

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3304/2015

In the matter between:

PIO MARAPI TEEK

PLAINTIFF

and

THE MINISTER OF JUSTICE

1ST DEFENDANT

THE OMBUSMAN

2ND DEFENDANT

Neutral citation: *Teek v The Minister of Justice* (I 3304/2015) [2018] NAHCMD 52
(13 March 2018)

Coram: OOSTHUIZEN, J

Heard: 3 - 6 October 2017

Delivered: 13 March 2018

Flynote: Action for damages against defendants for having frustrated and delayed the serving of summons against former foreign Supreme Court Acting Justices.

Summary: Plaintiff based his action upon damages he could have obtained against former foreign Supreme Court Acting Justices in the High Court of Namibia. *Held*, the High court of Namibia could not have had or assumed jurisdiction over the foreign Justices.

ORDER

In the premises the following orders are made:

1. Plaintiff's claim(s) is dismissed.
2. Each party to bear its own costs.

JUDGMENT

[1] This case is about a retired Supreme Court Judge of Namibia, who fell from grace due to alleged misdeeds concerning young children. In his quest to redeem himself through civil legal process in the wake of alleged failures and alleged wrongful pronouncements by three foreign acting Supreme Court Judges during April 2009, who upheld an appeal against his discharge in terms of Section 174 of the Criminal Procedure Act and referred the matter back to the High Court of Namibia.

[2] Plaintiff endeavoured to institute civil action against the three foreign Justices of Appeal who were appointed as Acting Justices of Appeal in the Namibian Supreme Court by the Namibian head of state in order to preside in the aforesaid criminal appeal matter.

[3] During July 2010, plaintiff sued the former acting Justices of Appeal (Streicher, Mthiyane and Brand) for alleged damages in the sum of N\$6, 873, 455.00 relating to alleged defamation, *contumelia* and loss of earning capacity under Case No. I 2181/2010.

[4] Another case was previously issued against the same Justices under Case No: I 2090/2010, but withdrawn on the same date due to the issuing of Case No: I 2181/2010.

[5] Plaintiff had Case No I 2181/2010 issued by the Registrar of the High Court of Namibia in terms of Section 4 of Act 27 of 1994, which read —

‘Notwithstanding the provisions of any other law relating to service of any process outside Namibia, any process, other than a process relating to the enforcement of a civil judgment, may be issued by the registrar of the High or Supreme Court or by any clerk of the magistrate’s court, as the case may be, without leave of the court in question’.

[6] In passing it is noted that the aforesaid section 4 concerns the issuing¹ of process and not the service thereof. Service of process is provided for in the provisions of ‘any other law relating to the service of any process outside Namibia’.

[7] This court, *obiter*, is of the view that the former Rule 5 and presently Rule 12, remains effective operating ‘any other law relating to the service of any process outside Namibia’. This court, however, does not find it necessary to deal with this aspect in the present judgment.

[8] It is common cause that the plaintiff requested the Registrar to issue the combined summons, particulars of claim and annexures and serve same on the defendants in South Africa. It is also common cause that the Registrar, upon receipt of the summons, has forwarded the same summons to the Directorate of Legal Services, Ministry of Justice, with a request for service in South Africa through diplomatic channels.²

¹ Court's Emphasis.

² Page 50, pleadings bundle

[9] Summons in Case No I. 2181/2010 was never served and was withdrawn during 2016.³

[10] The present case against the Minister of Justice and the Ombudsman was issued on 6 October 2015 (Case No. I 3304/2015).

[11] The particulars of claim in the case before me was amended on 3 June 2016.⁴

[12] Paragraphs 6, 7, 8 and 10 of the amended particulars of claim clearly convey that the abandoned/withdrawn action against the three former Supreme Court Acting Judges formed the basis of plaintiff's action against the present defendants.⁵

[13] Initially, plaintiff confirmed under oath that he had a good case against the three Judges and would have succeeded in obtaining damages against them.⁶

[14] Plaintiff also confirmed that because of the complained conduct of the first defendant, he was never able to bring that case and hence the money he would have obtained, was lost to him.⁷

[15] Still under cross-examination of counsel for the first defendant, plaintiff went on and confirmed that if he was wrong and did not have a good case against the three Judges, he would, *ipso facto*, have suffered no loss from the conduct of first defendant or its officials.⁸

[16] Paragraph 10 of plaintiff's witness statement in the present case reads:

'The ground of my cause of Action against both Defendants is based upon their corrupt conduct: incompetent, imprudent, intentional, unlawful, and malicious undue lengthy delay;

³ Transcribed Record, P30, lines 20-23.

⁴ Pages 80-87, Pleadings Bundle.

⁵ Pages 83-85, Pleadings Bundle.

⁶ Transcribed Record, Page 31, lines 3-7.

⁷ Transcribed Record, page 31, lines 8-12.

⁸ Transcribed Record, Page 31, lines 16-21.

in-action and remissness, in the handling of the matter, Case No: I 2090/2010, referred to them, in gross violation of my Constitutional and Statutory/Legal Rights, resulting in my financial loss. As a consequence, Defendants are liable to pay me compensation for damages suffered in the amount of N\$6 000 000.00.⁹

[17] Plaintiff's amended particulars of claim made it clear that he alleged that the defendants' alleged dilatory conduct was with the 'settled malicious intent to prevent the plaintiff from prosecuting the Action against and be compensated for damages by the said Justices - malicious symptomatic institutionalized protectionism, on the part of Defendants, to his financial detriment.'¹⁰

[18] The court requested the parties after the closing of their cases, to address it on whether, if a Namibian Court had to hear the case against the former acting Supreme Court Justices, it would have assumed/exercised jurisdiction to hear and decide that under case I 2181/2010.

[19] The court is mindful of the plaintiff's concern to deliberate and decide the grounds of the case the plaintiff withdrew against the three acting Supreme Court Justices under Case No: I 2181/2010 due to a further appeal by the state against plaintiff's acquittal at the end of 2010, still to be heard, and shall refrain from doing so on the contentious merits. However, the court shall inquire into the withdrawn case concerning the jurisdiction issue, which does not form part of the possible criminal appeal.

[20] In paragraph 8 of the withdrawn particulars of claim in Case No I 2181/2010 against the three Justices, plaintiff alleged that the Namibian High Court had jurisdiction over the three Justices on the strength that the whole cause of action arose within the jurisdiction of and at all times material thereof the Justices were residents/incola of the Namibian High Court and acted within the scope of their

⁹ Page 192, Pleadings Bundle and Page 22, lines 21-30 of the Transcribed Record. It is clear that the plaintiff intended Case No: I 2181/2010, as he has withdrawn Case No: I 2090/2010, before re-issuing on same case under Case No: I 2181/2010.

¹⁰ Page 84, Pleadings Bundle, paragraph 6

appointment/employment and /or their judicial authority and capacity during the period of such appointment/employment as Namibian Judges in an acting capacity.¹¹

[21] The High Court of Namibia have jurisdiction over all persons residing or being in and in relation to all causes arising within Namibia.¹²

[22] The High Court may exercise jurisdiction over a claim sounding in money, if at the commencement of the action (issuing and service of the summons) it has the power to do so. It will have jurisdiction if it can compel execution of its judgment, for example: if it can give or pronounce an effective judgment.¹³

[23] 'If at the time of the commencement of the action the defendant is not physically present within the state, the state has no power over him, and, unless there is some other factor which makes it probable that a judgment sounding in money will be effective against the defendant, the courts of the state have no jurisdiction to entertain an action against him in which such a judgment is claimed. There are four factors, any one of which might be thought to be sufficient to make a judgment sounding in money effective against a defendant who is not physically present within the state at the time of the commencement of the action. These are:

- (a) the domicile of the defendant within the state;
- (b) the residence of the defendant within the state;
- (c) the fact that the defendant is a national of the state; and
- (d) the presence of property of the defendant within the state'¹⁴

[24] In Case No: I 2181/2010 against the three acting foreign Justices, the summons was issued by the Registrar, but was never served before its withdrawal. According to the plaintiff the summons were never served due to the conspiratorial inaction of the defendants in the present, Case No: I 3304/2015. The latter (present case before me) relies on the unserved summons in Case No: I 2181/2010 for damages. The particulars of claim in Case No: I 2181/2010 fail to plead the jurisdiction of this Court properly and I find that the Namibian High Court could not assume

¹¹ First Defendant's Discovery Bundle Page 10 and 11.

¹² Section 16, High Court Act 16 of 1990.

¹³ Pollak on Jurisdiction, Second Edition, Pistorious, Juta & Ltd, 1993, pages 3 and 12.

¹⁴ Pollak, op cit, Page 42.

jurisdiction in the case of the three foreign Acting Judges. Not one of the four factors in the preceding paragraph was properly pleaded. It was necessary for plaintiff to allege and disclose facts in his particulars against the three foreign Justices to show that the Namibian High Court would have had effective jurisdiction. In other words: the summons and particulars of claim against the three foreign Justices were bad in law.¹⁵

[25] The objection by the plaintiff that this court was not entitled to raise jurisdiction *mero motu*, is not sound. A court hearing a matter is precluded from raising jurisdiction after *litis contestation*.¹⁶ I am not precluded from considering jurisdiction as a definitive important question in the withdrawn action against the three acting foreign Justices. No relief sounding in money could be claimed with the summons and particulars of claim in Case No: I 2181/2010.

[26] Despite plaintiff's initial stance in the current case against the two defendants,¹⁷ he has changed his position again during the latter part of the case, asserting that if he might not have been successful against the three acting foreign Justices, he still suffered damages due to the wilful dilatory conduct and inaction of the defendants who were in breach of their statutory and constitutional duties towards him. Plaintiff has however failed to formulate this alternative in such a way that it is clearly premised on the provisions of Article 25(3) and 25(4) of the Namibian Constitution.¹⁸ The court finds it unnecessary to deal with this alternative in more detail in view of the concessions and findings before. An action based on the non-service of a summons, which was bad in law (although not perceived as such by the defendants in the present case at the time), is a *non-sequitur*.

[27] The remaining issue to be decided is the issue of costs. Plaintiff, a former High Court Judge and a retired Supreme Court Judge, should have been more vigilant in

¹⁵ Vide also *United Africa Group (Pty) Ltd v Uramin Inc and Others* 2017 (4) NR 1145 HC at 1156 and 1157, Paragraphs [49] and [50]. Also: *SOS - Kinderdorf International v Effie Lentin Architects* 1990 NR 300 HC at 302I - 303 C. Also: *Namibia Bunker Services v Katanga Futur* 2015(2) NR 461 HC at 472 [39].

¹⁶ Pollak, *op cit*, p12, footnote 47.

¹⁷ Vide paragraph 13-15 *supra*.

¹⁸ *McNab and Others vs Minister of Home Affairs NO and Others* 2007 (2) NR 531 HC at 552 and 553, paragraph 52.

electing between his rights and courses open to him. His frustration with the perceived inaction of officials of the defendants is understandable. He did encounter frustrating delays and non-responsiveness. That is to be gleaned from the myriad of exchanged documents in this case. It is true that he, at critical times, have chosen the wrong options, but he persistently tried to redeem himself through legal process. In the frame of mind, he was and possibly still is concerning perceived wrongs perpetrated against him, I find it difficult to mulc him with costs. None of the defendants are private commercial entities, but organs of state who stood accused of dereliction of duties. The Courts' finding is premised on a central issue, not raised by defendants in the pleadings or in the joint pre-trial report.

[28] I therefore, decline to apply the normal principle that costs follow the result.

[29] In the premises the following orders are made:

29.1 Plaintiff's claim(s) is dismissed.

29.2 Each party to bear its own costs.

GH Oosthuizen
Judge

APPEARANCES

PLAINTIFF:

PM Teek

Plaintiff in person

FIRST DEFENDANT:

Kuper, SC (with him N Marcus)

Instructed by Government Attorneys.

SECOND DEFENDANT:

N Bassingthwaite

Instructed by the Office of the Ombudsman