IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
21 February 2022

Case no: 14367/2021

In the matter between:

N[….] D[….] C[….] Applicant

and

G[….] C[….] Respondent

In re:

G[….] C[….] Applicant

And

N[….] D[….] C[….] Respondent

This judgment is issued by the Judges whose names are reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded on Case lines and is deemed to be 21 February

2022.

JUDGMENT

Munzhelele J

Introduction

[1] The applicant brought an application to declare the respondent a vexatious litigant. The applicant seeks an order in terms of section 2((1) (b) of the Vexatious Proceedings Act[1] ('the Act). From her notice of motion, she requested the following orders:

1. To declare the respondent a vexatious litigant in terms of section 2(1) (b) of the Act.
2. That no legal proceedings should be instituted by the respondent against the applicant in any court without the leave of that court or any judge of the high court.
3. Alternatively, the respondent should be ordered to pay the cost orders under case numbers 1788/2016, 2816/2016, 95061/2016 and 28000/2016 *prior* to pursuing any legal proceedings against the applicant.
4. That the respondent should be ordered to provide security under case 50091/2021 as per the notice in terms of rule 47 within ten (10) days of this order being made and in the event the security is not being furnished within the time stipulated, the applicant be given leave to apply on the same papers, amplified for the dismissal of the application brought by the respondent for custody of the children.

[2] This application was opposed by the respondent and had filed an answering affidavit. He alleged that the applicant failed to prove that the litigation is vexatious on the part of the respondent and that the applicant is curtailing the

[1] Act 3 of 1956.

rights of the respondent to approach the court unnecessarily so.

Background of the case according to the applicant

[3] The respondent and the applicant were married in August 2001 and had two children. They were divorced in September 2014. In April 2015, they remarried and stayed as a family at house no [….]. This house is registered in the applicant's names.

History of the litigation as narrated by the applicant

[4] During the subsistence of the marriage, the applicant brought an application for a protection order against the respondent on 18 December 2015. The application was opposed. However, the protection order was granted on 14 January 2016. On 19 January 2016, the respondent launched two urgent applications against the applicant. One was an urgent review of the protection order and the second one was for the return of specific movable properties. All these applications were dismissed with costs.

[5] The respondent issued a divorce summons against the applicant on 19 January 2016. During this time, the respondent embarked on applications to remove the applicant from the business and replace her with himself as the sole director of the business. The second application was to remove the applicant's name as the property owner. However, the application for removing the applicant's name as the property owner was opposed, and the case is still pending. On the other hand, the respondent explained that this was the starting point of litigations against the applicant. The respondent alleged that the applicant's appropriation of the trust property and registering the property in her name was unlawful. This prompted the respondent to sue on behalf of the trust to recover the said property.

[6] On 9 February 2016, the respondent, again for the second time, brought another application on an urgent basis for review of the protection order. This application was also struck off the roll with costs. On 22 March 2016, the respondent brought a third application to review the protection order, and it was struck from the roll again with costs. On 6 April 2016, a decree of divorce order

was served by the police, which showed that the divorce was granted on 17 March 2016, whereas the divorce was known to be defended and had not yet been finalized. It was surprising to see a decree of divorce order when it was not known as to when the matter was before court. On the exact date of 17 March 2016, the applicant was served with an order varying the parental rights towards the children.

[7] On 5 April 2016, the applicant was issued with an interim order calling upon her to show cause why an order should not be made final concerning the review of the protection order. This is the fourth case regarding a review of the protection order. The applicant then decided to approach the court on an urgent basis to rescind the decree of divorce order and also to reinstate the protection order against the respondent because the respondent obtained this through fraudulent means. The urgent application was granted, the decree of divorce order was rescinded, and the protection order was reinstated.

[8] The divorce was set down for hearing and it was finalized on 12 September 2019. The settlement agreement was made an order of the court. The settlement agreement on para 1 stated that the parties had agreed to share residency and care of the minor child. They each stayed with the minor child for a week, and during the weekends, the child will be taken by another parent. While the settlement agreement contained the shared residence, the respondent then brought an application which was to be heard on 1O December 2020, for the following orders:

1. Granting the termination of the parental rights and responsibilities of the applicant (respondent in the case of 10 December 2020) towards the minor child in terms of section 28(1) (a) of the Children's Act 38 of 2005;
2. That clause 1.2.2 of the divorce settlement entered into between the applicant and respondent be amended in as far as it is inconsistent with the court order.
3. The applicant to pay costs.

This was the second time that the respondent wanted the applicant's rights to the

minor child terminated. The first time was when the respondent served an interim order which was to vary the applicant's parental rights to the applicant on 17 March 2016. This order was rescinded. The respondent brought this second application because he felt that the applicant did not care for the child. After all, she allowed the child to attend school when another child contracted covid-19.

[9] The applicant then opposed this application and brought an application to declare the respondent a vexatious litigant. She also filed an application for the respondent to pay security for costs before bringing his application to take away the applicant's parental rights towards the minor child.

Version of the respondent (differs from that of the applicant)

[10] The respondent's version is that the applicant and he, were the trustees of a family trust, created by the respondent. The applicant then started to abuse her position as a trustee. The respondent said that the applicant, through fraudulent means, then misappropriated the funds which were meant to purchase the property for the family trust. The applicant then purchased the property and it was registered in her name. Further, responded said that the applicant has been running the common business alone to exclusion of the respondent. The respondent feels aggrieved by this and then started to litigate against the applicant to gain back the property.

Arguments on behalf of the applicant

[11] The applicant contends that the respondents' applications are not *bona fide;* they are aimed at harassing and annoying the applicant. She further contends that the respondent's applications had no merits; as a result, they were struck from the roll. Further, the applicant is dragged to court, while knowing that the respondent will not pay the costs of the application when he loses the case. This has been shown by the previous applications wherein all the costs are still not paid. The respondent aims to see the applicant drained financially because of all these litigation costs. The respondent refused to pay security for the application he had now brought to court for termination of the applicant's parental

rights.[2] The applicant submits that the respondent is acting ma/a *fide* in not paying the costs orders against him and refusing to comply with the notice in terms of rule 47.

Arguments on behalf of the respondent

[12] The respondent alleges that the applicant failed on all eight cases to state facts upon which the allegations of vexatious and frivolous litigation rest. The applicant instituted the vexatious litigations proceedings without proving the grounds thereof. Further, regarding the security for costs, the respondent dispute that the applicant is entitled to security for costs before any matter is heard. It is alleged that the security for costs requested by the applicant is exorbitant. The attached bill of costs was just annexed on the papers, whereas they have no import on whether or not there was a reasonable ground to institute the proceedings. The respondent submits that the applicant's application is fundamentally flawed and stands to be dismissed based on all the above points. Regarding the application for custody of the children, the respondent contends that nothing is untoward in his application. The applicant should have explained why she says that the application regarding the claim for custody of the children is vexatious. The respondent submits that all his applications are centered on the issue of property, the minor child and the domestic violence application brought because of the applicant's conduct. He further submits that there are factual disputes regarding the above mentioned three issues that require adjudication; as such, his right to access the court cannot be curtailed. The respondent submits that he cannot let the applicant continue to own the stolen property and continue to shield herself from the scrutiny of the law. The respondent further submits that he is protected by section 34 of the Constitution of SA, which provides that everyone has the right to have any dispute that the application of the law can resolve, decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum. The respondent

[2] In all these arguments, the applicant relied on the following cases: Haitas v Port Wild Props12 (Pty) Ltd 2011(5) SA562 (GSJ), Mears v Brooks' Executor & Anor 1906 TS at 546, Fisheries Development Corp v Jorgensen 1979(3) SA1331 (W) at 1339E-F, Ecker v Dean 1937 AD 254 at 259 and Frankal Pollak Vinderine INC v Stanton no 2000(1) SA 425 (W) at 447G-H

admits that the South African court, particularly the high courts, has the inherent power to stop frivolous and vexatious proceedings when they abuse the process.[3]

[13] The respondent contends that this application by the applicant is of final interdict, and the requirements for final interdict were not met; as a result, the application should be dismissed. It was requested by the respondent that the issue of costs on this application should be on a scale between attorney and client on the basis that the applicant is harassing the respondent through bringing a futile application where the respondent is required to defend himself and, in the process incur costs.

The Law

[14] Section 2(1) (b) of Vexatious Proceedings[4] provides that;

> *"If, on an 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 any reasonable ground instituted legal proceedings in any court or in an inferior court, whether against the same person or against different persons, the court may, after hearing that other 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 that 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."*

[15] I, therefore, agree with the respondent when he submits that the requirements to prove that there has been vexatious litigation are:

---

[3] The respondent referred the court to *In re Anastassiades* 1955 (2) SA220 (W).
[4] Act 3 of 1956.

"That the respondent has 'persistently' instituted legal proceedings; and That such proceedings have been 'without reasonable ground."

[16] The proceedings themselves must be *"vexatious".* In other words, the proceedings must be annoying, irritating, distressing, or harassing and must be taken without reasonable grounds, and the intent of the respondent should be judged objectively. The applicant should prove that the respondent has knowingly and deliberately and repetitively continued with his vexatious conduct. It is not necessary to prove that the vexatious litigant knows that their conduct is vexatious but rather that a reasonable person in those same circumstances would believe the conduct to be vexatious. The onus is no different to that which ordinarily applies in civil litigation. The applicant has to prove on a balance of probabilities that the application is frivolous, vexatious or without merits. In *Amdocs SA Joint Enterprise (Pty) Ltd v Kwezi Technologies (Pty) Ltd*[5] in which the court held that the words *"frivolous, vexatious or without merit" should be given their ordinary meaning and that "an applicant for relief in terms of section 165(3) is entitled to succeed if he can demonstrate that the demand is without merit in the sense that it cannot succeed"* (own emphasis).

Discussion

[17] The respondent was justified in opposing the protection order, filed on 18 December 2015 and which despite opposition was granted on 14 January 2016. The urgent review of the protection order, which was brought within five (5) days after the 14 January protection order, would be an abuse of the court process. What could have changed in five days after 14 January 2016? It is general knowledge that vexatious litigation involves legal proceedings brought solely to harass or oppress the other party. It would not matter whether they are brought for the first time or repetitive they can still be brought to harass or annoy the applicant. In this regard, the respondent was abusing the legal system for his

[5] 2014 (5) SA 532 (GJ) para 14-17.

own ends without any merits. All his urgent applications were struck off the roll with costs.

[18] The same applies to the second application to review the protection order on 9 February 2016 and the third time on 22 March 2016. This was an abuse of legal process and harassment of the applicant. It was a clear indication that the respondent became aggrieved because a protection order was granted against him and refused to accept that he was unsuccessful in a domestic violence application. He was hopelessly persisting in bringing the urgent review application one after the other to re-litigate. He hoped that eventually, he would find a judge who would understand him and grant the review. On the contrary, his applications were struck off with costs.

[19] The respondent finally obtained an interim order, and it is unknown who granted him such an order. Still, Judge Potterill rescinded such interim order because it was improperly obtained. The Judge referred the matter for investigation. This shows how desperate the respondent was to such an extent that he could do anything to harass the applicant.

[20] The respondent resorted to improper means to achieve what he wanted. Knowing that there is already a court order for the protection of the applicant, the respondent brought the urgent review of such an order four (4) times. The respondent, again well knowing that the divorce proceeding is still pending went ahead and obtained a divorce decree without the respondent's knowledge. Judge Potterill rescinded all these orders. The respondent has persistently exploited and abused the court process to achieve improper purposes.

[21] The respondent's motivation is to see the applicant punished because he alleges that the applicant has misappropriated the trust money meant to buy the house and took it and bought the house for herself instead of buying it for the trust. During all these litigations, the respondent paid no costs regarding reviewing the protection order and the rescission of the interim orders. A vexatious litigant, in many instances, disregards the court orders. The flagrant disregard by the respondent to pay the costs is in my view a significant element of vexatiousness on the part of the respondent. The Act seeks to protect an applicant who is subjected to costs and unmeritorious litigation as well as the functioning of the courts to proceed unimpeded by groundless proceedings. In

the matter of *Christensen NO v Richter*[6]*,* an application in terms of section 2(1)(b) of the Act was brought to declare the first respondent a vexatious litigant. The first respondent had launched several applications against the estate. In deciding whether to declare the first respondent a vexatious litigant, the court held that:

> *"The applicant is, in my view,* a *vexatious litigant. He should therefore be prevented from instituting any further legal proceedings against the estate and/ or its executors. I am satisfied under the circumstances that the applicants have made out* a *case for a final interdict. They have established* a *clear right for the granting of* a *final interdict. It is clear that the applications launched by the first respondent are vague and not substantiated and the balance of convenience favours the granting of the final interdict. The first respondent cannot continue to litigate as relentlessly as he does, disregarding court orders. This has to stop. I am inclined to accept that the applicants have no alternative remedy to stop him from continuing with his actions."*

[22] It has been clear to everyone that the respondent's intentions to deliberately and repetitively review the applicant's protection order and the none payment of costs orders are meant to annoy, harass, punish, distress the applicant. A person cannot litigate one thing endlessly. The element of good faith will not permit that adjudication should be more than once. Surely he should know that a final judgment by a competent court between him and the applicant based on the conduct alleged on such protection order and his opposing papers has been made. He could appeal the judgment. A long-established principle of English law in the case of *Henderson v Henderson*[7] stated that *"parties to a litigation are required to bring their whole case at once rather than re-litigating the same subject matter concerning the same parties in serial litigation. There should be finality in litigations".*

[23] I cannot deal with the applications and actions which are still pending in court but with the application or actions that have been brought now, like the application to terminate the applicant's parental rights. This application is

[6] 2017 JDR1637 (GP) at para 68.
[7] (1843) 3 Hare 100.

frivolous because the family advocate's report has not been filed, which can guide the court to the correct decision regarding the interest of the minor child. The letters annexed on the application indicates that children were not prohibited from attending school because there were proper measures in place. It is correct that there was *covid-19* reported at school, but proper measures were put in place. One cannot terminate another's parental rights because the methods of raising children differs. I find that this application has no merits at all. It has been brought solely to harass the child's mother, who is the applicant. The respondent had failed to vary the parental rights of the applicant on the 17 March 2016, now he is bringing a similar application to take away the applicant's rights to the minor child again without reasonable grounds.

[24] Regarding the application for security in terms of rule 47, it is clear, firstly, that the respondent has not been paying his costs orders on all these litigations, as I have said above. The applicant has been incurring costs on all these applications. Secondly the respondent has been placed under administration because he struggles to pay his debts. Therefore, the applicant could not recover the costs of the applications brought by the respondent. She certainly will not recover the costs of this application for termination of the parental rights if the respondent is allowed to bring his application without security for costs. I find it appropriate for the respondent to pay security for costs to be incurred during the application for termination of the parental rights. The reasonable amount for costs of this application for termination of parental rights could be R120 000.00 (hundred and twenty thousand rand) in the circumstances.

Constitutional issue

[25] In *Beinash and Another v Ernst and Young and Others*[8], the court considered the constitutionality of s2(1)(b) of the Act. The court confirmed that:

> "the provision does limit a person's right of access to court. However, such limitation is reasonable and justifiable. While the right of access to court is import ant, other equally important purposes justify the limitation created by the Act. These purposes include the effective functioning of the courts,

[8] 1999 (2) SA 116 (CC).

the administration of justice, and the interests of innocent parties subjected to vexatious litigation. Such purposes are served by ensuring that the courts are neither swamped by matters without any merit, nor abused in order to victimize other members of society".

[26] Although the right of access to courts is protected under s34 of the Constitution of the Republic of South Africa,1996 (the Constitution), this right can be limited in terms of s36 of the Constitution and justified to protect and secure the right of access for those with meritorious disputes.

[27] The applicant should be protected from this abusive litigation aimed at punishing her and depleting her finance without recourse in the process. I am satisfied that the respondent has persistently instituted vexatious legal proceedings against the applicant without reasonable grounds.

Costs

[28] The respondent requested that the applicant pay the attorney and client scale costs because she is abusing the court process. I have already found that the respondent is the one who is abusing the court process; as a result, he should pay the cost on attorney and client scale.

Order

[29] As a result, the following order is made.

1.1 The respondent is declared a vexatious litigant in terms of Section 2(1)(b) of the Vexatious Proceedings Act, 3 of 1956 ("the Act");

1.2 No legal proceedings shall be instituted by the respondent against the applicant in any Provincial or Local Division of the High Court of South Africa or any inferior court, without the leave of that court, or any Judge of the High Court, as the case may be;

1.3 Alternatively, the respondent is ordered to pay the cost orders under case numbers 1788/205; 2816/2016; 95061/2016 and

28000/2016 *prior* to pursuing any legal proceedings against the applicant.

1.4 The respondent is ordered to provide security in the amount of R120 000 (Hundred and twenty thousand rand) under case number 50091/2021 as per the notice in terms of Rule 47 within Ten (10) days of this order being made, and;

1.5 In the event of security not being furnished within the time stipulated, the applicant be given leave to apply on the same papers, amplified as may be necessary, for the dismissal of the proceedings;

1.6 Costs are awarded against the respondent on attorney and client scale.

M. Munzhelele
Judge of the High Court
Pretoria

Virtually Heard: 18 November 2021
Electronically Delivered: 21 February 2022

Appearance:
For the applicant: Adv. A. Ruszkowska
Instructed by: Hefferman attorneys

For the respondents: Adv I. Mureriwa
Instructed by: Baloyi Masango Incorporated