



REPORTABLE

CASE NO: SA 18/2018

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

PIO MARAPI TEEK

Appellant

and

**MINISTER OF JUSTICE
OMBUDSMAN**

**First Respondent
Second Respondent**

Coram: SAKALA AJA, SHONGWE AJA and CHINHENGO AJA

Heard: 5 March 2021

Delivered: 29 April 2021

Summary: This is an appeal against the decision of the High Court dismissing a claim by the appellant, a former judge of the Supreme Court of Namibia, each party to bear its own costs.

The appeal emanates from a series of events which in brief are that: the appellant was criminally charged with abduction, kidnapping and sexual assault against minor girls in 2005. He was subsequently acquitted in 2006 in terms of s 174 of the Criminal Procedure Act. An application for leave to appeal was refused. The State successfully petitioned against the refusal and the matter was returned back to the High Court. The court after hearing all the evidence, found the appellant not

guilty and discharged him on all counts. The State appealed against the acquittal but the appeal was dismissed and the acquittal confirmed.

During what seemed to be a lengthy stream of events, the appellant instituted civil proceedings against the non-resident judges which were later withdrawn in 2010. Appellant issued new summons under a different case number against the same judges, this summons was never served on the non-resident judges. The appellant accused the Minister for taking long to serve the summons, laid a complaint with the Office of the Ombudsman. He thereafter instituted an action against the Minister of Justice and the Ombudsman, which was heard by the court *a quo* and dismissed such claim with each party to pay its own costs.

The main issue to be determined is whether, the court *a quo* had the authority to *mero motu*, raise the question of jurisdiction in a matter not squarely before it – but related to the one before it during the hearing. Also, whether the two cases against the non-resident judges and the one against the Minister and the Ombudsman were interrelated.

Held that, the court *a quo* was correct in finding that there was a relationship between the two cases.

Held that, the court *a quo* was correct in finding that it had authority to *mero motu* raise the question of jurisdiction as the judges could clearly not raise it as the summons had not been served on them.

Appeal is dismissed with costs.

APPEAL JUDGMENT

SHONGWE AJA (SAKALA AJA and CHINHENGO AJA concurring)

[1] This is an appeal against the judgment and order of the court *a quo*, which dismissed the appellant's claim and ordered each party to pay its own costs, under High Court case no: I 3304/2015.

[2] The appellant issued summons against the Minister of Justice (Minister), as the first defendant and the Ombudsman, as the second defendant. He claimed damages for unlawful, malicious and irrational refusal or failure aggravated by the wrongful and malicious undue and long delay in handling a matter in which the appellant was suing three non-resident judges from South Africa for damages suffered, under case no I 2181/2010. The three judges had been duly appointed as acting judges of the Supreme Court of Namibia. The undue delay alleged by the appellant was their failure to ensure that the summons is served on the non-resident judges.

[3] At the commencement of this appeal, the appellant moved three condonation applications, firstly for failure to comply with the rules of court which resulted in the appeal lapsing and for re-instatement of the appeal. Secondly, for failing to file the record of appeal timeously and thirdly, for condonation of filing an incomplete record.

[4] Both respondents indicated a desire to have the matter finalised, which was also the appellant's wish, there was no objection against all applications for

condonation. After consideration of all the facts and submissions, the court granted condonation of all the applications, costs to be costs in the cause.

Background

[5] For one to appreciate and understand the reasons for this protracted litigation, it is significant to briefly lay out the backdrop and facts of this matter from the onset.

[6] The appellant, a retired judge of the Supreme Court of Namibia, had been criminally charged in January 2005, *inter alia*, with abduction, kidnapping and sexual assault against two minor girls. In July 2006 he was acquitted on all charges after the close of the State's case, in terms of s 174 of the Criminal Procedure Act 51 of 1977. The State applied for leave to appeal that decision, which application was subsequently refused. The State petitioned against the refusal, three non-resident judges from South Africa were seconded and appointed as acting Judges of the Supreme Court of Namibia to hear the petition.

[7] The petition was subsequently granted and the matter was referred back to the High Court, to hear the remainder of the evidence. Second time around after hearing all the evidence, the High Court returned a verdict of not guilty and discharged him on all counts. The State appealed against the acquittal which the Supreme Court heard on 1 October 2018, and handed down judgment on 3 December 2018 the appellant (respondent in the criminal appeal) was acquitted on all charges.

[8] However, before the matter was finalised, the appellant instituted civil proceedings against the three non-resident judges under case no: I 2090/2010, which action was subsequently withdrawn in July 2010. However, the appellant caused to be issued a new summons under case no: I 2181/2010 against the same three judges for damages suffered.

[9] The summons under case no: I 2181/2010 was never served on the three non-resident judges. In the case under consideration, the appellant accuses the Minister of dragging this feet in having the summons served on the three judges. The appellant laid a complaint with the Office of the Ombudsman, which complaint, in the appellant's view, was not properly attended to by the Ministry of Justice and the Office of the Ombudsman.

[10] The failure to properly attend to this complaint resulted in the appellant instituting an action against the Minister and the Ombudsman under case no: I 3304/2015. This is the case that was before the court *a quo*, which resulted in a dismissal and which has now been appealed against this court under case no: SA 18/2018.

High Court

[11] At the hearing of the matter, only two witnesses testified. The appellant and one Mr Limbo, on behalf of the first respondent. The second respondent closed its case without calling any witnesses.

[12] The appellant's evidence was to the effect that he had a good case against the non-resident judges and would have succeeded in obtaining damages against

them. Under cross-examination he confirmed that, if he was wrong in saying that he had a good case, he would *ipso facto*, have suffered no loss from the conduct of the Minister and his officials.

[13] As regards to the second respondent, the appellant conceded that the effort of the second respondent was commendable and did everything within his powers to assist him in his complaint. He further conceded that the second respondent's liability is limited, that he and his officials are not liable for anything done in good faith. Section 11 of the Ombudsman Act 7 of 1990 provides for such limited liability.

[14] On the day of the hearing of this case: I 3304/2015, during 3-6 October 2017, the court, after hearing evidence of all the parties, and just before they presented their final submissions, *mero motu*, requested the parties, after the close of their cases, to address it on whether 'if, a Namibian Court had to hear the case against the former [non-resident] acting Supreme Court Justices, it would have assumed/exercised jurisdiction to hear and decide that under case no: I 2181/2010'.¹

[15] At the commencement of the hearing, the following day, the appellant did not quite agree with the question raised by the court on the point of jurisdiction. He submitted that the court could not, *mero motu*, raise the question of jurisdiction. He contended that only the three non-resident judges, as parties to that action, were entitled to raise the issues of lack of jurisdiction. He argued further that such an objection would have had to be raised either by way of an exception or special

¹ *Kauesa v Minister of Home Affairs & others* 1995 NR 175 (SC) at p183.

plea. The respondents argued to the contrary submitting that the two cases were related and therefore the court was entitled to raise the question of jurisdiction.

[16] Having heard all the submissions, the court handed down its judgment on 13 March 2018, dismissing the appellant's claims and ordering each party to bear its own costs. The court briefly reasoned that the appellant failed to properly plead jurisdiction in Namibian court in case no I 2181/2010. That the appellant failed to allege and aver that the three non-resident judges were domiciled in Namibia; that they were resident in Namibia at the time of issuing of the summons; that the three judges were nationals of Namibia and lastly that they owned property in Namibia to found jurisdiction.

[17] The court *a quo* thus concluded that the Namibian court could not assume jurisdiction in the case against the three non-resident judges as the summons and particulars of claim were bad in law. Reference was made to *United Africa Group (Pty) Ltd v Uranim Inc & others* 2017 (4) NR 1145 (HC) at 1156 and 1157 at paragraphs 49 and 50, in support of the above proposition.

On appeal

[18] The appellant noted an appeal against the judgment on the grounds that the court *a quo* erred and misdirected itself. He argued that his case against the three non-resident judges was not related to the case against the present respondents. He contended that these are two distinct matters with each based on independent set of facts and causes of action.

[19] He contended that it was incompetent for the court to, *mero motu*, raise the question of jurisdiction. He further argued that the cause of action in the present case is based on their failure to exercise their legal duties to assist and facilitate the service of the summons against the non-resident judges. The appellant further argued that the Minister frustrated his action against the non-resident judges which had good prospects of success.

[20] The first respondent contended that for the appellant to succeed against the Minister, he bears the onus to establish the allegation of malice. He further argued that the appellant failed to show that he was entitled to recover the compensation that he stood to receive from the non-resident judges.

[21] First respondent submitted that the appellant failed to show that the Minister and his officials acted with malicious intent, to prevent the appellant from prosecuting the action against the non-resident judges – by refusing to forward his summons to the Ministry of Foreign Affairs for service in the Republic of South Africa.

[22] The second respondent submitted that the action was correctly dismissed because the appellant did not suffer any damages as a result of the remissness of either of the respondents. The appellant failed to show that the Ombudsman had a legal obligation or duty under the Reciprocal Service of Civil Process Act 27 of 1994. In terms of the Ombudsman Act, the second respondent's liability is limited, in that he, his deputy and members of his staff are not liable for any acts or conduct done in good faith.

[23] It is common cause that as a result of certain utterances by the three non-resident judges, the appellant felt aggrieved and defamed. He decided to sue for damages. In his particulars of claim, he demanded a sum of N\$ 6 million being for shock, pain, suffering and *contumelia* for the alleged defamation.

[24] It is further common cause that the summons, in case no: I 2182/2010, was issued by the registrar to be transmitted to the Directorate of Legal Services of the Ministry of Justice for service. The appellant waited for the service of the summons for a considerable number of months. It is not in dispute that he made several inquiries regarding the service of the summons without success. It is also not in dispute that a plethora of letters were exchanged between the appellant and the offices of the registrar and the Directorate of Legal Services.

[25] In November 2013, the second respondent wrote to the appellant to inform him that their investigation and inquiries revealed that the summons in case no I 2182/2010, had not been served because the appellant had not complied with rule 5(1) of the Rules of the High Court. He was also informed that they were closing their file.

[26] Aggrieved by the closing of the complaint file, the appellant pursued his request to the Ombudsman to reopen the file. He wanted the Ombudsman to inquire from the directorate to clarify how they reconciled the provisions of s 4 of the Reciprocal Service of Civil Process Act with the provisions of rule 5(1). He alleged that he was entitled to issue the summons in terms of s 4 without leave of court. He contended that South Africa was a designated country. He was advised to approach the High Court to assist with the interpretation of the alleged

contradiction between the rules and the statute. He was again informed that the file will remain closed.

[27] The appellant did not approach the High Court, he was subsequently advised that the summons has been found and that he must collect it so that he can serve it himself. He insisted that it be brought to him.

[28] I am unable to find a reasonable and acceptable ground upon which the appellant still pursues this appeal. Having confirmed and conceded under cross examination that, if he was wrong in saying that he has a good case against the non-resident judges, he would, *ipso facto*, have suffered no loss from the conduct of the first respondent and its officials. To resist that there is no relationship between the present case and the case against the three non-resident judges, makes absolutely no sense. It was the appellant himself who first raised the relationship of the two cases by relying on the damages he would have received.

[29] The court *a quo* was correct, in my view, in finding that there was a relationship between the two cases. It was further correct to find that it had authority to, *mero motu*, raise the question of jurisdiction. Clearly the non-resident judges could not raise the question of jurisdiction simply because the summons was never served on them.

[30] Thus the court *a quo* determined that because *litis contestatio* had not been reached, in the case against the three non-resident judges, it was entitled to raise the question of jurisdiction and rightly so in my view². The court *a quo* reasoned

² *Teek v The Minister of Justice* (I 3304/2015 [2018] NAHCMD 52 (13 March 2018) 'Pollak on Jurisdiction, 2 ed (1993) by D Pistorius.

that it was not precluded from raising the question of jurisdiction because it was a definitive and important question to be raised against the summons under case no: I 2181/2010.

[31] In this appeal, the facts are mostly common cause, the only issue left is a legal one. Whether the court *a quo* was entitled to raise the question of jurisdiction. The authorities are clear that every summons must allege and aver that the court has jurisdiction and also state the basis of such allegation.

[32] Once the court decided that it had no jurisdiction to adjudicate that matter (case no I 2182/2010) it was the end of the appellant's case against the present respondents (on the conceded ground that the two cases are related). The court *a quo* found it unnecessary to deal in detail with the merits of the present case.

[33] The court in passing dealt with the fact that the appellant failed to formulate his alternative claim in such a way that it is clearly premised on the provisions of Article 25(3) and 25(4) of the Namibian Constitution.³ Notwithstanding the decision on the question of jurisdiction, the court *a quo* wished to express a view that even on the question of constitutional damages, there was very little prospect of success.

[34] Based on the above reasons, I find that the two cases are related and the court *a quo* was correct in concluding that it had no jurisdiction to adjudicate on the matter of the three non-resident judges.

³ *McNab & others v Minister of Home Affairs NO & others* 2007 (2) NR 531 (HC) para 52.

[35] The following order is made:

- (a) The appeal is dismissed with costs, excluding the costs order of the court *a quo*.
- (b) The costs on appeal shall include the costs of one instructing and one instructed legal practitioner.

SHONGWE AJA

SAKALA AJA

CHINHENGO AJA

APPEARANCES:

Appellant: In Person

First Respondent: N Marcus
Instructed by the Office of the
Government Attorney,
Windhoek

Second Respondent: N Bassingthwaighte
Instructed by Ellis Shilengudwa Inc,
Windhoek