve disputes, inevitably leaving one person or the other dissatisfied; moreover they are, in the process, required to make findings on the credibility, honesty and integrity of witnesses and litigants and to justify those findings.'

[4] *Torwood Properties (Pty) Ltd v South African Reserve Bank* 1996 (1) SA 215 (W) at 228B
[5] *Engelbrecht v Khumalo* 2016 (4) SA 564 (GP) at 566H – 567B
[6] Supra.
[7] *Soller v President of the Republic of South Africa* 2005 (3) SA 567 (T).

[5] I should further point out that s 47(1) is not only concerned with legal proceedings targeting what judges do in their judicial capacities. The provision has been interpreted expansively to also cover actions arising from their personal interactions. Also covered is litigation arising from incidents that occurred before their elevation to judicial office.'

[18] It is further true that the applicant who is challenging the constitutionality of s 21(1) and s 21(2) bears the onus to prove its unconstitutionality. Although in this matter the applicant was invited by the court to address it, the applicant should at least have discharged the onus on it to proof that the specific sections are unconstitutional.

[19] The fact that a different procedure must be followed in order to proceed with litigation against a judge of the High Court, other than the "normal" process usually used, cannot, *per se* constitute a violation of article 10 of the Constitution.

[20] It is also inherent in equality to differentiate as long as there is a reasonable connection between the differentiation and the object sought to be achieved and it is clear that the object which is being protected here, is that a judge cannot be litigated against without having certain protection in place which will allow for the screening of frivolous lawsuits being instituted against a judge. It is therefore possible that legislation can provide for reasonable classifications if these classifications are rationally connected to the object of the section, and looking at the purpose of such sections, the court must conclude that there is indeed a reasonable purpose for such limitation.

[21] The applicant further needs to demonstrate, to be successful with a Constitutional challenge that s 21(1) and s 21(2) of the High Court Act, 'produces an unreasonable rigidity and inflexibility which has the effect of either denying applicants their right of access to court; or because of its failure to provide for safeguards employed in other comparable statutory schemes, it treats them unequally.'[8] (The Majiedt decision was overturned on appeal but the above statement still holds true)

[8] *Majiedt and others v The Minister of Home Affairs and Immigration and another* (P)A190/2003 delivered 2005/5/16.

[22] Unlike the Supreme Court Act, 15 of 1990 which in s 12 provides for the Chief Justice to give permission for the issuing of a summons or subpoena against the Chief Justice or any other judge of the Supreme Court or the South African Superior Courts Act, 10 of 2013, s 21(1) of the High Court act provides that the High Court must grant such permission. It is then also explicit that such a decision will be a judicial decision and as such will be open to appeal or review proceedings. This in fact is a further guarantee that is available to a person bringing such application for permission, of fair treatment.

[23] As the proceedings appeared before myself in terms of rule 132 of the Court Rules, it is necessary to satisfy the judge regarding the reason why there was no activity on the matter. Sub-rule (7) reads as follows:

> 'Where a party or his or her legal practitioner appears on that date the managing judge must inquire as to why there is no activity on the case and if the managing judge is satisfied with the reason he or she must make such order that he or she may consider suitable or appropriate and give appropriate directions for the speedier conduct of the proceedings.'

Conclusion

[24] The language of s 21(1) of the High Court Act is clear that, no civil legal process can be issued against a judge unless this has been permitted by the High Court. Section 21(1) applies to civil proceedings by way of summons or notice of motion intended to be instituted against a judge in the judge's personal and/or judicial capacities.

[25] From the above it is clear that I am not satisfied with the reasons for non-activity provided by the applicant, although it was explained by the applicant. I further conclude that the applicant indeed needs permission from the High Court to institute such litigation. The Registrar therefore issued these processes without ensuring that the necessary permission accompanied the said process.

[26] In the result, I make the following order:

1. The applicant does not have the necessary permission to proceed with litigation against Justice Usiku and the matter is struck from the roll in terms of rule 132(10) and regarded as finalised.

E RAKOW
Judge

APPEARANCES

APPLICANT: H Christian (In Person)
Hendrik Christian t/a Hope Financial Services, Windhoek

RESPONDENT: Non-Appearance
Registrar of the High Court, Windhoek