



REPORTABLE

CASE NO: SA 14/2018

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE PERMANENT SECRETARY OF JUDICIARY

APPLICANT

and

**RONALD MOSEMENTLA SOMAEB
CHIEF JUSTICE OF THE REPUBLIC OF NAMIBIA**

**FIRST RESPONDENT
SECOND RESPONDENT**

Coram: DAMASEB, DCJ

Heard: IN CHAMBERS

Delivered: 3 JULY 2018

FLYNOTE : Practice – Section 14 (7) - Court's jurisdiction to dismiss an appeal that is frivolous or vexatious or otherwise without any prospect of success– Section 16 – Supreme Court's jurisdiction to review lower courts' decisions and those of administrative bodies or tribunals – RECUSAL of Judge.

SUMMARY: In the High Court, the first respondent brought an application under section 16 of the Supreme Court Act seeking an order directing the Supreme Court to review its own decision. The presiding Judge *a quo* amongst others took the view that such an application was fatal for lack of compliance with section 12 of the Supreme Court Act; that the High Court was not competent to direct the Supreme Court how to exercise the s 16 review jurisdiction; that the matter was *res judicata*; and further dismissed an application for his recusal on the basis that it had no merit.

First respondent appealed against the order of the High Court on the ground that the presiding judge ought to have recused himself because he was junior to the Chief Justice who was cited as a first respondent in the proceedings in the High Court. The second respondent (Permanent Secretary of Judiciary) in that appeal moved the Supreme Court in terms of rule 6(1) of the Rules of that court to summarily dismiss the appeal in terms of s 14(7)(a) of the Supreme Court Act on the grounds that it was frivolous or vexatious or otherwise without any prospect of success.

The first respondent objected to that application on the ground that it was brought outside 21 days as required by rule 16 (1)

While upholding the first respondent's objection,

Held that it is competent for the Supreme Court to invoke s 14(7)(a) *mero motu*.

Held that –there is no fine dividing line between the jurisdictional criteria of s 14(7)(a) and that the common denominator between them is that objectively viewed such an appeal so unmeritorious that no court can grant a remedy for it under the law.

Held further that – an appeal without any prospect of success is an exercise in futility and therefore frivolous and since its only purpose is to annoy it is vexatious.

Held that – only judges appointed in terms of Articles 79 and 80 of the Constitution are competent to preside in a matter involving the Chief Justice even if in terms of hierarchy subordinate to the Chief Justice; that an appeal seeking to achieve a contrary result is caught by s 14(7)(a);

Held further that – the section 16 review powers of the Supreme Court are exercisable only by the Supreme Court and that the High Court is not competent to direct it to do so; and that an appeal seeking a contrary result is also caught by s 14(7)(a)

Held – that the issue which the first respondent seeks to ventilate on appeal is *res judicata* and therefore not justiciable and similarly caught by s 14(7)(a)

Held that – since the relief sought by the first appellant is not known to law the appeal is non-justiciable and therefore liable to be dismissed, with costs.

APPEAL JUDGMENT IN TERMS OF S 14(7)(a) OF ACT 15 OF 1990

DAMASEB, DCJ:

[1] I have before me an appeal instituted by the first respondent (Mr Somaeb) against a judgement and order of Angula DJP. That appeal, which is opposed by the Permanent Secretary for the Judiciary (PS) who was the second respondent in the High Court proceedings which are the subject of the appeal, has brought an application (as applicant) under rule 6(1) of the Rules of the Supreme Court for the summary dismissal of the appeal. The Chief Justice was cited as a co-respondent with the PS in the High Court proceedings before the DJP and he is cited as the second respondent in the PS's application in terms of rule 6(1).

[2] The appeal falls to be disposed of in terms of s 14(7)(a) of the Supreme Court Act 15 of 1990 (the Supreme Court Act) which states that:

'(a) Where in any civil proceedings no leave to appeal to the Supreme Court is required in terms of any law, the Chief Justice or any other judge designated for that purpose by the Chief Justice-

(i) May, in his or her discretion, summarily dismiss the appeal on the grounds that it is frivolous or vexatious or otherwise has no prospects of success; or

...

(b) Where an order has been made dismissing the appeal on any of the grounds referred to in subparagraph (i) of paragraph (a) of this subsection, such order shall be deemed to be an order of the Supreme Court setting aside the appeal.'

[3] I have been designated by the Chief Justice as contemplated by the section and assume jurisdiction in terms thereof.

[4] Mr Somaeb has given notice that the PS's application is irregular because it was brought outside the 21-day period as required by rule 6(1). Mr Somaeb's notice of appeal against the DJP's order was lodged on 9 April 2018. An application in

terms of rule 6(1) therefore had to be filed on or before 11 May 2018¹. The PS's application was only filed on 14 May 2018 and it is therefore out of time. No condonation was sought for its late prosecution. Mr Somaeb's notice of irregular proceeding is therefore properly taken. But that is not the end of the matter.

[5] Rule 6 is an avenue for a respondent to an appeal to move the court to exercise its jurisdiction under s 14(7)(a). But nothing precludes the court of its own motion to invoke the jurisdiction in an appropriate case. That is so because the jurisdiction under s 14(7)(a) is not made 'subject to' the Chief Justice making rules for its exercise by the Supreme Court. The section is clearly intended to reinforce the Supreme Court's inherent jurisdiction to prevent an abuse of its process. The present is such a case as will become apparent below.

Brief facts

[6] Mr Somaeb, after having his appeal struck from the roll, with costs, by a three-judge panel of this court (which included the Chief Justice), launched proceedings in the High Court asking that court to direct the Supreme Court to exercise its review jurisdiction under s 16 of the Supreme Court Act 15 and to review its decision striking the appeal. The assumption underlying Mr Somaeb's complaint in the High Court is that some irregularity occurred in the way the opposition to his appeal was conducted, in particular that there was some collusion between the deputy registrar of the court and the legal practitioner for the opposing party.

[7] Before the DJP the point was taken by the respondents that the proceedings

¹ See the definitions section of the rules for the computation of 'court days'.

were not competent because Mr Somaeb had not obtained the requisite consent before launching civil proceedings against the Chief Justice. Section 12 (1) of the Supreme Court Act stipulates that no civil action may be instituted against the Chief Justice without the consent of a judge of the Supreme Court. The point was also taken that the alleged collusion between the registrar and the opponent's legal practitioner was raised before the Supreme Court but was not sustained and that, to the extent that court had already considered and rejected it, it had become *res judicata*. The further point taken was that the review jurisdiction granted under s 16 of the Supreme Court Act is the exclusive preserve of the Supreme Court and only that court can determine when and how it is to be exercised.

[8] At the commencement of the proceedings before the DJP, Mr Somaeb sought the learned judge's recusal on the stated ground that the latter was subordinate to the Chief Justice and that such relationship created the perception of bias to his prejudice. As he put it:

'The nature of the application is objection against the managing judge sitting on a case in which the Chief Justice...where there is a real likelihood of bias on his part, expressed differently, where a reasonable man like me would suspect that the managing judge might not be impartial'.

The High Court's decision

[9] The DJP took the view after 'considering the application for recusal and the arguments advanced on behalf of the parties' that the recusal application had no merit and proceeded to hear the matter. The DJP considered the failure by Mr Somaeb to obtain consent to launch civil proceedings against the Chief Justice to be

fatal; that in respect of the alleged collusion he wished to raise the exception *res judicata* applied and that, in any event, the High Court, being subordinate to the Supreme Court, has no jurisdiction to order the Supreme Court how to regulate its proceedings.

[10] Aggrieved by the High Court's order, Mr Somaeb launched an appeal to this Court against the order made by Angula DJP. The principal ground he puts forward is that the DJP erred in not recusing himself because:

'It was impermissible for the Judge a quo to sit on this case where his boss, the Chief Justice, is the first respondent as well as the head of the [permanent secretary for the judiciary]'

[11] Neither before the DJP nor in the purported notice and grounds of appeal, does Mr Somaeb give any hint who should or could have been the judge to preside in the matter he instituted in the High Court.

The scope of s 14(7)(a)

[12] This is the first time that this court will exercise its jurisdiction under s 14(7)(a). The question therefore arises, when is an appeal frivolous or vexatious or otherwise without any prospect of success? In a different context, it has been laid down that something is vexatious if its intent is to 'harass or annoy'.² Hoff J in *Namibia Seaman and Allied Workers Union v Tunacor Group Ltd Namibia*³ had the following to say about the meaning of vexatious or frivolous proceedings:

² Vaatz v Law Society of Namibia 1990 NR 332 (HC) at 335.

³ 2012 (1) NR 126 (LC) para 15.

“In its legal sense, “vexatious” means “frivolous improper” instituted without sufficient ground, to serve solely as an annoyance to the defendant. . . .”

[13] The court has an inherent jurisdiction to prevent an abuse of its process. As was recognized in *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd* 2012 (2) NR 671 (SC) para 21:

“Abuse connotes improper use, that is, use for ulterior motives. And the term abuse of process connotes that the process is employed for some purpose other than the attainment of the claim in the action.”

[14] An appeal is liable to be summarily dismissed under s 14 (7) (a) either if it is (a) frivolous, (b) vexatious or (c) without any prospect of success. There is no prospect of success where the litigant, objectively viewed, has no reasonable chance of success. It is conceivable that an appeal which qualifies as one of the three jurisdictional alternatives will also fall under one or both of the other two criteria. In my view, there is no fine dividing line to be drawn between the three categories. The common denominator between the three categories is that the appeal to which they relate is so unmeritorious that no court can grant a remedy for it under the law.

[15] To illustrate, if an appeal is frivolous, it would be vexatious for a party to pursue it. An appeal without any prospects of success is an exercise in futility and therefore frivolous. Its only reason would be to annoy and in that sense, is vexatious.

[16] For this court to entertain Mr Somaeb's appeal it has to find that the relationship existing between the Chief Justice and the DJP disqualified the latter from presiding in the matter. Indeed, it implies that no judge holding an appointment

under Articles 79 and 80 of the Namibian Constitution can ever preside in a matter involving the Chief Justice. This court will also have to form the *prima facie* view that it is competent for the High Court to order it to exercise its s16 review jurisdiction; and that civil proceedings can be instituted against the Chief Justice without compliance with s 12 of the Supreme Court Act.

Recusal

[17] Under Article 78 of the Namibian Constitution, judicial power vests in the courts established under the Namibian Constitution and no other. Only judges appointed under Articles 79 and 80 of the Constitution can preside in matters that come before the High Court and the Supreme Court. Any such judge will in terms of hierarchy be subordinate to the Chief Justice although not subject to his direction in the performance of their judicial functions. The notion that judges of this country duly appointed under Articles 79 and 80 cannot preside in matters involving the Chief Justice has no basis in law and is so unrealistic and fanciful as to be frivolous. It is axiomatic that the Chief Justice cannot sit in matters concerning him and therefore judges of a status below him must preside because the Constitution requires that they do.

[18] It is no surprise therefore that the DJP saw no merit in the application for his recusal. To suggest by way of appeal that no judge in this country can in law preside in a matter involving the Chief Justice is therefore seeking relief which no competent court in Namibia can grant and renders the appeal frivolous, vexatious or without any prospect of success.

No consent obtained to sue the Chief Justice

[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 he 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 prospect of success.

Review jurisdiction

[20] The s16 review jurisdiction is exercisable only by the Supreme Court in respect of decisions of courts below it and other administrative bodies and officials. It is a jurisdiction which is not competent in relation to decisions of the Supreme Court⁴. Asking the High Court to order the Supreme Court to review its own decision is therefore seeking a remedy unknown to law. To the extent that Mr Somaeb seeks to achieve that result by way of an appeal, such an appeal is frivolous and vexatious and without any prospect of success.

⁴*Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others* (SCA 3/2007) [2008] NASC 19 (3 December 2008) para 9, *Schroeder and Another v Solomon and Others* (SCA 1/2007) [2010] NASC 11 (14 September 2010) para 12, *Likanyi v S* (SCR 2 / 2016) [2017] NASC 10 (07 August 2017) para 25.

Non-justiciability

[21] The concept refers to the amenability of an issue to be adjudicated upon in a judicial forum. An issue is justiciable if a court can legally take cognisance of it in the sense that the party seeking its resolution can rely on a violation of a right for which a remedy can be granted. There can be no remedy where a first instance court has determined an issue and all appeal avenues have been exhausted according to law.

[22] Mr Somaeb's litigation is an example of a very disturbing trend which is becoming common in our courts. After a matter is decided by the High Court, a party appeals to the Supreme Court. Once the Supreme Court takes a binding decision, it is either asked to review its own decision or the matter is re-litigated in the High Court to challenge the Supreme Court's decision. Litigation is in that way kept alive and pending in the court system without any end in sight on matters that have been authoritatively determined by the highest court of the land, involving the same parties on exactly the same issues of fact and law.

[23] Quite apart from a matter being *res judicata* in the circumstances I have described, such a matter is not justiciable at all and must not be entertained by the courts. Courts exist to resolve live disputes between parties. A dispute loses that attribute if it has already been authoritatively determined and all legally available appeal or review processes have been exhausted. It is not competent for a court to entertain such a matter. When a matter is non-justiciable, it behoves the registrar not to place it on the court's roll as it merely wastes court time and resources as no

remedy can be competently granted by any court before which it had become non-justiciable.

[24] The issue of collusion which Mr Somaeb seeks to raise in respect of a power of attorney of the opponent was ventilated by him in the Supreme Court. That court did not consider it a good point. It is thus *res judicata* and because it has already been authoritatively determined by the court it has become non-justiciable and cannot be entertained by this court or any other court.

[25] Mr Somaeb's appeal against the judgement granted by Angula DJP under Case No: HC-MD-CIV-MOT-GEN- 2017-0010 is frivolous and vexatious and carries no prospect of success and stands to be summarily dismissed in terms of s 14(7)(a) of the Supreme Court Act.

Order

[26] The appeal under Case No: SA 26/2014 is dismissed, with costs. The registrar of the Supreme Court is directed to comply with s 14 (7)(c) of the Supreme Court Act.

DAMASEB, DCJ

APPEARANCES

APPLICANT:

Windhoek

M Khupe

of Government Attorney,

FIRST RESPONDENT:

R M Somaeb

In person