



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2024/00057
2024-028945

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: NO

19 JULY 2024

DATE

SIGNATURE

In the matter between:

MAXWELL NDLOVU MAVUDZI

First Applicant

SELLO ATHLONE RATHETE

Second Applicant

and

ACTING JUDGE MUDUNWAZI SAMUEL MAKAMU N.O

First Respondent

**DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG
DIVISION, JOHANNESBURG (THE STATE)**

Second Respondent

JEREMIAH NYASHA MUSIWACHO DUBE

Third Respondent

REBECCA DUBE

Fourth Respondent

MAXWELL MAVUDZI

Fifth Respondent

CONSTANCE RAMONE

Sixth Respondent

EDWARD SHONIWA

Seventh Respondent

ZAMASWAZI RADEBE

Eighth Respondent

Heard: 25 March 2024

Order: 25 March 2024

Reasons: These reasons were handed down electronically by circulation to the parties' legal representatives by email and by uploading to Caselines and release to SAFLII. The date and time for hand down is deemed to be 10:00 am on 19 July 2024.

Summary: *Section 47(1) of the Superior Courts Act 10 of 2013 – application for permission to institute civil proceedings against judge of a Superior Court – requirements – good cause – must make out prima facie case showing justiciable issue – consent to be granted if fair, just and equitable – contemplated proceedings not identified or clarified – good cause not shown – application dismissed*

ORDER

1. The First and Second Applicants' non-compliance with the Uniform Rules of Court is condoned and the matter is heard as one of urgency in terms of Uniform Rule 6(12).
2. The request by counsel appearing for the DPP to make legal submissions is granted.
3. The First and Second Applicants' request for permission in terms of section 47(1) of the Superior Courts Act 10 of 2013 to cite Mr Acting Justice Makamu is refused.
4. There is no order as to costs.

JUDGMENT (REASONS)

MLAMBO, JP

Introduction

[1] On 25 March 2024, I dismissed an urgent consolidated application brought by the applicants in terms of section 47 of the Superior Courts Act.¹ The applicants sought my permission, as head of this Court, to cite the first respondent, an Acting Judge (Makamu AJ), in civil proceedings. I initially refused to entertain the request directed to me based solely on correspondence which the applicants had sent to my office. The applicants then launched this formal application. These are my reasons for the order I granted.

[2] The essence of the proceedings in which the applicants contemplated citing Makamu AJ, is firmly rooted in the criminal trial he was, at the time of the application, seized with. The relief sought was initially two-fold, first that the applicants be granted permission to cite and institute proceedings against Makamu AJ. Second, that their sentencing, having been found guilty by him, be interdicted from continuing pending the outcome of an appeal to the Supreme Court of Appeal and/or any subsequent appeal to the Constitutional Court. The interdict relief sought was premised on a contemplated application to the Supreme Court of Appeal on reservations on questions of law in terms of section 319(1) of the Criminal Procedure Act.² However, as things turned out, by the time I heard the application, the interdictory relief sought had been abandoned by the applicants. What remained was simply a request that consent be granted to cite Makamu AJ in civil proceedings.

[3] The first applicant, Maxwell Ndlovu Mavudzi and the second applicant, Dr Sello Athlone Rathete, are two of 11 accused persons who were found guilty on multiple charges in the matter of *S v Dube and Others*.³ Makamu AJ, the first respondent, presided over the criminal trial. Before sentencing could proceed, the applicants launched these applications. The second respondent is the Director of Public Prosecutions, Gauteng Local Division (DPP). The third to ninth respondents are the remaining accused persons in the trial and they did not participate in this application.

History of the trial

¹ 10 of 2013.

² 51 of 1977, as amended.

³ Unreported judgment of the Gauteng High Court, Johannesburg, case number SS 063/2016 (13 November 2023).

[4] Before I deal with the applications, it is necessary to provide a brief background of the trial. The applicants, with nine others were indicted on 391 counts of fraud, forgery, uttering, corruption and various charges under the Prevention and Combatting of Corrupt Activities Act⁴ linked to money laundering. The charges emanated from the alleged submission of fraudulent VAT refund applications to the South African Revenue Service regarding storage facilities for imported diesel. The trial began on 1 August 2018 and the applicants, together with the other accused persons were convicted on 13 November 2023. During the trial several interlocutory applications, including recusal applications against Makamu AJ and state advocate, Mr Majola, were launched. The two applicants and accused 1 initiated some if not all the applications, which were dismissed by Makamu AJ.

[5] Immediately following their convictions, the applicants and accused 1 made known their intentions to reserve questions of law for the Supreme Court of Appeal in terms of section 319. At the hearing of the application on that day, the State, although having not filed papers, made submissions that the application should be heard once the sentencing process had been finalised. Makamu AJ, in an *ex tempore* ruling, took the view that, while he accepted that such an application could be brought at any time, he was certain that the accused would appeal both conviction and sentence. He ruled that they should rather wait until the conclusion of the sentencing process and raise their section 319 applications then. He said:

“I think it would be best placed to deal with it [the section 319 application] at the end of the trial when we deal with the question of application for leave to appeal and at that particular point it will be more relevant to, it is either to grant it or not to grant it.”

[6] The current applicants made common cause in taking the view that the Makamu AJ had constructively dismissed their applications because he clearly considered the merits in reaching his conclusion, hence their focus on the SCA.

Section 47 of the Superior Courts Act

[7] Section 47 of the Superior Courts Act provides:

“(1) Except for an application made in terms of the Domestic Violence Act, 1998 ... no civil proceedings by way of summons or notice of motion may

⁴ 12 of 2004.

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.

- (2) Where the issuing of a summons or subpoena against a judge to appear in a civil action has been consented to, the date upon which such judge must attend court must be determined in consultation with the relevant head of court.”

[8] Both this section and its predecessor contained in the now repealed Supreme Court Act⁵ have received judicial attention and somewhat crystallised rules have emerged on its interpretation and approach.

[9] In *Soller v President of the Republic of South Africa*,⁶ Ngoepe JP dismissed an application for permission to sue the Judge in that matter. He explained the procedure to be followed in these types of applications as follows:

“For leave to be granted in terms of the section, 'good cause' must be shown.... Whether or not good cause has been shown will depend on the facts and circumstances of each case.”⁷ (Citation omitted.)

[10] He went on to find that in showing good cause, a litigant need do no more than show a *prima facie* case. He said:

“I have throughout been mindful of the fact that no more than a *prima facie* case is required at this stage, as opposed to proving a case on a balance of probabilities.”⁸ `

[11] The decision in *Soller* was followed by *N v Lukoto*,⁹ where Ngoepe JP reiterated the importance of the good cause element. In this instance, permission was granted. The matter involved a maintenance claim against the Judge who denied paternity. Good cause was found to have been shown, especially as the Judge had embarked upon delaying tactics preventing the handling of the matter by the maintenance officials, who had tried to reach out to the Judge. The last resort was for the mother of the child to seek judicial intervention, hence the request for permission to cite him.

⁵ 59 of 1959.

⁶ [2005] ZAGPHC 13; 2005 (3) SA 567 (T) (“*Soller*”).

⁷ *Id* at para 9.

⁸ *Id* at para 11.

⁹ [2005] ZAGPHC 79; 2007 (3) SA 569 (T).

[12] The centrality of the good cause element was again emphasised in the Western Cape division, where Matjiedt J (as he then was) had to consider a section 47 case against the then Judge President, in *Nagan v Hlophe*.¹⁰ In this instance, an Acting Judge who had heard a matter with the Judge President, was assigned scribe duties in line with that division's practice. The Acting Judge relocated to the United States without producing the judgement. This caused the Judge President to make allegedly defamatory statements about the delay. When these comments were picked up and disseminated by a local newspaper, the Acting Judge sought permission to sue for defamation.

[13] Considering the good cause element, Matjiedt J (as he then was) held as follows:

"An important consideration in deciding whether to grant permission to sue a Judge would, in my view, be the interests of justice and the constitutional founding values of openness and transparency. Generally speaking, litigants ought to be able to enforce unreservedly their constitutional rights to, for example, dignity, access to courts and of equality before the law. These rights should be enforceable even against judicial officers performing judicial functions, provided that there is at least an arguable case made out by such litigants against the judicial officer concerned. To hold otherwise would be to undermine the spirit and ethos of our Constitution. The constitutional rights enunciated above are all potentially at stake here insofar as the Applicant is concerned. Conversely and most certainly no less importantly, Judges too enjoy the protection which the Constitution affords them in section 165 (2), namely to "apply the law impartially, without fear, favour or prejudice."¹¹

[14] Following this case, the importance of good cause was again considered by this Court in *Engelbrecht v Khumalo, In re - Tarloy Properties (Pty) Ltd v Engelbrecht*.¹² There, this Court said:

"[There is] not ... a complete bar against the institution of legal proceedings against judges, hence the requirement of consent. The approach of the courts is to determine whether good cause has been shown in the application or request to institute the intended legal proceedings against the judge concerned. The cases I have considered dealing with good cause are clear that the good-cause test is not all-embracing but is case- specific. This entails a balanced and common-sense appraisal of the individual facts and circumstances of the matter."¹³ (Footnotes omitted.)

¹⁰ [2009] ZAWCHC 56.

¹¹ *Id* at para 10.

¹² [2016] ZAGPPHC 607; 2016 (4) SA 564 (GP).

¹³ *Id* at para 7.

[15] In that matter, this Court said that what was required was to ask whether the pending proceedings against the judge had a justiciable issue that would make it fair, just and equitable that consent be granted.¹⁴

Discussion

[16] Having considered the foregoing judicial pronouncements on the role of the good cause requirement in section 47 requests, I must now consider if the applicants before me have established good cause to cite Makamu AJ in this matter. For this to be so, I must find that there is a *prima facie* case made out for a justiciable issue that would make it fair, just and equitable that I should grant consent.

[17] Shortly before the hearing of this application, both applicants abandoned the interdict relief. This meant that the applicants had to show which civil proceedings they required my consent to cite Makamu AJ in. What was clear in the papers filed by both applicants was that they wanted to advance their section 319 request before Makamu AJ could sentence them. Their quandary was this – Makamu AJ had ruled, in his *ex tempore* ruling that he would consider their section 319 requests after he had finalised the sentencing proceedings. There was no clear indication from both applicants as to the nature of the civil proceedings for which they sought my section 47 consent.

[18] A question I posed to both applicants was whether those contemplated proceedings were an appeal against Makamu AJ's ruling. A further question I posed to the applicants was the prospect of interfering with Makamu AJ's handling of the matter which was pending before him, and the attendant possible disruption of the matter for a potentially long period without conclusion. The applicants were unable to articulate what civil proceedings they would be instituting against Makamu AJ for which they sought my consent.

[19] In light of the principles articulated in the decisions considered above, it is not possible to determine if any good cause has been shown by the applicants for the consent they seek from me. There is clearly no good cause in circumstances where there is no clarity regarding the nature of the civil proceedings contemplated and for

¹⁴ Id at para 8.

which consent to cite him/her is sought. This is so as I'm unable to determine the justiciability of the issue(s) in the contemplated civil proceedings. In other words, I am unable to determine if there is a case for Makamu AJ to answer i.e. in the civil proceedings contemplated by the applicants.

[20] It follows that the applicants have failed to establish good cause for the consent they seek in terms of section 47 to cite Makamu AJ. The consequence is that the applications must fail and it is not necessary to consider the matter any further.

[21] It was for these reasons that I made the following order:

Order

1. The First and Second Applicants' non-compliance with the Uniform Rules of Court is condoned and the matter is heard as one of urgency in terms of Uniform Rule 6(12).
2. The request by counsel appearing for the DPP to make legal submissions is granted.
3. The First and Second Applicants' request for permission in terms of section 47(1) of the Superior Courts Act 10 of 2013 to cite Mr Acting Justice Makamu is refused.
4. There is no order as to costs.



D MLAMBO
Judge President of the High Court
Gauteng Division

Appearances

For the First Applicant:

In person

For the Second Applicant:

R Gissing instructed by Strauss De
Waal Attorneys

For the Second Respondent:

S Majola instructed by Director of Public
Prosecutions, Johannesburg

Date of hearing: 25 March 2024

Date of order: 25 March 2024

Date of reasons: 19 July 2024