REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

HC-MD-CIV-MOT-REV-2020/00355

In the matter between:

SCHAMEERAH SEVEN (7) REG: CC/2003/1053	**1ST APPLICANT**
SCHAMEERAH FOUR (4) REG: CC/2003/2211	**2ND APPLICANT**
DANIEL KUDUMO KAMUNOKO	**3RD APPLICANT**
ELVIS BONGANI NDALA ID NO. 6405025883088	**4TH APPLICANT**

and

STANDARD BANK NAMIBIA LIMITED (WINDHOEK) REG: 78/10799	**1ST RESPONDENT**
HONOURABLE JUSTICE PARKER	**2ND RESPONDENT**
DR WEDER, KAUTA & HOVEKA INC.	**3RD RESPONDENT**
JUDICIAL SERVICE COMMISSION	**4TH RESPONDENT**
THE MINISTER OF JUSTICE	**5TH RESPONDENT**

Neutral Citation: *Schameerah Seven (7) REG: CC/2003/1053 v Standard Bank of Namibia* (HC-MD-CIV-MOT-REV-2020/00355) [2021] NAHCMD 114 (02 March 2021).

CORAM: MASUKU J

Heard: **09 February 2021**

Delivered: **02 March 2021**

Flynote: Subordinate Legislation- Rule 61 Rules of Court - Legislation – Section 21 of the High Court Act, 1990 - prohibits the issuing of a summons or subpoena against the Judge of the High court of Namibia in any civil action except with the consent of the Head of Court or the next senior judge —— Complying with the provisions of s 21 – Noncompliance with s 21 constituting an irregular proceeding – Applicant failed to obtain such consent – Whether subsequent condonation application cures the non-compliance with s 21.

Summary: The applicants brought an application against the above-named respondents. The second respondent is a judge of the High court of Namibia and was cited in his capacity as a judge who presided over a matter in which the applicants had an interest. Section 21 of the High Court Act, 1990 stipulates that no process shall be issued against a judge of the High Court without the consent of the Head of the High Court and in his absence, the next available senior judge of the High Court. The respondents raised the non-compliance in terms of rule 61 of this court's rules.

Held: that s 21 of the High Court is a peremptory provision that should be complied with prior to the institution of proceedings.

Held that: the provision serves to quietly dispose of patently frivolous claims, which serve to damage the reputation of a judge.

Held further that: failure to comply with the said provision is one that the court has no discretion or power to condone.

Held: that the non-compliance in this case rendered the applicants' application against the fourth respondent an irregular step as contemplated by rule 61.

Held that: the prejudice suffered in this case is not just that of the judge sued, but such non-compliance has the potential to imperil the very notion of judicial independence, as judges may fear handling cases, apprehending that they may be personally sued for performing their official duties.

Held further that: dissatisfied litigants have legal options open to them if dissatisfied with judgments of the High Court, namely appealing to the Supreme Court or filing an application for review. If on the other hand, a judge is accused of impropriety inconsistent with his or her oath of office, then a formal complaint may be laid with the Judicial Services Commission for investigation and further action, if warranted.

The application for irregular proceedings filed on behalf of the second respondent was thus upheld with costs.

ORDER

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1. The applicants notice of motion dated 24 September 2020 against the second respondent is declared an irregular step or proceeding in terms of rule 61 of the Rules of the High Court;
2. The application in so far as it relates to the Second Respondent, is struck from the roll.
3. The Applicants are ordered to pay the Second Respondent's costs, jointly and severally, the one paying and the other being absolved.
4. The matter is postponed to **18 March 2021** for directions regarding the further conduct of the matter.
5. The parties are ordered to file a joint status report on or before 15 March 2021.

RULING

MASUKU J:

Introduction

[1] The interlocutory application presently serving before court is one for irregular proceedings in terms of rule 61 of this court's rules. It is raised on behalf of the 2nd respondent based on the contention that the application against the 2nd respondent

constitutes an irregular step or proceeding for non-compliance with s 21 of the High Court Act, 1990, ('The Act').

[2] The relief sought on behalf of the second respondent is as follows:

'[1] Declaring applicants notice of motion dated 24 September 2020 as an irregular proceeding alternatively an irregular step in terms of rule 61 of the Rules of the High court;
[2] Removing this matter from the court roll not to be re-enrolled without leave from the High Court;
[3] Costs of this application; and
[4] Further and/ or alternative relief.'

Background

[3] The applicants' main application was instituted by virtue of a notice of motion dated 24 September 2021. The applicants sought numerous types of relief in their notice of motion. In a nutshell the applicants' case emanates from matters over which the second respondent presided, namely case numbers I 3939/2015 and I 2586/2009 respectively. The orders issued in those matters declared the property of the applicants especially executable. The applicants have approached this court seeking an order for the respondents to be interdicted from selling the property so declared to be executable. They further for the order declaring the property executable, to be set aside.

[4] They further seek evidence to be provided by the second respondent detailing his compliance with Rule 108 of the Rules of Court when he granted the order in question. The applicants in their application further seek security for costs in the amount of Three Billion Eight Million Namibia Dollars amongst others.

[5] Upon the parties' first appearance for judicial case management, the court directed the applicants to the non-compliance with section 21 of the High Court Act. In response to the issue raised by the court, the applicants on 21 October 2021 filed a condonation application addressed to the Chief Justice and Deputy Chief Justice of the Supreme Court of Namibia, requesting permission to institute proceedings against the second respondent and to continue suing the second respondent.

[6] The second respondent is a Judge of the High Court of Namibia. It is the Respondents case that the applicants, before instituting proceedings against the second respondent, were supposed to obtain consent from the Judge president allowing them to institute action against the second respondent in terms of s 21 of the High Court Act, 1991, which reads as follows;

'[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 head of the High Court.
[2] Where the issuing of a summons or subpoena against a judge to appear in a civil action has been consented to, the date upon which such judge shall attend court shall be determined in consultation with the Judge-President or, in his or her absence, the next senior judge of the high court available.'

[7] In advancing argument on the second respondent's behalf, it was contended that the requirement for the consent to institute proceedings is not intended to be a mere courtesy, but rather an opportunity for the head of court not to allow baseless, unwarranted and ill-conceived litigation against a judge. The second respondent further went on to argue that the subsequent application for condonation filed by the applicants cannot cure the unlawfulness and defectiveness of the main application as the request to the head of court must be made prior to the institution of proceedings.

[8] The applicants' submissions were very brief. They do not dispute that they ought to have acted in terms of section 21 and regarded the failure to do so as an oversight on their part. They further conceded that their oversight constituted an irregular step as per Rule 61 of the Rules of the High Court. The applicants have no qualms with having the matter struck against the second, fourth and fifth respondents and having them removed as parties to the proceedings but wish to proceed against the first and third respondents if the court is amenable thereto.

Determination

[9] I am of the considered view that section 21 is a peremptory provision and should be complied with to the letter prior to the institution of proceedings. In other

words, the applicants were supposed to seek and first obtain the consent required to institute an application in this court against the second respondent who presided in with

[10] The subsequent condonation application lodged by the applicants addressed to the Chief Justice and Deputy Chief Justice of the Supreme Court of Namibia can by no means cure the defective application before court. The provisions of the Act quoted above, are clear, and state that an application requesting consent should be addressed to the Head of the High Court, which the applicants have failed to do. The head of the High Court is the Judge-President. The applicants accept that they did not seek and obtain consent from him before instituting the current proceedings. The fact that the Deputy Chief Justice of Namibia also serves as the Judge-President of the High Court cannot avail the applicants because in sitting in each position, the incumbent exercises different powers accorded him by either the High Court Act or by the Supreme Court Act.

[11] In *N v Lukoto* [1] Ngoepe JP had the opportunity to deal with an application brought in terms of s 25(1) of the Supreme Court Act 1959 which is *in pari materia* with our section 21 of the High Court Act. The learned JP pronounced the procedure to be followed in the following terms:

'[4] It is necessary to explain how such applications are traditionally dealt with and the reasons therefor. 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 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/her. The matter may then be disposed of in Chambers or in an open court,

[1] N v Lukoto 2007 (3) SA 569 (T)

depending on the intensity of the opposition. Once an applicant shows good cause, leave would be granted.'

[12] I am of the considered view that the approach that the learned JP followed in that case, is fully applicable to our jurisdiction as well. This is so amongst other things, due to the similarity in the wording of the relevant provision under consideration.

[13] In the matter of *Somaeb v The Chief Justice*[2] one of the issues that had to be determined by Angula DJP, is s 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 similarly and the failure of the applicant to comply with the provisions of section 12 of the Supreme Court Act, 1990. The court held that:

'[29] 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'

[14] The application was thereby dismissed. On appeal, the Supreme Court, per Damaseb, DCJ upheld the position taken by the High court and went on to state that:

'[19] It is common ground that Mr Somaeb did not obtain consent as required by law in order to institute the proceedings against the Chief Justice subject of the appeal brought in this court. The High Court had no discretion to condone that failure. There is no prospect that on appeal the Supreme Court will come to a different view. Pursuing an appeal to ventilate that issue is frivolous and vexatious and without any prospects of success.' [3]

[15] The Court further cited Majiedt J in the matter of *Winston Nagan v The Honourable Judge-President John Hlophe*[4], who explained the consideration in granting leave to sue a judge in the following words:

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

[3] Permanent Secretary of the Judiciary v Somaeb and Another [2018] NASC 21

[4] *Winston Nagan v The Honorable Judge-President John Hlophe* Case Number 1006/08 Delivered 19 March 2009.

‘[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)

[16] Rule 61(4) of the Rules of the High Court reads as follows:

‘If at the hearing of the application the managing judge is of the opinion that the proceeding or step is irregular or improper he or she may, with due regard to the alleged prejudice suffered, set it aside in whole or in part either as against some of them and grant leave to amend or make any other order that the court considers suitable or appropriate.’

[17] What is the prejudice in this case? I am of the considered view that the conduct of the applicants in suing process against a judge of this court, without the necessary consent is prejudicial and is one that must be strongly discouraged and severely condemned. It is potentially inimical to judges properly performing the functions of their office. In this case, Parker AJ was sued for billions and was further to be held criminally liable for treason at the applicants’ behest. This is totally unacceptable and unbecoming.

[18] It will be a sad day when judges are unable, unwilling or are afraid of sitting in court and determining matters for fear that they will be sued therefor. Judges should not go to court with knees shaking and not observing the natural distance or their voices quaking because of the potential that they may be sued by litigants, if they find against those litigants. Nor is it desirable that judges should retire to their chambers, having reserved judgment and start drafting their judgments with trembling fingers. The course of justice, the rule of law and the independence of judiciary, will be seriously undermined thereby.

[19] This is not to say litigants must accept judgments against them with no interrogation whatsoever. There are channels provided by law for dissatisfied litigants in respect of High Court judgments, namely appeal and/or review before the Supreme Court. On the other hand, if there is a complaint about the handling of matters by judges, that borders on impropriety or a violation of the oath of office, the litigant or other person aggrieved, may approach the Judicial Services Commission, to lay a complaint.

[20] It therefor becomes plain that the conduct of the applicants in this matter, must not be allowed to gain traction. It is a recipe for disaster and chaos. We owe to all Namibians, alive and those to be born, an abiding duty to deliver to them a judiciary that is free, fair, impartial and not compromised by fear of reprisals for performing its constitutional duty.

[21] I do not in any way shape of form wish to be seen to second-guess how the Judge-President would have reacted to the application for consent in this matter. That the legal route was not followed should not deprive this court of the opportunity to send red flags over the potential harm the applicants' conduct, if allowed to thrive will bring. The applicants are accordingly admonished of the potential threat to the independence and impartiality of the Judiciary their action poses. Some other sanction in the court's arsenal, more than words, may in future, be unleashed on such errant conduct.

Conclusion

[22] The court is accordingly satisfied and is of the considered view that the second respondent has made out its case in terms of Rule 61 of the court rules. As indicated, the applicants accept that they fell foul of the provisions of the applicable law and there is, in the circumstances, only one order appropriate for the court to grant and I do so below.

Order

[23] In the premises, the proper order to issue is the following:

1. The applicants notice of motion dated 24 September 2020 against the second respondent is declared an irregular step or proceeding in terms of rule 61 of the Rules of the High Court;
2. The application in so far as it relates to the Second Respondent, is struck from the roll.
3. The Applicants are ordered to pay the Second Respondent's costs, jointly and severally, the one paying and the other being absolved.
4. The matter is postponed to **18 March 2021** for directions regarding the further conduct of the matter.
5. The parties are ordered to file a joint status report on or before 15 March 2021.

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T.S. Masuku

Judge

APPEARANCES:

APPLICANTS:	In Person
SECOND RESPONDENTS:	Ms. Heather Harker Of Office of the Government Attorney