

**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

**CASE NO: 10499/2009**

In the matter between:

**P.H.J. GERBER**

Applicant

and

**ADVOCATE R.J. DE KOCK N.O.**

First Respondent

**NPA OFFICE, CAPE TOWN**

Second Respondent

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**JUDGMENT HANDED DOWN ON 17 JUNE 2010**

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1. The applicant, Mr P.H.J. Gerber, appears in person. In his application the applicant sought orders –
  - (a) compelling the Director of Public Prosecutions and the NPA Office in Cape Town not *“to be obstructive”* and to comply with the requirements of section 8(2) of the Criminal Procedure Act No 51 of 1977, *“namely to consult”* and
  - (b) that the Director of Public Prosecutions and the NPA Office do not obstruct the applicant from prosecuting privately in terms of section 8(1) of the Criminal Procedure Act *“by not applying their mind (sic) to consultation between myself and the DPP or the NPA Office ... in terms of section 33 of the Bill of Rights”*.

2. The applicant has withdrawn this application.
3. The respondent<sup>1</sup>, however, has brought a counter-application for a declaration in terms of the Vexatious Proceedings Act, No. 3 of 1956, in terms whereof an order is sought that the applicant shall not be entitled to bring any legal proceedings against any person in any court in the Republic of South Africa without the leave of this Court or any judge thereof.
4. Mr J.C. Gerber, the deputy director of public prosecutions and a senior counsel of the Western Cape High Court and appointed as such in terms of section 13(1) of the National Prosecuting Authority Act, No. 32 of 1998, deposed to the affidavit opposing the application and in support of the counter-application. Insofar as it pertains to the application, he points out that it is in fact *res judicata* since similar applications were dismissed by this Court on 5 December 2008, 12 December 2008, 6 January 2009, 13 February 2009, 9 April 2009 and 7 May 2009. In his affidavit Mr Gerber sets out the background to this matter. It appears that the applicant was formerly employed by Honey Attorneys. The applicant's apparent dereliction of duty resulted in two disciplinary hearings being held against him. The second of such disciplinary hearings resulted in him being dismissed from his employment. The applicant applied to the Labour Court of South Africa for the review and setting aside of the sanction of dismissal that had been

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<sup>1</sup> Only the first respondent is properly before court

handed down by the Commissioner. The aforesaid application was dismissed with costs by Nel AJ on 19 November 2007.

5. The applicant laid criminal complaints with the South African Police Service against four people whom he alleged had committed the offence of defeating the ends of justice. One was a director and the second a professional assistant with Honey Attorneys. Two were officials attached to the Labour Court. The South African Police Service opened dockets in respect of these complaints and investigated them. The dockets were considered by the Senior Public Prosecutor, Cape Town, as well as Mr Gerber's office. Mr Gerber stated that after carefully considering the evidence against the aforementioned persons, the prosecution at the instance of the State was declined in respect of all four of them.
6. The applicant applied to Mr Gerber by way of what purported to be a notice of motion for a certificate to be issued to him in terms of section 7(2) of the Criminal Procedure Act, in order for him to pursue a private prosecution against the above persons on a charge of defeating the ends of justice.
7. A certificate in terms of section 7(2) of the Criminal Procedure Act, dated 9 July 2008, was furnished to the applicant and his application before the Cape of Good Hope Provincial Division of the High Court was consequently struck off the roll.

8. The applicant thereafter again approached this Court by way of notice of motion dated 11 July 2008 to secure assistance from Mr Gerber in furnishing him with printed search warrants and warrants for the arrest of persons.
9. In order to assist the applicant Mr Gerber furnished him, under cover of a letter dated 12 July 2008, with a blank search warrant and arrest form. Mr Gerber states that he was under no duty to do so and merely did so as a gesture of goodwill. In the aforesaid letter Mr Gerber advised the applicant as follows:

*"I further wish to state that it appears that you are preparing to institute a private prosecution in terms of section 7 of the Criminal Procedure Act, 1977 (Act 51 of 1977). No member of my personnel nor myself –*

- (a) will conduct any further consultation with you regarding this matter or any other matter emanating therefrom;*
- (b) will assist you in any way regarding any further investigation of the matter, in preparation for the trial or in obtaining further statements. Nor will instructions be issued to the South African Police Service to assist you;*
- (c) will assist you in your attempt to obtain either search warrants or warrants for the arrest of any person connected with the matter."*

10. Mr Gerber points out that the applicant complains that the "obstructive behaviour" by Mr Gerber and his personnel in denying his rights in terms of the Bill of Rights and that such behaviour is allowing the registrars of the

Labour Court in Cape Town and the Labour Appeal Court in Braamfontein to act with impunity. Mr Gerber denies these allegations. He points out that he has no connection whatsoever with the registrars of either the Labour Court in Cape Town or the Labour Appeal Court in Braamfontein.

11. Mr Gerber also denies that he or his personnel who have dealt with the applicant are behaving obstructively or that they were in any way infringing upon the applicant's rights in terms of section 8 of the Constitution.
12. Mr Gerber pointed out that with regard to the certificate issued in terms of section 7(2) of the Criminal Procedure Act –
  - (a) such certificate is issued when he considered that the institution of a prosecution by the State will either be bad in law, malicious or that there is no reasonable prospect of obtaining a conviction on the evidence contained in the docket submitted by the South African Police Service after their investigation;
  - (b) the issuing of such a certificate also entails that he considered that any further investigation into the complaint by organs of the State will further extend expenditure by the State on the matter, is not warranted or justified in all the circumstances of the matter and that the interests of justice will in no way be advanced thereby;

- (c) a further consequence of the issuing of such a certificate is that the entire prosecution is then in the hands of the private prosecutor. Such a prosecutor may then not rely on or expect any assistance from the State in the furtherance of the private prosecution. This Mr Gerber contends is supported by the provisions of sections 9 and 10 of the Criminal Procedure Act. Section 9 stipulates that the private prosecutor must furnish security for the costs of such a prosecution and section 10 stipulates that the *“private prosecution shall be instituted and concluded and all process in connection therewith issued in the name of the private prosecutor”*.

13. Mr Gerber states that the fact that a certificate in terms of section 7 of the Criminal Procedure Act has been granted to the applicant, relieves members of the office of the Director of Public Prosecutions, Cape Town, of any obligation to assist the applicant.

14. My attention was drawn to the fact that the applicant had brought similar applications in this Court under Case Nos. 1992/2008, 21319/2008, 20451/2008, 1000/2009, 999/2009 and 7245/2009. The history of these applications were as follows:

- (a) Case No. 1922/2008 was struck from the roll on 5 December 2008;
- (b) The application under Case No. 21319/2008 was dismissed by La Grange J on 6 January 2009;

- (c) The application in Case No. 20451/2008 was dismissed by Traverso AJP on 12 December 2008;
  - (d) The application in Case No. 1000/2009 was dismissed with costs by Allie J on 13 February 2009 as was Case No. 999/2009
  - (e) The application under Case No. 7245/2009 was dismissed with costs by Erasmus J on 9 April 2009 on the basis that it had previously been dismissed by Traverso AJP;
  - (f) The application under Case No. 8423/2009 was dismissed with costs by Cloete AJ on 7 May 2009 on the basis that it had previously been dismissed by Traverso AJP and Erasmus J.
15. Mr Gerber submits that it is clear from the foregoing that the applicant has since July 2008 consistently instituted unfounded and vexatious legal proceedings. Mr Gerber contends that the actions of the applicant is abusing the legal process in order to be able to pursue a vendetta against the aforementioned persons. The applicant has, it appears to me, persisted in bringing applications that had already been dismissed by this Court, and which therefore would be *res judicata*.
16. Mr Gerber contends that the actions of the applicant, in persisting without any reasonable grounds in instituting legal proceedings without just cause, cannot be in the interests of justice or of the affected persons. Mr Gerber asks that an order be made in terms of section 2(1)(b)<sup>2</sup> of the Vexatious

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<sup>2</sup> Section 2(1)(b) of the Act provides as follows:

Proceedings Act, No. 3 of 1956, namely that the applicant shall not be entitled to bring any legal proceedings against any person in any court in the Republic without the leave of this Court or any judge thereof, and that the applicant is to pay the costs of this application.

17. Section 2 of the aforementioned Act provides that a court, if it is satisfied that a person has persistently and without reasonable grounds instituted legal proceedings in any superior or inferior court, whether against the same person or different persons, may order that no legal proceedings shall be instituted by the said person in any superior or inferior court without the leave of that superior court, a judge of that court or that inferior court, as the case may be (Herbstein & van Winsen, The Civil Practice of the High Courts of South Africa, 5<sup>th</sup> edition, at page 246-247 and pages 520, 525).
18. In Fisheries Development Corporation v Jorgensen 1979 (3) SA 1331 (W) the court stated at 1339 that vexatious in the sense that the word is used in the Act means *"frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant"*.
19. The applicant appeared in person. He conceded that the applications were all similar. He also conceded that they were dismissed as set out above. He

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*"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 any inferior, 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 grounds for the proceedings."*



contended however that these dismissals were summarily done and because he perceived that he did not have a fair hearing, he considered that they had not been dealt with. This he said was the case because he had not been given any reasons.

20. Mr Oliver, who appeared for the respondents, informed me that he had on several occasions endeavoured to assist the applicant and that he had pointed out to him that there were no prospects of success in the application as well as the reasons for there being no prospects of success.

21. It seems to me that there never was any prospect of the applicant succeeding with the relief sought by him once he had been furnished with a certificate in terms of section 7 of the Criminal Procedure Act. The applicant seeks an order that the court order the respondents to grant him a certificate in terms of section 8(2) of the Criminal Procedure Act, and that the respondents consult with him as provided for in that Act.

22. Section 8(2) of the Criminal Procedure Act provides as follows:

*"A body which or a person who intends exercising a right of prosecution under subsection (1), shall exercise such right only after consultation with the attorney-general concerned and after the attorney-general has withdrawn his right of prosecution in respect of any specified offence or any specified class or category of offences with reference to which such body or person may by law exercise such right of prosecution."*

23. Subsection 8(1) refers to any body upon which or person upon whom the right to prosecute in respect of any offence is expressly conferred by law. Mr Oliver submitted that it is clear that the applicant is not a body or person upon whom the right to prosecute in respect of any offence is expressly conferred by law. This must be so. I am, accordingly, in agreement with Mr Oliver that the relief sought by the applicant is incompetent. What the applicant was entitled to was a certificate in terms of section 7 of the Criminal Procedure Act and it is common cause that such a certificate was issued to him and that he returned same to the respondents.

24. As pointed out above, the applicant has withdrawn the instant application.

25. In re Alluvial Greek Ltd 1929 CPD at 532 Gardener JP held as follows at 535 with regard to an issue concerning costs

*“There are people who enter into litigation with the most upright purpose and the most firm believe in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear.”*

26. Though the applicant has explained that he was acting in a *bona fide* manner, I am of the firm view that his conduct, nonetheless, is still to be regarded as vexatious. If he was at all concerned with the absence for any reason for any of the many orders granted against him, it was open to him to have requested such reasons. This he failed to do, and, instead, he

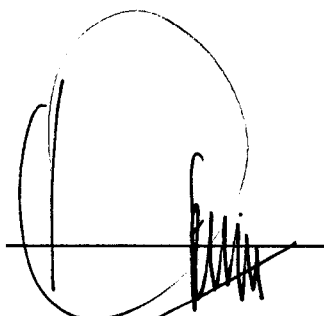
embarked on a persistent course of conduct in bringing applications the one after the other.

27. In my view the respondent is entitled to an order in terms of the counter-application.

28. In the premises I grant the following order:

(a) In terms of the provisions of section 2(1)(b) of the Vexatious Proceedings Act, No. 3 of 1956, the applicant shall not be entitled to bring any legal proceedings against any person in any court in the Republic without leave of this Court or any judge thereof;

(b) The applicant is to pay the costs of this application.



OLIVIER AJ