HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE DIVISION, CAPE TOWN]

Case No: 9028/17

In the matter between:

ADVOCATE SEPHEKA MTHENJWA	**Applicant**
v	
JUDGE ELIZE STEYN	**First Respondent**
NATIONAL MINISTER OF JUSTICE	**Second Respondent**

Heard: **31 October 2017**

Delivered: **30 November 2017**

JUDGMENT

Tlaletsi JP

[1] The applicant, Mr Sepheka Mthenjwa, an admitted advocate of the High Court of South Africa, residing at Unit […] Village, Kraaifontein, Western Cape issued a Notice of Motion proceedings in which he sought leave or

consent to institute legal proceedings against Judge Elize Steyn of the Western Cape Division of the High Court, the first respondent. Further ancillary relief is also sought. The second respondent is cited as 'National Minister of Justice. No relief is sought against him.

[2] The applicant appeared in person. The relevant s 47(1) of the Superior Courts Act[1] in terms whereof the application is purportedly brought provides that:

> "Notwithstanding any other law, no civil proceedings by way of summons or notice of motion may be instituted against any judge of a Superior Court, and no subpoena in respect of civil proceedings may be served on any judge of a Superior Court, except with the consent of the head of that court or, in the case of a head of court or the Chief Justice, with the consent of the Chief Justice or the President of the Supreme Court of Appeal, as the case may be."

[3] In simple terms what the section provides is that before any person may institute civil legal proceedings, either by way of summons or Notice of Motion against any Judge of a Superior Court, he or she must first obtain the consent of the Head of Court to which the Judge is appointed. Furthermore, a Judge may not be served with a subpoena in respect of civil proceedings without having obtained the consent of the Head of Court. In this case the Head of Court is the Judge President.

[4] Before I deal with the merits of the application it is necessary to dispose of the point *in limine* raised by the first respondent. It was contended on her behalf that the applicant failed to comply with s 47(1) in that he has not obtained the consent of the Judge President in order to institute the application under consideration.

[5] In my view, the objection raised by the first respondent is significant. It is not a matter of form over substance or simply a procedural issue. It has both the procedural as well as the substantive elements attached to it. At a procedural level, the inquiry is what procedure should a prospective litigant

[1] Superior Courts Act 10 of 2013 which came into operation on 23 August 2013. S 47(1) repealed s 25 of the Supreme Court Act 59 of 1959 and s 5 of the Constitutional Court Complementary Act 13 of 1995.

wishing to institute legal proceedings against a Judge follow. The substantive level relates to the decision to be taken by the Head of Court once he/she receives a request to give consent to institute legal proceedings against a Judge in his / her Court.

[6] In *N v Lukoto*[2] 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 the precursor to s 47(1) and had the following to say:

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

[7] It is worth noting that in the *Lukoto* matter, the proceedings were initiated by a letter from the Public Prosecutor, as the intended action related to a maintenance inquiry. The respondent did not oppose the request and same was granted. After a lengthy delay and further developments at the maintenance inquiry the Public Prosecutor issued another letter to the Judge President to seek consent. It was only when it was clear that leave to institute proceedings was opposed that the Judge President directed that a formal affidavit be filed, a case number be allocated and the respondent be given an opportunity to file an opposing affidavit. The matter was heard open court.

---

[2] *N v Lukoto* 2007 (3) SA 569 (TPD) at 572B-E par 4.

[8] The above seminal remarks in the *Lukoto* decision, on the procedure to be followed in the institution of legal proceedings against a Judge, were endorsed by Mlambo JP in *Engelbrecht v Khumalo*[3] as follows:

> "In essence the person seeking consent writes to the head of the court concerned. On receipt of the request the head of court discusses the matter with the judge concerned and may thereafter either grant the consent requested or direct that a formal process be followed involving the filing and service of an application accompanied by the necessary affidavits. The head of court will then hear argument and thereafter dispose of the matter as he deems fit."
>
> "I followed a similar approach in this matter. I considered the correspondence from Engelbrecht and from the judge and advised Engelbrecht's attorneys that I was disinclined to grant consent based on the correspondence at my disposal. I advised that should Engelbrecht be so inclined he was at liberty to pursue the matter formally through a court process where both parties would be afforded the opportunity to file affidavits and advance submissions." [Emphasis provided].

[9] The procedure outlined in the *Lukoto* decision was further endorsed in *Winston P Nagen v The Honourable Judge President John Hlophe*.[4] In the latter decision the letter seeking leave from the respondent to institute action had a draft consent attached to it for signature by the Judge concerned. It was only after the claim was disputed by the Judge that formal proceedings were pursued.

[10] In *casu* the applicant did not, before instituting the current application, seek the consent of the Judge President either through a letter or any other form of informal request. He contended that it was not necessary to seek permission or consent to institute proceedings against the Judge because a requirement that a letter should precede the application is not a Rule of Court. He submitted that the requirement would offend against section 34 of the Constitution[5] which provides that: *"everyone has the right to have any dispute that can be resolved by the application of law decided in a fair*

---

[3] *Engelbrecht v Khumalo* 2016 (4) SA 564 (GP) at 566H-567C.

[4] *Winston P Nagan v Honourable Judge President John Hlophe* (unreported: Western Cape High Court, Cape Town, case number 100061/08 delivered on 19 March 2009).

[5] Act 108 of 1996.

public hearing before a court or, where appropriate, another independent and impartial tribunal or forum." The applicant further contended that this application would, in any event, have been necessary since the first respondent had denied the allegations forming the basis of the application at the Judicial Service Commission.

[11] The constitutionality of s 25(1) of Supreme Court Act, 59 of 1959, was considered in *Soller v President of the South Africa.*[6] In that matter it was contended *inter alia*, that the section violated a complainant's right enshrined in s 34 of the Constitution. In dismissing the application to declare s 25(1) of Act 59 of 1959 unconstitutional, Ngoepe JP correctly reasoned as follows:

> "[14] It is true that s 25(1) of Act 59 of 1959 places a hurdle in the way of a prospective litigant, namely, that leave first be applied for and obtained. Is the section justified? Broadly, the purpose thereof is to ensure the independence of the Judiciary. 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 (cf May's case, supra at 19H). 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.
>
> [15] Some of the people not sufficiently acquainted with the execution of judicial functions may tend to think that Judges are not accountable for their decisions. Nothing is further from the truth. Judges are expected to justify every decision they take: they must give full reasons therefor. Surely that is being accountable, not only to the litigants, but to the public at large. The latter are entitled to know why and how a particular decision was arrived at and if they so wish, make informed criticism of the judgment, including questioning its correctness. For them to be able to do so a Judge owes them the reasons for his/her decision. How, then, would Judges be able to account for their adverse findings on the character of litigants or witnesses without exposing themselves to an avalanche of non-meritorious civil actions by disgruntled litigants if there were to be no sifting mechanism? Were

[6] *Soller v President of the Republic of South Africa* 2005 (3) SA 567 (T) at par 14 – 16.

> they, under those circumstances, nonetheless stoically to continue to do their work as they should, they could find themselves spending more time in court as defendants than as adjudicators of disputes. The administration of justice would be hampered, and genuine litigants would be seriously prejudiced.
>
> [16] The section does not completely take away the right to sue except in instances where the claim has no merit; but, a question may be asked, who on earth has a 'right' to prosecute a frivolous or non-meritorious claim? Furthermore, where leave has been refused, an applicant can appeal"

The above reasoning and conclusion are equally applicable to s 47(1) and as such the applicant's contention that s 47(1) is unconstitutional is without merit.

[12] I now revert to the question whether this application should have been preceded by a request for leave to the Head of Court. In my view, the words employed by the legislature in s 47(1) are couched in peremptory terms. The legislature's intention is to prohibit the institution of any civil proceedings, be it by way of summons or by Notice of Motion, against a Judge without the consent of the Head of that Court in which the Judge serves. The question to be asked is whether the proceedings under consideration constitute civil proceedings by way of Notice of Motion referred to in s 47(1). These proceedings were initiated in the form of a formal application issued by the Registrar of the Court without the knowledge and involvement of the Head of Court. The application was served on the first respondent placing her on terms to respond to the substantive allegations made in the founding affidavit and annexures thereto. She was required to respond within a time frame as prescribed by the Uniform Rules of Court. The proceedings were not specifically directed at the Head of Court. The Head of Court only came into the equation right at the end of the spectrum, after pleadings have closed and the matter was ripe to be heard. Once the application was issued by the Registrar it became a public document to which any member of the public had access. It follows that the present proceedings constitute proceedings referred to in s 47(1) and therefore, leave of the Head of Court was necessary before they could be instituted.

[13] There are good reasons why a form of *'informal'* notice or communication to the Head of Court is necessary before formal legal proceedings to obtain consent are instituted. This is the substantive aspect of the requirement. The Head of Court must first determine whether the claim, to which the request for consent relates, would have merit if instituted. He/she would also take the matter up with the Judge concerned and where appropriate, impress upon the Judge to satisfy the claim/demand or accede to the consent. Where the Judge unreasonably refuses to satisfy the claim or accede to the request, a party seeking consent would be granted consent to bring a formal application. In such event the Judge would be exposed to filing papers in response to the application which may ultimately be adjudicated either in chambers or in open court.

[14] The requirement to bring a request before issuing a formal application to seek consent serves as a screening process for the Head of Court. It contributes to the need to insulate Judges against ill-conceived and unwarranted legal proceedings. This statutory requirement for the insulation of Judges should therefore start at the very beginning when legal proceedings are contemplated and not only when substantive proceedings are instituted. The requirement for an informal request to institute proceedings is not intended to be a mere courtesy, but an opportunity for the Head of Court not to allow baseless, unwarranted and ill-conceived litigation against the Judge.[7] The Judge who refused to heed the advice of the Head of Court to settle the dispute or agree to the consent exposes himself/herself to a formal application for consent to the Head of the Court.

[15] In conclusion I find that the application brought by the applicant is fatally defective on two fronts. Firstly, it is not directed at the Head of the Court. It is issued through the Registrar's Office and directed at the Court. Secondly, the application is issued without the consent of the Head of the Court. For these reasons the application falls to be dismissed.

---

[7] *Soller v President of the Republic of South Africa* 2005 (3) SA 567 (T) at para 14.

[16] Unfortunately the allegation that the first respondent lied is in the public domain. She was forced to file an affidavit to respond to the allegations against her. The conduct of the applicant has defeated the whole purpose of s 47(1). In any event the application itself is, as will be shown hereunder, without merit. A brief factual background to the application is necessary to illustrate my point.

[17] It is common cause that on 02 September 2014 the applicant was employed as counsel for an applicant in an urgent application that served in the Western Cape High Court. The first respondent was an Urgent Court Judge and therefore this matter was assigned to her. She received the file shortly before lunch. The parties were informed that the matter would be called as soon as the first respondent was ready to hear it.

[18] During the course of the day the Registrar, on the direction of the first respondent, contacted the parties to notify them that the Judge was ready to hear the matter. The first respondent was advised that the respondent's legal team was already waiting in the allocated courtroom. The applicant and his instructing attorney were at the time not present. Shortly after 16h00 first respondent was informed that the applicant's representative in the matter had arrived and that the matter could be heard.

[19] When first respondent entered the courtroom, the applicant's representative had disappeared. The first respondent instructed the court orderly to call his name as well as that of his counsel (the applicant) outside court. None turned up. The Court orderly could also not explain to the Court what happened to the representative who was in the courtroom earlier. Counsel for the respondent was given an opportunity to address the Court. In his opening address he informed the Court that he telephonically spoke to the applicant and informed him that the matter was ready to be heard. The applicant replied that he was in Kraaifontein *en route* to the Court; he requested the respondent's counsel to stand the matter down until he arrived. The respondent's counsel told him it would be in the court's

discretion whether to grant the indulgence and not up to him to stand the matter down.

[20] Counsel for the respondent (in the urgent application), with leave of the first respondent, made submissions to the Court on the merits of the application and also prayed for the dismissal of the application with costs. Thereafter the first Respondent made the following pronouncement:

> "Court: It is now nearly quarter past four. It is about an hour since we contacted the applicant in this matter who brought an urgent application to this court to hear an urgent application. We asked them to come to court, we are told that the applicant's attorney appeared briefly and disappeared. We haven't heard anything further from either of them regarding their absence. I do not think that it would be fair to keep everybody else waiting any longer in any event."

The application was dismissed with costs at 16h14. This was after the first respondent had satisfied herself that the application was totally without merit and fatally defective given that there had been no service of the application on the respondent who was only identified and cited as 'The Purchaser' in the application."

[21] The first respondent returned to her chambers to attend to among others, a matter which was scheduled to be heard at 16:15. Upon reaching her chambers she was informed that the applicants had arrived and were in the courtroom. First respondent returned to the courtroom. She addressed the applicant as follows at 16:16:

> "Mr Mthenjwa, will you please stand up: The Court has granted an order in this matter. We have waited for an hour for your appearance. We have not been informed that you are on your way and that you are close and that you are nearly here. There is no merit in this application in any event. If you are not happy with the order of the court, you can ask for leave to have it set aside. That is all. Thank you very much. The court will adjourn. (at 16:18)."

[22] These latter remarks by the first respondent are the main cause of controversy which precipitated this application. The applicant's cause of action is outlined in paragraph 5 of his founding affidavit as follows:

> "What is clearly in dispute is that the first respondent, in reconvening the court after my arrival, lied by saying she had never been informed of my request to stand the matter down until my arrival. She repeated this

> denial in her response to the Judicial Service Commission when she was asked to reply to the allegation of the lie that I levelled against her."

[23] In short what the applicant is contending is that the first respondent "lied" to him in court after it was reconvened by saying she had never been **informed of his request to stand the matter down until his arrival.** In response to paragraph 5 of the founding affidavit the first respondent states that:

> "The statement that I "lied" is clearly defamatory and I reserve my right to deal therewith in due course should I so decide or be so advised.
> However, Advocate Mthenjwa has, at best for him, misunderstood or misconstrued what I said which appears at page 7 of the transcript. In saying 'We have not been informed that you are on your way and that you are close and that you are nearly here,' what I was conveying was that, had I been told that they were close, I would obviously have stood the matter down for a short while, say five minutes, to enable them to get to Court, given that I had already been waiting for almost an hour. However, they were not contactable. This does not contradict the fact that I knew, because Advocate Rabie informed me as much, as appears from page 2 of the transcript that Advocate Mthenjwa had much earlier indicated that he was in Kraaifontein and that he was en route to the Court and that he requested the matter to stand down. While being fully aware of that, I had not been informed how much longer I would be expected to wait and I was not, in the circumstances, prepared to wait indefinitely for advocate Mthenjwa and his attorney to make their appearance. Then I was told that representatives of the applicant were in court but when I arrived in court, such person had left. I may have expressed myself badly, but in saying I did not know where they were, that part of what I referred to and what I meant to convey in the part of the record that appears at page 7 of the transcript."

[24] For the applicant to be granted leave to institute proceedings against the first respondent he has to satisfy the requirements of *"good cause".* The following passage from *Soller v President of the Republic of South Africa*[8] sets out the correct legal position:

> *"[9] For leave to be granted in terms of the section, "good cause" must be shown, Erasmus Superior Court Practice Al-76. Whether or not good cause has been shown, will depend on the facts and circumstances of each case. It is of course common cause that the words were uttered, and published, by the Judge. The words, ordinarily speaking, would be defamatory. The question is whether, given the context in which they were uttered of the applicant, the applicant has shown good cause for the purpose of obtaining the leave required. It is trite law that a judge enjoys at least a qualified privilege when executing judicial functions. After examining authorities regarding the*

[8] 2005 (3) SA 567 (TPD) at para [9].

position of non-judicial officers (eg counsel, witnesses etc) Joubert JA says the following:

> *"As regards the legal position of a judicial officer I must stress the fact that the law requires of him to be 'capable of doing as part of his duty everything which makes for the tracking down of the truth and the 'administration of justice'... The nature of his judicial duties are such that a judicial officer is more often than not active in a sphere where the performance of his judicial duties exposes him to the risk of injuring a person in his reputation. It is for this very reason that there is according to our common law a rebuttable presumption that a judicial officer, who defames someone in the exercise of his judicial authority, does so lawfully within the limits of his authority. "[May v Udwin 1981 (1) SA 1 (A) 19C-F".]*

The application must be considered against this background."

[25] In *Engelbrecht v Khumalo*[9] supra, Mlambo JP restated the position as follows:

> *"The test is no different regarding matters where consent is sought, as is the case in this matter, to institute legal proceedings against a Judge. In this context a court would 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. Simply put the issue is whether the proceedings, for which consent to litigate against a judge is sought, contains a justiciable issue."*

[26] In my view, the applicant has failed to meet the threshold of good cause. What he perceived to be a lie has been fully explained by the first respondent. What the first respondent said must be understood within the context of the information already known to her which was already on record. Nowhere in the transcript is it reflected that the first respondent said that she was not informed of the applicant's request for the matter to be adjourned until his arrival. No malice can reasonably be inferred from the words uttered by the first respondent in Court.

[27] Reference was made to the first respondent repeating her denial as she did in a dispute the applicant referred to the Judicial Service Commission. Reading the extract of the decision of the Judicial Conduct Committee,

---

[9] Para [8] (see also *Winston P Nagan v Honourable Judge President John Hlophe* [unreported: Western Cape High Court, Cape Town, case number 100061/08 delivered on 19 March 2009]. In this case Majiedt J referred to an "arguable case" at para 10 having agreed to the test in the *Soller* decision.

attached to the applicant's founding affidavit, the first respondent disclosed that the respondent's counsel informed her from the bar that he had been in contact with the applicant who requested that the matter stand down. There is therefore no inconsistency between what the first respondent says in these proceedings and what she conveyed to the Judicial Conduct Committee.

[28] The applicant does not disclose the intended legal proceedings against the first respondent in his papers. In response to my question, he intimated *inter alia*, that the nature of the proceedings would be decided once leave to institute proceedings has been granted, and that it is not necessary to disclose that at this stage. It is fundamental that an indication be given before leave to litigate is granted so that the Head of Court can be in a position to assess whether there is an arguable or justifiable case the Judge has to face. A blanket leave to institute proceedings would defeat the very object of s 47(1) of the Superior Courts Act and open Judges to frivolous and ill-conceived litigation.

[29] There is one general observation I wish to make. The applicant is quite indifferent in his conclusions. His incautiousness was expressed in his papers and during his address. He accused the first respondent of racism, *"attempted bribe",* that *"… it brings out her deceitful character…"* These are strong allegations which should not be lightly made against a person, worse against a judicial officer.

[30] In summary, I find that the application is defective for failure to comply with s 47(1). On the factual and legal basis I cannot find that there is an arguable case made out which warrants the granting of leave to institute legal proceedings against the first respondent. I am mindful of the fact that, at this stage of an inquiry, the applicant merely needs to establish a *prima facie* case and not to prove his case on a balance of probabilities. The upshot of this is that the application must fail.

[31] In light of my decision and the fact that no relief is sought against the second respondent, it shall not be necessary to decide whether there is any connection between the second respondent and the Judges, and whether the second respondent is vicariously liable for the actions of Judges. There is no reason why costs should not follow the result.

[32] In the result I make the following order: -

Order:

The application is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

_____

L. P TLALETSI
JUDGE PRESIDENT
Northern Cape High Court, Kimberley[10]

Counsel:

For the Applicant:	**IN PERSON**
For the First Respondent:	**Mr. I JAMIE SC with MARK FILTON**
Instructed by:	State Attorney, Cape Town (L.S Ngwenya)

[10] Duly appointed by the Minister of Justice and Corrections to preside in this matter.