REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

Case Title: Werner Januarie v George Mbundu & 5 Others	**Case No:** HC-MD-CIV-MOT-REV-2021/00424
	Division of Court: High Court (Main Division)
Heard before: Honourable Lady Justice Schimming-Chase	**Date of hearing:** 19 May 2022
	Delivered on: 4 July 2022
Neutral citation: *Januarie v Mbundu* (HC-MD-CIV-MOT-REV-2021/00424) [2022] NAHCMD 333 (4 July 2022)	

The order:

Having heard **Mr Januarie**, in person and **Ms Meyer**, for the 1st, 4th, 5th and 6th respondents, and having read the papers filed of record:

IT IS ORDERED THAT:

1. The review application is dismissed.
2. No order is made as to costs.
3. The matter is removed from the roll and regarded finalised.

Reasons for the order:

[1] This is a review application launched by the applicant, Mr Werner Januarie, in person. With the exception of the second and third respondents, the rest of the respondents are government officials who at some point worked on the applicant's case which is still pending in the children's court, referred to in more detail below. These officials are cited in their personal capacities and were served at the Office of the Government Attorney.

[2] Due to the manner in which the notice of motion is drafted, I deem it prudent to quote same here in its entirety. The notice reads:

'TAKE NOTICE that **WERNER JANUARIE** (hereinafter called the applicant) intends to make application to this court for an order

(a) The respondents in this matter should show cause why decisions, actions or inactions or lack of the continuance of proceedings should not be reviewed and corrected or set aside.

(b) The respondents in this matter should also show cause why this honourable court should not order the removal of the children from their current residents.

(c) And also show cause why criminal sanctions should not be imposed on second and third respondent as well as sanctions imposed on their co-conspirators.

(d) Also show cause why the court should not find that applicant on a balance of probability as provided for in section 93(4) of the child care and protection Act 3 of 2015 has proofed to be the father of the children concerned.

(e) Respondents should further also show cause why sole custody of the two minor children should not be awarded to the applicant and be made a final order of the court.

(f) Also show cause why this honourable court should not order the registration of child birth to have been done illegally and found to be unlawful and find it was done to circumvent an ongoing legal process therefore be set aside.

(g) Further the respondents should show cause why this honourable court should not order new birth certificates be made bearing applicants name registered as the father on the new registration of births on the birth certificates of the tow minor children.

(h) As well as show cause why this honourable court should not make a determination regarding applicant's application applied for, since the second respondents already acted contrary and in direct contravention of the provisions of both the Namibian constitution and the childcare and protection Act 3 of 2015.

(i) Also show cause why the decision of the presiding judicial officer and inaction as well halting of proceedings for well over a year, is not impugning and an infringement, violation as well contravention of the guaranteed constitutional right of applicant and the children.

(j) As well show cause why the conduct of the presiding judicial officer and the lack of the continuance of proceedings is not a biased decision against the applicant and the children and why it does not amount to a gross irregularity in the process.

(k) Also show cause why this honourable court should not order charges of fraud, perjury or knowingly including a falsehood in a sworn statement, a crime under the justice of the peace and commissioners of oaths Act 16 of 1963, violation of section 102 of child care and protection Act 3 of 2015, child endangerment, child trafficking and child exploitation, obstruction and defeating the course of justice are instituted against the 2nd respondent.

(l) Respondents are further also required to show cause why this honourable court should not order that charges of conspiracy to commit fraud and perjury, violation of section 102 of child care and protection Act 3 of 2015, child endangerment, child trafficking and child exploitation, obstruction and defeating the course of justice are or instituted against 3rd respondent and all other third parties involved.

(m) Equally show cause why respondents 1, 4, 5 and 6 should not be found to have failed to carry out their functions and duties efficiently diligently and show cause why they should also not be found to be guilty of offences of gross negligence and dereliction of duties.

(n) To also show cause why an order of restitution and personal cost should not be ordered

against certain/some of the respondents or against all the respondents, for psychological injury as well as for the injurious conduct of some or all of the respondents.

(o) Lastly respondents should show cause why it should not be found that the respondents acted contrary and in violation of the principles and legal doctrine of public and administrative law and in direct contravention of article 18 of the Namibian constitution and as a result, why punitive measures should not be instituted against the responsible parties.'

[3] The genesis of this matter and what gave rise to the lengthy and at times unintelligible relief sought by the applicant, emanates from a paternity dispute between the applicant and the mother of two minor children. The mother of the two minors (who from my reading of the papers appears to be the second respondent), informed the applicant that he is not the biological father of the two minors. The applicant on his part is convinced that he is their biological father. He approached various government offices, particularly the relevant governmental respondents in their official capacities, as well as the children's court for assistance in proving his parentage.

[4] It is apparent from the papers that the paternity dispute referred to the children's court by the applicant is still pending. According to the applicant, those proceedings are stalling, particularly because the mother of the children cannot be located for the paternity tests to be conducted. Disgruntled by the pace at which that matter is progressing in the children's court and because he is convinced that the mother of the minors as well as her relatives are 'conspiring to circumvent the law', the applicant then approached this court for the review relief.

[5] On a consideration of the founding papers alone, this application is regrettably marred with defects and cannot succeed for a number of reasons. I will only address two aspects and these are firstly, non-service of second and third respondents and secondly, the fact that the applicant does not make out a case in his founding papers for the relief sought, in any shape or form.

[6] It is noted that this application was served only on the legal representatives of the first, fourth, fifth and sixth respondents on 2 November 2021. Second and third

respondents have not been served at all. At this juncture it is worth mentioning that such non-service is fatal, especially because the second respondent, as mother of the minor children has a direct and substantial interest in any matter concerning her minor children. In *Knouwds NO v Nicolaas Cornelius Josea and Another* [1] Damaseb J (as he then was) reasoned that:

'[22] Service' of process is the all-important first step which sets a legal proceeding in train. Without service, can there really be any argument that proceedings are extant against a party?'

[7] In terms of Rule 8, any document initiating application or action proceedings in this court must be served by the Deputy Sheriff in one of the ways set out in that rule. Where service in terms of Rule 8 is impossible because it is unknown where exactly in Namibia that person may be, then the Rules of Court provide for a procedure in Rule 13. In terms of Rule 13, the applicant could also have applied on Form 3 for leave to serve the second and third respondents via substituted service. This, the applicant neglected to do.

[8] This may ordinarily be remedied by giving the applicant an opportunity to effect service of the process, however, the present application is defective in so many respects, that the application would fail on the return date for the reason that the applicant has not made out a case in his founding papers, as set out below.

[9] It is necessary to note that the official respondents who were served with the application on 2 November 2021 noted their intention to oppose through the Government Attorney on 2 December 2021 and delivered their notice in terms of Rule 66(1)(*c*) on 11 February 2022. This is clearly out of time for the governmental respondents and no condonation was sought nor granted in this regard. This is confirmed by Ms Meyer, who appeared for the official respondents at the hearing of this matter. Their papers are therefore not considered for purposes of this decision.

[1] *Knouwds N.O v Nicolaas Cornelius Josea and Another* 2007 (2) NR 792 (HC). On appeal, the Supreme Court did not set aside this position. See *Knouwds NO v Josea and Another* 2010 (2) NR 754 (SC).

[10] As regards the merits of the application, other than a general lament about the case stalling in the children's court, there is no decision which has been made by any administrative official that falls to this court to review. A review application must pertain to a decision or proceedings sought to be reviewed and set aside and such proceedings or decision must be recorded and form part of the review record. Absent that, this court has nothing before it to review and set aside. In *Hangula v Minister of Mines and Energy*[2] this court inter alia reaffirmed this principle.

[11] Ex facie the founding papers, there is also no case made out to justify granting any of the prayers set out in the notice of motion simply because this application is premature. The applicant must make out his case in the founding papers,[3] and this he failed to do. There is also no review record filed, no decision was made available to this court to review, nor was the applicant able to direct the court to any decision or proceedings which warrant being reviewed and set aside.

[12] As regards the proceedings pending between the applicant and the second respondent, section 38(3) of the Child Care and Protection Act 3 of 2015 ("the Act") provides that a children's court is a court of record and has similar status to that of a magistrate's court at a district level.

[13] It appears from the papers filed that the children's court has issued a warrant of arrest for second respondent for her non-appearance at the proceedings before that court. In terms of s 56(7) of the Act, that court has power to convict the second respondent in terms of that section and may give her a fine of N$5000 or sentence her to one year of imprisonment or both such fine and imprisonment for her non-appearance at the proceedings before that court. There is no reason for this court to interfere with the proceedings before that court. Furthermore, it also appears from the founding papers that the children's court already ordered that a scientific test be

[2] *Hangula v Minister of Mines and Energy and Another* 2020 (4) SA 1204 (HC) paras 16 and 20.

[3] *Transnamib Ltd v Imcor Zinc (Pty) Ltd (Moly-Copper Mining And Exploration Corporation (SWA) Ltd and Another Intervening)* 1994 NR 11 (HC).

conducted to prove parentage of the two minors and those proceedings are also still pending. Therefore, and in any event, any presumption in terms of ss 94 and 95 of the Act falls within the purview of the children's court.

[14] It is clear that the applicant is of firm view that the two minor children are his. That he would persist in endeavouring to establish that is admirable. However, the applicant needs to be cognisant that the offices and institutions entrusted with matters of this nature require time to do that which they were entrusted to do. The children's court is yet to make a finding on this matter based on the evidence before it, which evidence and record are not before this court.

[15] In the result the following order is made:

1. The review application is dismissed.
2. No order is made as to costs.
3. The matter is removed from the roll and regarded finalised.

Judge's signature:	**Note to the parties:**
	Not applicable.
Counsel:	
Applicant	**1st, 4th, 5th and 6th Respondents**
W Januarie (In person)	M Meyer Government Attorney