IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

Date of hearing: 3 November 2016

Case number: 74492/2016

REPORTABLE: Yes

OF INTEREST TO OTHER JUDGES: Yes

REVISED

17/11/16

In the matter between:

NEDBANK LIMITED	**Applicant**
and	
SHEPARD TENDAYI CHIURA	**First Respondent**
ESTER CHIURA	**Second Respondent**

JUDGMENT

BRENNER AJ

1. This application involves a claim to declare the first and second respondents, Messrs Shepard and Estaer Chiura ("the Chiuras'), vexatious litigants in terms of the Vexatious Proceedings Act, 3 of 1956, ("the Vexatious Proceedings Act"), and ancillary relief. The ancillary relief includes an order that the Chiuras do not have locus standi in the existing litigation, and that they are in contempt of an order of Court granted by Mr Justice Vorster J on 14 October 2014.

2. As pertinently summarised by Counsel for the applicant, Nedbank Limited ("Nedbank"), the crisp issues are whether:

   i. Nedbank has made out a case for relief under the Vexatious Proceedings Act;

   ii. The Chiuras have locus standi in certain interrelated litigation, dealt with below;

   iii. The Chiuras are in contempt of the order of the Honourable Mr Justice Vorster AJ;

   iv. Nedbank is entitled to interdictory relief against the Chiuras in the interrelated litigation.

3. It is contended by Nedbank, as summarised at paragraph 5 of the heads of argument of Advocate KW Luderitz SC:

> *"The Chiuras have launched* a *torrent of litigation against Nedbank without any consideration for its rights, the rights of its attorneys, the judges of his division, the rules of court, the procedures, practice directives, applicable legal principles and the numerous warnings that have been given to the Chiuras to obtain legal representation.'*

4. The disputes amongst the relevant parties find their provenance in litigation which commenced almost nine years ago, in 2007. I will summarise the litany of events which culminated in this application, and several other cases. These form the subject-matter of two further matters heard simultaneously with this application on 2 November 2016, for which judgment which will be given contemporaneously with

this judgment.

5. To obviate prolixity and needless repetition, certain facts mentioned in this judgment will not be repeated in the other interrelated matters under case numbers **7580/2007, 1730/2013, 20740/2013** and **96723/2015.**

6. When the matters were argued before me, all parties concurred that it was convenient for me to hear argument on all matters under the above case numbers, in unison with this application under case number **74492/2016.** This judgment should accordingly be read conjunctively with my judgments in all of the other, interrelated cases.

7. In the main, the facts adumbrated below are proven, unchallenged facts, (corroborated in large part by supporting documents), the veracity of which are either uncontested by the Chiuras, or are not the subject-matter of genuine, bona fide dispute.

8. I interpose to mention that the detail provided in the founding affidavit in this application was of great use to me in providing a salient chronology of the sequence of events over the past nine years. In the main, the substance of the founding affidavit in casu remained undisputed by the Chiuras in their seven page answering affidavit. I will traverse this in greater detail below.

9. On 17 October 2005, the Chiuras, who appear to have been married out of community of property, acquired certain immovable property situate at erf 2106 Dainfern Extension 19 Township, Gauteng ("the property"). The full purchase price of R2 350 000,00 was financed by Nedbank. In 2005, the property was registered in their names simultaneously with the mortgage bond in favour of Nedbank.

10. After the Chiuras had defaulted on the payment of the requisite instalments on the bond, Summons was issued under case number **7580/2007.** Default judgment was granted on 29 March 2007 for payment of R2 401 460,05 plus mora interest and costs. Additionally, the property was declared specially executable ("the Nedbank judgment"). The property was sold in execution to Shlomo and Miriam Mishan ("the Mishans") at a public sale in execution on 28 July 2009, for a price of R1 450

000,00. The property was registered in their names on 28 September 2009.

11. According to the Chiuras, they first learnt of the default judgment when they received the notice of sale in execution circa July 2009. They vacated the property in November 2009.

12. On 6 May 2009, the Mishans sold the property to a company cited as Joyspring Trade & Investment 11 (Pty) Ltd ("Joyspring") for a price of R3 325 000,00, and registration of transfer occurred in 2010. It should be observed that the property was sold for R975 000,00 more than the price paid by the Chiuras in 2005.

13. It should be noted, however, that the sale took place four years afterwards, and the Mishans contended that they had effected substantial improvements to the property before the sale to Joyspring. I have also taken judicial notice of the known fact that prices obtained in forced sales are frequently lower than their market value. It is also not extraordinary for a property to be sold for a price which is lower than the bond.

14. Joyspring acquired the property with finance from Absa Bank Limited ("Absa"), and a bond in Absa's favour was registered with the transfer in 2010.

15. On 20 July 2011, four years after the Nedbank judgment (which occurred on 29 March 2007), the Chiuras launched a rescission application to set aside the judgment, and the ensuing sale in execution on 28 July 2009, this under case number **1730/2013** ("the rescission application"). On 1 October 2012, they withdrew the rescission application. It appears that this case number has continued to be perpetuated in subsequent litigation. Nothing turns on this, as its aim was identical in terms to what is sought in the rescission applications dealt with under case numbers **7580/2007,** and **20740/2013.**

16. But thereafter, it was reinstated and heard before the Honourable Mr Justice Tuchten, J under case number **7580/2007** ("the Tuchten order"). Tuchten J held the view that the advertisement of the property prior to the sale in execution to the Mishans did not adequately describe the property. In terms of the Tuchten order, dated 24 January 2013:

i. The sale in execution to the Mishans was set aside;

ii. The transfers of the property to the Mishans and Joyspring were set aside and declared as invalid;

iii. The Registrar of Deeds was directed to cancel the above transfers and all mortgage bonds accompanying such transfers, and to reinstate the transfer to the Chiuras with the Nedbank bond;

iv. The Nedbank judgment remained intact, there being no merit in the claim for the rescission of the default judgment against the Chiuras, finding that the papers to substantiate the rescission of the judgment were "substantially false".

17. Erroneously, Absa was not joined as a party to the rescission application before Tuchten J. It is trite that Absa's interests were deleteriously affected by the Tuchten order.

18. Accordingly, on 9 April 2013, under case number **20740/2013,** Absa launched an application to set aside Tuchten's order, presumably under rule 42(1)(1) of the Uniform Rules of Court.

19. The application was heard before the Honourable Mr Justice van der Byl AJ on 20 April 2013. On 2 May 2013, van der Byl AJ set aside Tuchten's order ("the Van der Byl order").

20. On 2 July 2013, the Chiura's brought an urgent application to rescind the Van der Byl order, and to implement the Tuchten order. The application was enrolled for 9 July 2013. Ms Amelia Costa ("Costa") of Absa and Mr Allan Lowndes ("Lowndes") of Nedbank's attorneys warned the Chiuras, via correspondence, in advance, that their application was legally unsustainable.

21. On 9 July 2013, the Honourable Ms Justice Tlhapi J struck the application from the roll for want of urgency, with costs against the Chiuras. ("the Tlhapi order").

22. On 25 July 2013, the Chiuras brought another urgent application enrolled for 30

July 2013, to which they had supplemented certain papers which, in their view, rendered the matter urgent. They attached accounts and written demands from the City of Johannesburg and correspondence which they had addressed to senior directors and executives of Absa.

23. When the application came before the Honourable Ms Justice Mphahlele J, she was unconvinced by the supplementary papers and proceeded to dismiss the application, with costs against the Chiuras on the attorney and client scale ("the Mphahlele order").

24. Mphahlele J warned the Chiura's, at page 18 line 17, to *"never again abuse the* process *of this court."* At page 17 line 4 of the transcript of proceedings, Mphahlele commented:

> *"People who come to this court and abuse the* process, *we award punitive* costs *against them because we discourage people from approaching this court because this court we operate under pressure, we get papers and we have to read and address everyone and if we find amongst those files that there* is a *person who* is *abusing the* process *we award punitive* costs. *You did not have* a *reason to run to this court."*

25. The costs for the above two applications were taxed by Nedbank and warrants of execution were issued but the costs were not recovered, nor was payment tendered. Nor, indeed, had the Chiuras tendered to pay the amount owing to Nedbank under the original bond. The Chiuras have never produced any documents to prove any payment on the bond since the default judgment was granted on 29 March 2007.

26. On 12 September 2013, the Chiuras launched another application, under case number **20740/2013.** in which they sought to "appeal" the judgment of Van der Byl and to reinstate the Tuchten order. The application was brought in the ordinary course according to the notice of motion. In wanton disregard of the rules of Court, however, the Chiuras prematurely enrolled the application for hearing on 14 October 2013, which coincided with the first court day after the final date for

service of the answering affidavits. Nedbank had, in the interim, served a notice to oppose and answering affidavits. Lowndes again communicated with Mr Chiura to propose that the application should be removed from the roll, as the replying affidavits had not been served and the matter was not ripe for hearing. To no avail.

27. Later in September 2013, the Chiuras served a "supplementary claim for damages" in this application.

28. On 14 October 2013, the application was heard before the Honourable Mr Justice Vorster AJ who ordered that the matter should be struck from the roll, with costs against the Chiuras on the attorney and client scale. A further order was granted to prohibit the Chiuras from enrolling the matter again before all costs, including those of 14 October 2013, had been paid by them. By this stage, there were three costs orders against them ("the Vorster order").

29. The relief which the Chiuras' sought before Messrs Justices Tlhapi, Mphahlele and Vorster was substantially the same, namely, to set aside the van der Byl order and reinstate the Tuchten order.

30. On 5 May 2014, undeterred, the Chiuras applied for leave to appeal against the orders of van der Byl, Tlhapi, Mphahlele and Vorster. It is common cause that, by this time, the periods for applying for leave to appeal, with condonation, against the van der Byl order, the Mphahlele order, and the Vorster order, had expired. Further advance warnings were sent to them by Costs on behalf of Absa, Nedbank, Joyspring, and several attorneys, to inform them that their actions were irregular and vexatious. The warning was unheeded.

31. On 26 June 2014, yet another application for leave to appeal, with condonation, was served, this against the Vorster order.

32. On 7 July 2014, a third application for leave to appeal, with condonation, was served, to apply for leave to appeal the Van der Byl, Tlhapi, Mphahlele and Vorster orders.

33. On 11 November 2014, the Honourable Mr Justice Kollapen J heard further applications, including the application by the Chiuras, an application by Nedbank

for security for costs in respect of the three applications for leave to appeal on 5 May 2014, 6 June 2014 and 7 July 2014.

34. Nedbank also sought an order setting aside the three applications for leave to appeal as irregular in terms of rule 30(1) and 30(A), or an order for security for the costs in respect of the Chiura's three applications for leave. This time around, the Chiuras cited twelve respondents, namely: Absa, Nedbank, Shlomo Mishan, Miriam Mishan, the Sheriff of Halfway House, the Registrar of deeds, Pretoria, Joyspring, Richard Ngwenya and partners, Webber Wentzel Attorneys, Dainfern Valley Homeowners Association, the City of Johannesburg and Eskom. Three case numbers were allocated to the overall matter, namely: **7580/2007, 1730/2013** and **20740/2013.**

35. On 29 November 2014, the property was sold to Chimedza Zvikomborero and Mudzinganyama Chamurwa for R4,5 million. The transfer was registered much later, on 20 May 2016. Simultaneously with the transfer, a bond for R3,6 million was registered in favour of the Standard Bank.

36. The judgment of Kollapen J was given on 11 December 2014. At paragraph 8 page 8 of his judgment, Kollapen J remarked:

> *"It* is *clear that the applicants intended to bring leave to appeal applications in respect of all of the four orders to which reference* has *been made. That the applicants did* so *inelegantly and in* a *manner not contemplated by the Rules* is *hardly in doubt."*

37. In the result, Kollapen J granted an order to allow the Chiuras to amend their application for leave to appeal to accord with the Rules of this Court, this to occur within ten days of the date of his order. The application for an order for security for costs under Rule 47(3) was dismissed, and there was no order as to costs ("the Kollapen order").

38. On 15 December 2014, an amended application for leave to appeal against the van der Byl order was served. Despite the latitude afforded to the Chiuras under the Kollapen order, to amend their application so as to provide grounds for appeal,

the Chiuras chose to ignore same, with a cavalier disregard of the requirements for applications for leave to appeal.

39. This application was enrolled before the Honourable Mr Justice Ledwaba, DJP, on 18 February 2015, because Vorster AJ was unavailable to hear same. The matter was postponed for one week because Mrs Chiura was not present in Court.

40. The matter was heard before Ledwaba DJP on 18 February 2015. He was prepared to overlook the Chiuras' failure to explain their failure to timeously launch the application, mainly against the judgment of van der Byl AJ. Ledwaba DJP stated that, when he first postponed the application, he had informed Mr Chiura that, due to the complexities and the deficiencies of their application he recommended that they should secure legal representation.

41. He pointed out, as had Kollapen J, that the Nedbank order had not been rescinded. He repeated the encouragement by Kollapen J that the Chiuras should obtain legal advice, since, according to Kollapen J, their remedy may "lie elsewhere". Ledwaba DJP found that there were no reasonable prospects that another Court may find that Absa was not entitled to rescind Tuchten's order. He dismissed the application for leave to appeal, with costs, in a fully reasoned judgment, dated 8 May 2015.

42. Hereafter, it was open to the Chiuras to apply for leave to appeal to the Supreme Court of Appeal under sections 17(2)(b) of the Superior Court Act, 1O of 2013 ("the SC Act"). To the date of my order, this had not occurred.

43. On 3 June 2015, the Chiuras served another document, this time styled *"Notice of intention to appeal against the Judgment of Honourable Ledwaba against refusal of leave to appeal."* In reply, Nedbank's attorneys proposed to them in a letter that they should petition the Supreme Court of Appeal if they wished to challenge Ledwaba's judgment.

44. Another notice to appeal Ledwaba's judgment was served on 3 November 2015. Nedbank's attorneys again invited the Chiuras to apply for leave to the Supreme Court of Appeal, and that they should withdraw this notice. The Chiuras did not persist with these applications.

45. Instead, further proceedings, ancillary in nature to the Nedbank order, were prosecuted by the Chiuras. On 3 December 2015, an action was instituted out of this Court, under case number **96723/2015,** citing Nedbank, the Minister of Justice, the Registrar of Deeds, the Rules Board and the Chairman of the Rules Board as first to fifth defendants. The following relief was sought, namely:

i. Payment of the sum of R55 761 077,74 for compensation from Nedbank;

ii. A declarator that rule 46(1) and (12) of the Uniform Rules of Court be declared unconstitutional;

iii. Rescission of the default judgment granted on 29 March 2007 1n Nedbank's favour;

iv. an order to eject all current occupants from the property, to enable the Chiuras to resume occupation.

46. On 8 December 2015, the Chiuras purported to amend their Summons without due regard to the requirements of rule 28.

47. Nedbank was afforded ten court days within which to enter an appearance to defend, taking into account *dies non* between 16 December 2015 and 15 January 2016. The last day for service of the appearance to defend was therefore 19 January 2016.

48. On 29 February 2016, following service of the appearance to defend on 18 January 2016, the Chiuras applied for summary judgment. The application was late, the supporting affidavit did not make the requisite allegations as provided by rule 32, and the damages claim of some R55 million was unliquidated and summary judgment could therefore not be sought for same. Nevertheless, Nedbank served an affidavit resisting summary judgment.

49. On 3 March 2016, Nedbank served its special pleas and plea in the action.

50. On 8 March 2016, the Honourable Mr Justice Moseamo J refused the summary

judgment application and granted Nedbank leave to defend, with costs in the cause of the main action.

51. On 30 March 2016, despite the above, the Chiuras served an application for default judgment in the action, in wilful disregard of the fact that an appearance to defend and the six special pleas and plea had already been served. The application was enrolled on the unopposed roll on 12 April 2016. On 4 April 2016, prior to the hearing, Lowndes warned the Chiuras that their application lacked merit and that Nedbank would seek its dismissal and a punitive award of costs.

52. On 30 March 2016, the Chiuras launched a further application in the action styled "Amended Notice of Application for Default Judgment" in which they sought:

    i. The reversal of the van der Byl order, including the costs order;

    ii. The implementation of the Tuchten order;

    iii. The writing off of the costs orders granted under the Thlapi, Mphahlele, Vorster and Ledwaba orders.

53. When the application was heard on 12 April 2016, before Ms Justice Tolmay J, she postponed same to the opposed roll on 29 August 2016, granting costs against the Chiuras on the attorney and client scale. She informed the Chiuras that she was of the prima facie view that the application was without merit and urged the Chiuras to secure legal representation.

54. In the interim, there was a significant development. On 30 March 2016, Nedbank issued a warrant of execution under case number **20740/2013,** in terms of rule 45(8), against the "incorporeal movable property" of Mr and Mrs Chiura, being the first and second respondents, Mr and Mrs Chiura, namely, the right, title and interest of the Chiuras in and to the following:

    i. The action instituted by the said respondents out of the High Court of South Africa, Gauteng Division, Pretoria, under case number **96723/2015;**

ii. The application instituted by the said respondents out of the High Court of South Africa, Gauteng Division, Pretoria, under case number **7580/2007;**

iii. The claims of the said respondents as is more fully set out, inter alia, in the notice of motion and founding affidavit dated June 2013 and 29 June 2013 respectively, under case number **20740/2013** out of the High Court of South Africa, Gauteng Division, Pretoria.

55. In essence, therefore, the March 2016 warrant was issued to attach the Chiura's claims:

i. against Nedbank in the action for, inter alia, compensation of some R55 million and ancillary relief (case **96723/2015);**

ii. to the setting aside of the Ledwaba order dismissing leave to appeal against van der Byl's order, which had in turn set aside Tuchten's order rescinding the sale in execution of the property and all transactions subsequent thereto: (case numbers **7580/2007** and **20740/2013).**

56. The above is referred to below as "the March 2016 warrant". The basis of the warrant of execution comprised of three claims for legal costs which had been taxed against the Chiuras under case number **20740/2013,** for the sums of R98 680,67, R48 044,96 and R48 890,82 respectively, totalling R195 616,45 in the aggregate. Attempts to recover payment via the attachment of movables at the residence of the Chiuras had proved an exercise in futility.

57. On 21 November 2013, and 26 November 2013, nulla bona returns of service were rendered by the sheriff in respect of both Mr and Mrs Chiura, at their residence at 83 The Willows, Ruimsig, Roodepoort. They were each personally present when this occurred. Mr Chiura even signed a document to confirm this fact.

58. Moreover, the Chiuras have persistently and contemptuously ignored the express prohibition in the Vorster order dated 14 October 2013 that the Chiuras could not enrol the matter again before all costs, including those of 14 October 2013, had

been paid by them.

59. On 9 May 2016, Absa launched a counter-application in the application under case numbers **7580/2007, 1730/2013** and **20740/2013** for an order to declare the Chiuras vexatious litigants under section 2(1)(b) of the VP Act.

60. On 26 May 2016, a meeting occurred at the Chambers of Mr Justice Ledwaba DJP. It was attended by the Chiuras, and Nedbank's and Absa's attorneys. Ledwaba DJP explained to the Chiuras what court process entailed and advised them that Nedbank and Absa would not countenance their unabated disregard of the rules of Court. They were again informed that the only mechanism by which Ledwaba's order could be taken on further appeal was by further application to the SCA. They were entreated to obtain the services of legal representatives.

61. Reverting to the March 2016 warrant, this called on the sheriff of the High Court to notify all interested parties, including the Registrar of this Court, the Registrar of Deeds, the Minister of Justice, the Chairman of the Rules Board, and Shepherd and Ester Chiura. Finally, a disclaimer is made that any such attachment was not to be construed as an admission of the veracity of such claims.

62. Following due service of the warrant of execution on all parties, and the attachment of the rights forming the subject-matter thereof, a public sale in execution was advertised for 11hOO on 28 July 2016. The advert appeared in two newspapers. At this juncture, the Chiuras had engaged Khoza Attorneys to act for them. Mr Khoza requested the postponement of the sale, which was declined by Lowndes.

63. On 11 July 2016, Khoza attorneys wrote to Absa's attorneys, Clyde and Co, to inform Absa that its clients had confirmed that "they will not be proceeding further with any legal action against Absa".

64. 0n 21 July 2016, despite advance notice of the sale at least ten court days beforehand, the Chiuras brought an urgent application under case number **57340/2016,** enrolled for hearing on 27 July 2016, to stay the warrant of execution, pending the outcome of their application to set aside the Ledwaba order. The application was opposed.

65. On 27 July 2016, before the Honourable Mr Justice Ranchod J, advocate Katz van Zyl, on brief for the Chiuras, withdrew the application and tendered costs on the attorney and client scale.

66. At 09h53 on the morning of the auction, being 28 July 2016, the Chiuras launched yet another urgent applicaton to stop the sale. The application was served by email. Counsel was briefed by Nedbank and attended Court where he spoke with the registrar of Ranchod J, to be told that the Chiuras denied that they had agreed to withdraw the previous application but that they wished to re-enrol the application for 2 August 2016.

67. The auction proceeded on 28 July 2016, and the incorporeal rights as identified in the warrant of execution were duly auctioned and sold to Nedbank for R6 840,00, Nedbank not being the only bidder. Lowndes addressed a letter to the Judges in the urgent Court for that week, copied to the Chiuras, to apprise them of this fact. It was established by Counsel for Nedbank on 2 August 2016 that the second application had not been re- enrolled.

68. As pertinently pointed out by Nedbank, the restoration of the Chiuras to the status quo at the date of the Tuchten order would secure no beneficial relief. This because the default judgment still stood, with the result that the quantum of Nedbank's claim against them would have escalated to about R5 million. Not only had there been no tender to pay any costs orders, there was never any tender by them to pay the judgment debt.

69. The default judgment was granted on 29 March 2007. On their version, the Chiuras only moved out of the property in November 2009, two years and eight months later. I find no suggestion in the papers that the Chiuras made any payments towards the bond during this period.

70. On 4 August 2016, Nedbank proceeded to remove the applications enrolled for hearing on 29 August 2016, under case numbers **96723/2015, 20740/2013,** and **7580/2007.** On the same date, a notice of withdrawal of the action under case number **96723/2015,** and a notice of withdrawal of the application under case number **20740/2013** and a notice of withdrawal of the application under case

number **7580/2007** were served, all on behalf of the Chiuras, whose claims under these cases had been acquired by Nedbank.

71. On 16 August 2016, the Chiuras proceeded to attempt to involve Ledwaba DJP in the dispute. A document titled "Index to Bundle of relevant documentation to prove infringement" was served on his Registrar. The Chiuras had failed to understand that they had no locus standi in the relevant cases, and made accusations of dishonesty and collusion against Nedbank. The aforegoing action resulted in the Registrar of this Court becoming embroiled in a dispute as to whether Nedbank had the legal right to remove the matters from the roll and to withdraw them. Correspondence was exchanged.

72. In the result, on 20 September 2016, the Chiuras proceeded to serve a notice of set down for the matters under case number **20740/2013** and **96723/2015** hearing on 31 October 2016. They were allocated for hearing on 3 November 2016. It is apparent therefrom, therefore, that the Chiuras still considered Absa as part of the overall equation, in a volte face from the agreement previously reached with Absa.

73. In support of Nedbank's application against the Chiuras in casu, Nedbank advanced the following facts, inter alia:

    i. Nedbank had been exposed to a "torrent of litigation" since 2013, spending in excess of R1 million in legal fees, incurred as a result of the Chiuras' abuse, harassment and capriciousness;

    ii. Nedbank had suffered patent prejudice because of this;

    iii. The Chiuras had been represented by about 13 legal representatives;

    iv. The Chiuras had been warned to obtain legal representation by various Judges of this Court;

    v. The Chiuras had threatened parties to the litigation, had made defamatory attacks on Judges, had attempted to prefer criminal charges against Nedbank officials;

vi. The Chiuras had made vicious allegations of, inter alia, fraud, in letters to journalists, the CEO of Nedbank, the Judge President, the Deputy Judge President, the Judicial Service Commission, the Public Protector, the Constitutional Court and the Law Society; indeed, Lowndes had been reported to the Law Society;

vii. In a letter of demand to the Chairman and CEO of Nedbank, demand was made for payment of damages of R238 976,86;

viii. The Chiura's continuing litigation, amounting to eleven applications in toto, was frivolous, improper, harassing, baseless and unfounded, and in flagrant disregard of the Court, its process, the Uniform rules of Court.

74. In Nedbank's founding affidavit, the following pertinent comments are made at paragraph 189 page 63:

"I am advised further that the public interest requires that the functioning of the courts and the administration of justice proceed unimpeded by the clog of groundless proceedings initiated by the Chiuras."

75. And at paragraph 194 page 66:

"There is no end in sight to the unabated barrage of baseless applications and actions that Nedbank is forced to defend and incur costs (and time) in so *doing."*

76. And finally, at paragraph 197 page 67:

"Furthermore, even where punitive costs orders have been awarded against the Chiuras, none of the respondents have been able to recover any of the money spent opposing the Chiuras' applications."

77. The Chiuras' seven page answering affidavit omits to traverse in terms every allegation raised in Nedbank's founding affidavit. They simply make bare denials:

"We as the Applicants deny all allegations and contents in the Founding Affidavit of Elizabeth Barnes because the allegations are far from the truth, baseless, that's why they don't want it to go to Court."

78. The gravamen of the answer is the following. The Chiuras rely implicitly on the terms of the Tuchten order and the judgment of Kollapen J. Mr Chiura on behalf of the Chiuras attempts to re-argue the merits of the Tuchten order, the fact that the sale was "without reserve" and the comment by Kollapen J that *"it can hardly be said that the sale for R1,4 million represented the market price of the property."* In his view, Kollapen's judgment makes it *"untenable"* to accept the judgment of Ledwaba DJP that there are no prospects of success

79. Moreover, Kollapen J's judgment refutes Nedbank's right to declare the Chiura's vexatious litigants. The Van der Byl order, in his opinion, was incompetent because Tuchten was functus officio and Tuchten J was unaware of the Absa bond. Cognisance is not taken by the Chiuras of rule 42(1)(a) which provides for the rescission of an order granted in the absence of an interested party, which Absa certainly was.

80. In conclusion, the Chiuras make the following allegations concerning Nedbank's conduct, namely, inter alia:

i. Giving orders about pending court cases to court staff;

ii. Not adhering to agreed dates and the disappearance of court files;

iii. Not recognising the bill of rights in the Constitution;

iv. Intimidating and colluding with legal representatives engaged by the Applicants thus obstructing justice;

v. Buying their rights to cases; their understanding being that "a case number cannot be ceded, sold or forfeited";

vi. They have never refused to pay costs; they have simply suggested that the costs should be deducted from the damages suffered by them.

81. The above, then, are the salient facts germane to this application, and indeed, in several respects, to the other cases which were argued before me.

82. Counsel for Nedbank produced detailed heads of argument and argued the issues before me.

83. Mr Chiura, confirming that he acted for himself and his wife, Mrs Chiura, who was present in Court, produced a document entitled *"Arguments for rescission and damages summons for 3 November".*

84. The document was intended to support his argument against the orders sought by Nedbank and Absa against him and to support the Chiuras' applications for default judgment in the damages action and the rescission of the Ledwaba order, which, in effect, was a rescission of the van der Byl order. The document was read by Mr Chiura to the Court for the most part, and I have had the benefit of analysing it at length.

85. Mr Chiura apologised to the Court for being unrepresented despite being advised to secure representation. He blamed this on legal representatives who were either "intimidated or chose to collude with the respondent..." The document constitutes a reiteration of the alleged correctness of the Tuchten order and the Kollapen judgment.

86. The Chiuras' argument rested on the fact that Tuchten J found the sale in execution to be invalid and that Kollapen J had found that the conduct of the Chiuras could not be said to be *"vexatious, reckless or an abuse of the process of this Court."* The Chiuras accused the respondents' attempt to *"use technicalities to avoid the actual issues at hand."* This statement is paradoxical because the "technicalities" which are the real subject-matter at issue were the legitimate complaints by Nedbank that the Chiuras were consistently ignoring the Rules of Court and abusing its process.

87. In the document, the Chiuras mention that the Law Society is investigating the conduct of one Munya Dwanzura who allegedly influenced the deeds office to

transfer the property "illegally" to Joyspring, that the Law Society was investigating Nedbank's lawyer, Lowndes. All other attorneys and Counsel engaged by the Chiuras, including B Mlalazi, R Baloyi, E Dagada, Katz van Zyl and Khoza attorneys, had either acted negligently or had not taken proper instructions from them. The Chiuras had lost all trust in legal representation.

88. Mr Luderitz placed on record that a vast number of the allegations in the Chiuras' document were unsubstantiated, false and defamatory, and he reserved the rights of Nedbank.

89. Concerning the bare, unsubstantiated denials contained in the Chiuras' answering affidavit, I concur with the stance adopted by the Court in **Wightman t/a JW Construction v Headfour (Pty) Ltd and another 2008(3) SA 371 (SCA).** at paragraph 13:

"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a *bare denial meets the requirements because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on* a *bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say "generally" because factual averments seldom stand apart from* a *broader factual matrix of circumstances all of which needs to be borne in mind when arriving at* a *decision. A litigant may not necessarily recognise or understand the nuances of* a *bare or general denial as against* a *real attempt to grapple with all relevant factual a/legations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them.*

90. In the final analysis, no real, genuine, bona fide dispute of fact on any material matter was raised by the Chiuras in their answering affidavit. Little, if any, probative value can be attached to their version which, in substance, does not constitute a defence to any of the relief sought against them.

91. At the outset, I am constrained to express my view on the merits of the Van der Byl order. In my view, the rescission of the Tuchten order was sound, this because Absa was patently an interested party to the proceedings, and should have been joined and was indeed prejudicially affected by the Tuchten order. I refer to **Bowring NO v Vrededorp Properties CC and another 2007 (5) SA 391 SCA at paragraph 21.**

92. I will firstly deal with the interdictory relief against the Chiuras to prevent them from pursuing the cases in respect of which their claims were acquired by Nedbank. This is related to the relief to declare that they have no locus standi in respect of the claims in the matters with case numbers 7580/2007, 20740/2013 and 96723/2015.

93. Counsel for Nedbank drew attention to a plethora of cases on the attachment of incorporeal rights. The locus standi of the Chiuras is an obvious corollary to this issue, since their claims in the damages action and the two interrelated applications to set aside the Ledwaba order were attached and sold in execution to Nedbank, resulting in Nedbank assuming jurisdiction and locus standi over these claims.

94. Rule 45(8) of the Uniform rules provides that incorporeal property, whether movable or immovable, can be attached without a prior court order.

95. In **Marais v Aldridge and others 1976 (1) SA 746 Tat 750,** the Court made it very plain that rights in and to an action are susceptible to attachment:

"The right, title and interest of the litigant in an action constitutes incorporeal property which is liable to attachment at the instance of the judgment creditor and to be sold in execution to realise money to satisfy the creditor's claim."

96. The motivation of the purchaser of such an interest is irrelevant at law. In **Madden v BP Southern Africa (Pty) Ltd 1967 (2) SA 326 Nat 328:**

"It matters not that the purchaser will utilise the right acquired to frustrate the right of the judgment debtor to continue with the action. It is part of the price which the judgment debtor who cannot pay his creditor in any other way has to pay in order to put the judgment creditor in possession of funds which will go towards satisfying his claim."

97. Finally, in **Brummer v Gorfil Brothers Investments (Pty) Ltd and another 1999 (3) SA 389 SCA at 415 G to Hand 417 G to H:**

"a *defendant who used* a *statutory procedure, namely the attachment and sale on the open market of* a *claim, to bring to an end an action against him which he regarded as vexatious did not have an objectionable or improper intention";*

"If anyone was to blame, it was the appellant himself It was he who had...run up the costs, which he then failed to settle. His claim against the fifth respondent was an asset in his estate."

98. Based on the established facts, and the prevailing law, the Chiuras lacked locus standi to prosecute any claims under case numbers **96723/2015, 20740/2013,** and **7580/2007.** Nedbank has proved on a balance of probabilities that it has a clear right to a final interdict, injuries actually committed and/or reasonably apprehended, and the absence of similar protection by any other remedy.

99. A further issue is whether the Chiuras may be found guilty of contempt of the Vorster order. A leading case on contempt of Court is **Fakie NO v CC11 Systems (Pty) Ltd 2006 (4) SA 326 SCA,** which spelt out the requirements for an order for contempt of court. The three requisites, summarised, are: (1) the existence of the order; (2) service or notice of the order on the respondents and (3), non-compliance.

100. The judgment quoted the following instructive passage from **Fakie** at paragraph 23 p

338:

"23 .... Once the three requisites mentioned have been proved, in the absence of evidence raising a *reasonable doubt as to whether the accused acted wilfully and* ma/a *fide, all the requisites of the offence will have been established. What is changed is that the accused no longer bears* a *legal burden to disprove wilfulness and* ma/a *fides on* a *balance of probabilities but to avoid conviction need only lead evidence that establishes* a *reasonable doubt."*

101. Reading from the headnote in **Fakie,** at paragraph A to B at page 327:

In particular, the applicant (in contempt proceedings) had to prove the requisites of contempt (the order, service or notice, non-compliance and wilfulness and ma/a *tides) beyond* a *reasonable doubt. But, once the applicant had proved the order, service or notice and non-compliance, the respondent bore an evidentiary burden in relation to wilfulness and* ma/a *tides: Should he fail to advance evidence that established* a *reasonable doubt as to whether his non-compliance was wilful and* ma/a *fide, the applicant would have proved contempt beyond* a *reasonable doubt. A declarator and other appropriate remedies remained available to the applicant on proof on* a *balance of probabilities.*

102. And at paragraph A to B page 332 of **Fakie:**

"It is a crime unlawfully and intentionally to disobey a court order. This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court. The offence has, in general terms, received a constitutional 'stamp of approval' since the rule of law - a founding value of the Constitution - requires that the dignity and authority of the courts. as well as their capacity to carry out their functions should always be maintained.

(my emphasis)

103. Plainly, on their own admission, the Chiuras were well aware of the Vorster order

and its implications and elected to ignore it, wilfully so. The Chiuras have not discharged their evidentiary burden of proving a reasonable doubt that their non-compliance was wilful and mala fide. They have not alleged that they have complied with the order nor have they substantiated any such compliance. They are in contempt of the Vorster order.

104. Of further importance is whether Nedbank has the legal right to declare the Chiuras vexatious litigants within the meaning of section 2(1)(b) and (c) of the Vexatious Proceedings Act. It reads:

"(b) If, on any application made by any person against whom legal proceedings have been instituted by any other person or who has reason to believe that the institution of legal proceedings against him is contemplated by any other person, the court is satisfied that the said person has persistently and without reasonable ground instituted legal proceedings in any court or in any inferior court, whether against the same person or against different persons, the court may, after hearing that person or giving him an opportunity of being heard, order that no legal proceedings shall be instituted by him against any person in any court or any inferior court without the leave of the court, or any judge thereof, or that inferior court, as the case may be, and such leave shall not be granted unless the court or judge or the inferior court, as the case may be, is satisfied that the proceedings are not an abuse of the process of the court and that there is prima facie ground for the proceedings.

(c) An order under paragraph (a) or (b) may be issued for an indefinite period or for such period as the court may determine, and the court may at any time, on good cause shown, rescind or vary any order so issued."

105. A conspectus of the facts outlined above, fortified by the Chiura's own version in their answering affidavit, makes it quite plain that Nedbank exhausted all avenues available to it to come to an accommodation with the Chiuras to resolve matters.

106. They went so far as to guide them in the right direction by suggesting the best expedient available to them: that they pursue their legal rights and the process of

this Court by applying for further leave to appeal the Ledwaba order directly to the SCA. This advice was ignored with brazen impunity, and instead, a litany of unfounded and vexatious applications have been brought, at great expense, inconvenience and prejudice to Nedbank, with little or no prospect of recovering any legal costs from the Chiuras. The Chiuras must bear the consequences for their untenable disrespect of the rules of this Court.

107. This is a situation in which the employment of the Vexatious Proceedings Act is the only practical and viable remedy at Nedbank's disposal to put an end to the frivolous torrent of litigation which appears to have had no end in sight, and which was bringing the process of this Court into unwarranted disrepute.

108. Counsel for Nedbank, Mr KW Luderitz SC, referred me to a miscellany of case law on the subject. An important case appears to be that of **Beinash v Ernst and Young 1999 (2) SA 116 CC at paragraph 15:** (the case dealt with the constitutionality of the Vexatious Proceedings Act):

"In order to evaluate the constitutionality of the impugned section, it is necessary to have regard to the purpose of the Act. This purpose is 'to put a *stop to persistent and ungrounded institution of legal proceedings.' The Act does so by allowing* a *court to screen (as opposed to absolutely bar)* a *'person (who) has persistently and without any reasonable ground instituted legal proceedings in any Court or inferior court.' This screening mechanism is necessary to protect at least two important interests. These are the interests of the victims of the vexatious litigant who have repeatedly been subjected to the costs, harassment and embarrassment of unmeritorious litigation; and the public interest that the functioning of the courts and the administration of justice proceed unimpeded by the clog of groundless proceedings."*

109. Judgment was accordingly granted on 3 November 2016 as follows: an order was granted in terms of prayers 1 (including(a), (b), and (c)), 2, 3, 4, 5 (including 5.1 and 5.2), 6 and 7 of the notice of motion dated 22 September 2016 annexed hereto and marked “X”.

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T BRENNER
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA
17 November 2016

Appearances

Counsel for Applicant:	Adv KW Luderitz SC
Instructed by:	Attorneys Lowndes Dlamini
For the first and Second Respondents:	Shepard and Ester Chiura
Instructed by:	Personally represented

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

PRETORIA 03 November 2016 CASE NO: 74492/16

BEFORE THE HONOURABLE ACTING JUSTICE BRENNER

In the matter between:

NEDBANK **Applicant**

and

SHEPARD TENDAYI CHIURA **First Respondent**

ESTER CHIURA **Second Respondent**

HAVING HEARD counsel(s) and having read the documents filed of record:

IT IS ORDERED

That an order is granted in terms of prayers 1, (a), (b), (c), 2, 3, 4, 5, 5.1, 5.2, 6 and 7 of the Notice of Motion dated 22 September 2016 marked **"X".**

BY THE COURT

Att: Lowndes Dlamini
HIGH COURT TYPIST: BvZ

IN THE HIGH COURT.OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case no:74492/16
Date: 3/11/2016

In the matter between:

NEDBANK LIMITED	**Applicant**
and	
SHEPARD TENDAYI	**First Respondent**
ESTER CHIURA	**Second Respondent**

NOTICE OF MOTION

TAKE NOTICE that the above named applicant, **NEDBANK LIMITED ("Nedbank"),** intends to make application to the above Honourable Court for an order in the following terms:

1. An order interdicting and restraining the first and second respondents (collectively **"the respondents")** from persisting and proceeding with the following applications and action:

    (a) the action instituted by the respondents out of the High Court of South Africa, Gauteng Division, Pretoria under case number 96723/2015 (and the ancillary applications launched under the same case number);

    (b) the application instituted by the respondents out of the High Court of South Africa, Gauteng Division, Pretoria under case number 7580/2007; and

    (c) the claim(s) of the respondents as are more fully set out, inter alia, in the notice of motion and founding affidavit dated June 2013 and 29 June 2013 respectively, under case number 20740/2013 out of the High Court of South Africa, Gauteng Division, Pretoria

    ("the existing litigation")

2. An order declaring that the respondents do not have *locus standi* in the existing litigation and that all rights in and to the existing litigation now vest with Nedbank.

3. An order declaring the respondents to be in contempt of the order by the Honourable Acting Justice Vorster dated the 14 October 2013

4. An order declaring the respondents to be vexatious litigants in terms of the provisions of Section 2 of the Vexatious Proceedings Act, 3 of 1956 (as amended).

5. An order interdicting and restraining the respondents from instituting any new proceedings (applications or actions) against the applicant [or acting in any way pursuant to the existing litigation] in any Court or inferior Court, as the case may be, until and only in the event that:

5.1 the balance of all prior costs orders obtained by the applicant against the respondents have been paid in full including;

5.2 the respondents have first obtained the leave of a judge of this court on application and on notice to the applicant, to proceed with the institution of any such proceedings.

6. That any orders issued pursuant to prayers 1, 2, 3, 4 and 5 shall endure indefinitely until, and unless, set aside by an order of a competent court, alternatively, that such order shall endure for such finite period of time as this court deems meet.
7. That the first and second respondent be ordered to pay the costs of the application, on the scale as between attorney and client, jointly and severally, the one paying for the other to be absolved.

8. Further and/or alternative relief.

KINDLY TAKE FURTHER NOTICE that the attached affidavit of **ELIZABETH BARNES** and the annexures thereto will be used in support hereof.

KINDLY TAKE FURTHER NOTICE that the applicants have appointed attorneys **LOWNDES DLAMINI,** at the address set out below as the address at which they will accept notice and service of all process, notices and documents in these proceedings.

KINDLY TAKE FURTHER NOTICE that if you intend opposing this application and/or the relief sought you are required to:

(a) Within 5 days after receipt of this notice of motion give the intervening applicant notice of your intention to oppose the relief sought in the notice of motion;

(b) in the aforesaid notice of opposition, appoint an address in accordance with the requirements of Uniform Rule 6(5)(d)(i); and

(c) file your answering affidavit(s), if any, within 15 days after you have given notice of

your intention to oppose the application (if any).

KINDLY TAKE FURTHER NOTICE that should such notice of intention to oppose not be given, then the application will proceed on an unopposed basis on a date to be allocated by the Registrar of the High Court.

KINDLY ENROL THE MATTER ACCORDINGLY

DATED at **SANDTON** on this 22nd day of September 2016

_____

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TO:

THE REGISTRAR OF THE ABOVE
HONOURABLE COURT: **PRETORIA**

AND TO:

SHEPARD TENDAYI CHIURA
First Respondent

[…]
5th Road
Northwold
Randburg
PER SHERIFF

AND TO:

ESTER CHIURA
Second Respondent
[…]
5th Road
Northwold
Randburg

PER SHERIFF