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

Case No: 6239/2021

In the matter between:

C[...] N[...]S[...]

Applicant

and

PAUL DESMOND SAM

First Respondent

FRANKLYN HEINRICH LINCOLN RAYMOND, N. O.

Second Respondent

**CLERK OF THE SMALL CLAIMS COURT
BELLVILLE**

Third Respondent

**CLERK OF THE SMALL CLAIMS COURT
KUILS RIVER**

Fourth Respondent

B[...] A[...] S[...]

Respondent

and

Case No: 17234/21

In the matter between:

C[...] N[...]S[...]

Applicant

and

PAUL DESMOND SAM

First Respondent

B[...] A[...] S[...]

Second Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 08 DECEMBER 2022

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] This judgment concerns two matters involving the same background facts (cases 6239/2021 and 17234/2021) which were heard together, by agreement between the parties. The latter of the two is an application to declare the first respondent a vexatious litigant in terms of the Vexatious Proceedings Act 3 of 1956 (*“the vexatious proceedings”*), and is dealt with later.

[2] The former (6239/2021) concerns four actions which were instituted in the Small Claims Court by the first respondent against the fifth respondent, Mr S[...] . In regard to all four actions the applicant seeks relief declaring the proceedings null and void for want of compliance with section 29(1)(e) of the Magistrate’s Courts Act 32 of 1944, read with section 172 of the National Credit Act 34 of 2005; alternatively, ordering the first, second¹, third and fourth respondents² to join the applicant as co-defendant in the actions; in the further alternative, ordering that the actions be transferred to the Magistrate’s Court, and allowing the applicant opportunity to join those proceedings as co-defendant.

B. THE FACTS

[3] The facts are common cause. On 28 November 2018, after one week of marriage to Mr S[...] , the applicant instituted divorce proceedings against him in the Bellville Regional Magistrate’s Court, and the divorce proceedings are still pending.

¹ Second respondent is a Commissioner in the Small Claims Court.

² Third and fourth respondents are clerks in the Small Claims Courts of Kuilriver and Bellville, respectively.

The applicant and Mr S[...] have been separated since the second day of their marriage. In the divorce proceedings, the applicant seeks an order of forfeiture of benefits against Mr S[...] on account of an alleged infidelity.

[4] On 8 March 2021, whilst awaiting finalization of the divorce, the applicant received an unannounced visit from the Sheriff of the Kuilsriver Magistrate's Court, who proceeded to attach her movable property on the strength of a warrant of execution.

(Case SC 465/2020)

[5] Upon investigation, the applicant discovered that the warrant of execution had been issued by the Kuilsriver Magistrate's Court pursuant to a default judgment granted in the Small Claims Court (in case number SC 465/2020) on 6 February 2021 against Mr S[...] , in favour of the first respondent, for the amount of R20,000. In turn, the default judgment was based on an acknowledgement of debt signed by Mr S[...] in favour of the first respondent.

[6] The acknowledgement of debt was signed on 26 April 2020³. It states that the facts giving rise to the debt are 'monies borrowed'; that the debtor (Mr S[...]) acknowledges indebtedness in the sum of R20,000 plus interest at a rate of 18%; that the debtor agrees to pay the outstanding amount in instalments of R5000 over a period of four months. Should the debtor fail to make payment on the due date, it states that the full balance of the outstanding amount becomes due and payable together with legal costs. In such event, it provides that the creditor is entitled to apply to the Magistrate's Court for judgment against the debtor for the outstanding amount, including legal costs.

[7] On 23 March 2021 the applicant obtained an interim order in the Kuilsriver Magistrate's Court, returnable on 21 April 2021, and staying the warrant of execution, pending an application for rescission in the Small Claims Court. It is not clear from the papers when the rescission application was launched in the Small Claims Court, but from a reading thereof it appears to have been before these

³ Although the year is not clear from the face of the document, it is common cause between the parties in these proceedings that it is 2020.

proceedings were launched which was on or about 13 April 2021. The rescission application of the default judgment was set down for 27 May 2021, and on that date the matter was postponed *sine die* pending the outcome of these proceedings. On 1 September 2021 the warrant of execution was set aside, with costs against the first respondent.

[8] On 24 March 2021 the sheriff served three summonses upon the applicant which were also issued by the first respondent against Mr S[...] . One of the summonses (case number SC 048/2021) was issued out of the Small Claims Court, Bellville, and two (case numbers SC 100/2021 and SC 101/2021) were issued out of the Small Claims Court, Kuilsriver.

(SC048/2021)

[9] The summons in SC 048/2021, dated 10 February 2021, was based on an acknowledgement of debt signed by Mr S[...] in favour of the first respondent on 2 August 2020, for an amount of R20,000 plus interest at the rate of 18%. It too was for 'monies borrowed'.

[10] Subsequent to the launch of these proceedings, the applicant applied to be joined as second defendant in case number SC 048/2021, and was so joined on 28 April 2021. A feature of those proceedings is that the first respondent admitted that, although the amount reflected in the acknowledgement of debt is R20 000, he had only advanced an amount of R12,000 to Mr S[...] , and the two of them agreed that the amount to be repaid was to be R20,000, payable in two instalments. The Commissioner in those proceedings dismissed the first respondent's claim because of non-compliance with the provisions of the National Credit Act. According to the notes of the Commissioner, which are attached to the answering affidavit, it is noted that the first respondent is not registered as a credit provider; that no credit assessment was conducted; and that there was no notice sent in compliance with section 129 of the National Credit Act. In the papers before this Court the first respondent states that he intends taking the matter on review because he disputes that the provisions of the National Credit Act are applicable.

(SC100/2021)

[11] The summons in SC 100/2021, dated 19 March 2021 was also based on an acknowledgment of debt signed by Mr S[...] in favour of the first respondent on 7 January 2021, for an amount R20,000 plus interest at a rate of 18%. In the acknowledgement of debt the facts giving rise to the debt are stated as “*monies borrowed (accommodation, food, electricity, water and basic essentials)*”.

[12] On 14 April 2021, after the launch of these proceedings, the matter in SC 100/2021 was struck off the roll of the Kuilsriver Magistrate’s Court, apparently because Mr S[...] was resident in Belhar and the cause of action also arose there. The first respondent states here that he intends to take those proceedings on review.

(SC 101/2021)

[13] The summons in SC 101/2021, dated 19 March 2021 was also based on an acknowledgment of debt signed by Mr S[...] in favour of the first respondent on 11 October 2020, for an amount of R7000 plus interest at a rate of 18% for ‘monies borrowed’.

[14] On 14 April 2021 the matter was struck off the roll of the Kuilsriver Magistrate’s Court and, similar to the matter above, the Commissioner held that he did not have jurisdiction to determine the matter because Mr S[...] resides in Belhar and the cause of action arose there. The first respondent has similarly stated he intends to take the matter on review.

C. THE PARTIES’ ARGUMENTS

[15] In the first place, the applicant states that, since the matters involve the application of the National Credit Act, they should have been instituted in the Magistrate’s Court since it alone is the court of first instance in such cases. In this regard the applicant relies wholly on the judgment in *Standard Bank of SA Ltd v*

*Lethlogonolo Kekana and 5 Others*⁴ (“*Kekana*”) in which the following was stated by Thulare AJ (as he then was):

“The National Credit Act, 2005 (Act No. 32 of 2005 (the NCA)) is applicable to all these matters. The Magistrates’ Courts have court of first instance jurisdiction in such matters, section 29(1)(e) of the Magistrates’ Courts Act read with Section 172(2) of the NCA. Section 29(1)(e) of the Magistrates’ Courts Act read:

“29 Jurisdiction in respect of cause of action

(1) Subject to the provisions of this Act and the National Credit Act, 2005 (Act 34 of 2005), a court, in respect of causes of action, shall have jurisdiction in - ...

(e) actions on or arising out of any credit agreement, as defined in section 1 of the National Credit Act, 2005 (Act 34 of 2005).”⁵

[16] Firstly, to the extent that the effect of the *Kekana* judgment is that a matter involving the National Credit Act must be instituted in one court in circumstances where such a court has concurrent jurisdiction with another, it was overturned by the Supreme Court of Appeal in *Standard Bank v Thobejane*⁶, as was *Nedbank v Gqirana NO and Others* on which the *Kekana* judgment relied in the same paragraph quoted above. Secondly, the facts in *Kekana* and *Gqirhana* indicate that those judgments did not involve the Small Claims Courts – the facts in both judgments were dealing specifically with the *fora* of Magistrate’s Court and High Court.

[17] In any event and most importantly, the argument that the Small Claims Court lacks jurisdiction to determine a matter dealing with the National Credit Act is clearly contrary to the provisions of the Small Claims Court Act 61 of 1984. Section 15(d) of

⁴ *Standard Bank of SA Ltd v Kekana; Standard Bank of SA Ltd v Mbedu; Standard Bank of SA Ltd v Mayaphi; Standard Bank of SA Ltd v Mbha; Standard Bank of SA Ltd v Van Zyl; Standard Bank of SA Ltd v Rodgers* (19167/19; 16945/19; 16365/19; 17242/19; 14294/19; 21309/18) [2020] ZAWCHC 44 (25 May 2020)

⁵ At para 13.

⁶ *Standard Bank of SA Ltd and Others v Thobejane and Others; Standard Bank of SA Ltd v Gqirana N O and Another* (38/2019; 47/2019; 999/2019) [2021] ZASCA 92; [2021] 3 All SA 812 (SCA); 2021 (6) SA 403 (SCA) (25 June 2021).

the Small Claims Court Act expressly provides that the Small Claims Court has jurisdiction to determine '*actions based on or arising out of a credit agreement as defined in section 1 of the National Credit Act... where the claim or the value of the property in dispute does not exceed [the gazetted amount, which is currently R20,000]*'. Thus, to the extent that the matters discussed above fall within the definitions in section 1 of the National Credit Act, and within the monetary jurisdiction of the Small Claims Court, the Small Claims Court is clothed with jurisdiction to determine them. That is the intention of the legislature, as expressed in the clear and unambiguous and peremptory provisions of the Small Claims Court Act. I was not referred to any other authority for the proposition that the Small Claims Court lacks jurisdiction to determine matters relating to the National Credit Act. The point lacks merit, although it is understandable that the applicant has sought to fall within the purview of the *Kekana* judgment.

[18] To the extent that the further alternative relief seeking transfer of the matters from the Small Claims Court to the Magistrate's Court is based on the jurisdiction point above, it is similarly unfounded.

[19] There are other complaints raised by the applicant based on the National Credit Act. She states that the acknowledgments of debt in the various matters constitute 'credit agreements' in terms of Section 8(3) of the National Credit Act. The result is that the first respondent was required to comply with sections 129 and section 130 of the National Credit Act before any of the summons were issued applicant, which was not done in any of the matters. Further, she points out that the first respondent failed to aver in any of the summonses commencing the actions that he is a registered credit provider as contemplated in section 40 of the National Credit Act.

[20] The applicant also points to the frequency of the loans, stating that it demonstrates that the first respondent failed to perform any credit assessment into Mr S[...] 's ability to repay the loans before advancing each loan. The frequency indicates that, by the time a fourth loan agreement was entered into for the amount of R20 000 in 7 January 2021, Mr S[...] already owed the first respondent an amount

of R47,000 plus interest, and, as the various summonses indicate, had not repaid any of it.

[21] Section 8(3) provides as follows:

“(3) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2) or section 4 (6) (b), constitutes a credit facility if, in terms of that agreement

(a) a credit provider undertakes

(i) to supply goods or services or to pay an amount or amounts, as determined by the consumer from time to time, to the consumer or on behalf of, or at the direction of, the consumer; and

(ii) either to –

(aa) defer the consumer's obligation to pay any part of the cost of goods or services, or to repay to the credit provider any part of an amount contemplated in subparagraph (i); or

(bb) bill the consumer periodically for any part of the cost of goods or services, or any part of an amount, contemplated in subparagraph (i); and

(b) any charge, fee or interest is payable to the credit provider in respect of

(i) any amount deferred as contemplated in paragraph (a) (ii) (aa); or

(ii) any amount billed as contemplated in paragraph (a) (ii) (bb) and not paid within the time provided in the agreement.”

[22] From the evidence before this Court, it is clear that the acknowledgements of debts do indeed constitute credit agreements as defined in the above provision. They are in respect of monies borrowed, and one instance, monies paid on behalf of, or at the direction of, Mr S[...]. It is furthermore clear that, contrary to the first

respondent's denial, in terms of the acknowledgements of debt, there is an interest rate payable as well as legal costs.

[23] It is also not in dispute that the peremptory provisions of sections 129 and 130 of the National Credit Act were not complied with. Furthermore, it does not appear that Section 81, which provides for peremptory credit assessments to be undertaken, was complied with, before any of the loans were advanced to Mr S[...].

[24] All the above instances of non-compliance with the provisions of the National Credit Act provide for defences against the actions launched by the first respondent. In these proceedings, the first respondent has submitted schedules describing the reasons for the monies borrowed in SC 465/2020 and SC048/2021. In respect of both matters, having regard to the schedules for purposes of interfering with the decisions of the commissioners would be inappropriate and would amount to determining appeals, which is contrary to section 45 of the Small Claims Court Act.

[25] In any event, the case of SC 048/2021 has already been decided by the Small Claims Court. I note that the dismissal of that case was subsequent to the launching of these proceedings. However, the applicant has not sought to amend the relief sought here in light of these developments. Nevertheless, this Court does not have lawful reason to interfere with the decision of the Commissioner as the matter is *res judicata*. Furthermore, no case has been made for review of those proceedings in terms of section 46.

[26] As for the two matters - SC 100/2021 and SC 101/2021 - they were struck off the Kuilsriver Small Claims Court roll, and at the time of the hearing of these proceedings had not been re-enrolled. It is correct that the first respondent is not precluded from enrolling them in a court with jurisdiction to determine them. However, there is no basis on which to grant any of the relief sought by the applicant in respect of those matters.

[27] As for SC 465/2020, the schedule attached by the first respondent does not change the fact that the default judgment was in fact granted based on the acknowledgement of debt signed by the first respondent and Mr S[...]. The fact that

the first respondent may have another claim based on enrichment does not change the fact that the default judgment was granted as it was on the basis of that document. In any event, there was no alternative claim based on enrichment in those proceedings.

[28] There are other reasons for this Court to not interfere with the decision in case SC 465/2020. It is common cause that the applicant has launched rescission proceedings, as ‘an affected person’ in terms of section 36 of the Small Claims Court Act. This is because the marriage between her and Mr S[...] is in community of property as a consequence of the Matrimonial Property Act 88 of 1984, and as a result, she and Mr S[...] share a joint estate. In terms of section 15(5) of the Matrimonial Property Act her consent was required before any of the alleged loans were entered into between the first respondent and Mr S[...]. Accordingly, she is ‘a person affected’ by the default judgment, as contemplated in section 36 of the Small Claims Courts Act, and was supposed to be joined as a party to the proceedings in the Small Claims Court.

[29] Given that the Small Claims Court has jurisdiction to grant such rescission I do not consider it appropriate or prudent for this Court to intervene in the matter for the reasons given by the applicant. Although the High Court has inherent jurisdiction to intervene in matters when justice required it to do so, it is important to remember that section 169(1) of the Constitution authorises the High Court to decide all matters other than those reserved for other courts.⁷ In my view, the matters that are the cause for complaint are catered for in the Small Claims Court Act, and that court is therefore entitled to deal with them.

[30] Furthermore, the basis on which the rescission is sought in that court is the same as the case made out by the applicant in these proceedings and, in my view constitutes adequate grounds to grant her such rescission. In that regard, the relief sought by the applicant is a duplication of the relief sought in those proceedings. And to the extent that the relief sought in regard to case 465/2020 may be construed as a

⁷ *Thobejane* para [16].

review application in terms of section 46 Small Claims Court Act, no such case has been made out.

[31] The applicant points out that neither the Small Claims Court Act nor the Rules promulgated thereunder make provision for her to bring an application to join the Small Claims Court proceedings as a party. However, as the first respondent correctly points out, the applicant's non-joinder does not result in a nullity of the proceedings launched against Mr S[...]. It provides the applicant with an opportunity to apply for joinder. Although the Rules of the Small Claims Court do not expressly provide for joinder in the sense contemplated by the applicant, the commissioners in such proceedings are accorded sufficiently wide enough powers to determine proceedings in a just and expedient manner, as they may in their discretion determine.⁸ This much is implied by the provisions of section 31 and 32 of the Small Claims Court Act. The applicant's joinder to be an issue which can be granted in the discretion by the commissioner. The result of the exercise of those powers was displayed in SC 048/2021, where the commissioner joined the applicant as a second defendant after she made an application for it.

[32] No cogent reason has been given here for why the applicant cannot continue to do the same. Apart from the successful attempt for joinder in SC 048/2020, there is no indication that the applicant has in fact attempted to bring such joinder applications in any of the other matters in the Small Claims Court. If such an attempt were unsuccessful that might form grounds for this court to review such a decision. However, matters have not reached that point.

[33] There is no authority for the relief sought in these proceeding on this aspect - for this Court to order the Commissioner and the clerks of the Small Claims Court to join the applicant as defendant in the matters. The applicant's remedy is to apply for joinder. It is not for this Court to usurp the function of the commissioners by ordering them to join the applicant as a co-defendant.

⁸ See in this regard *Smit v Seleka en andere* 1989 (4) SA 157 (O). *Raman v Barlow Motor Investments (Pty) Ltd t/a Natal Motor Industries, Prospecton & Others* 1999 (4) SA 606 (D) at 608.

[34] For completeness' sake, it is doubtless that the applicant has a direct and substantial interest in the claims and is a person affected thereby. I do not agree with the arguments made on behalf of the first respondent to the effect that the Matrimonial Property Act does not entitle the applicant to insist on being joined in the matters. It has always been accepted law that a creditor has the right to also look at, in this case, the applicant's property in satisfaction of the debts that are the subject of these proceedings.⁹ The applicant is eminently affected by all the alleged debts between the first respondent and Mr S[...] , as has been shown by the first respondent's attachment of her property and her joinder as co-defendant in actions subsequent to the ones discussed above, namely 250/2021 and 251/2021, which were not the subject of this application.

[35] On a consideration of the circumstances discussed above I am not persuaded that this Court is entitled to intervene in the manner sought by the applicant. In summary, the Small Claims Court does indeed have jurisdiction to determine matters involving the National Credit Act, to grant joinder where it is sought, and to grant rescission where it is sought. I am not persuaded that the applicant will be denied justice if the relief is sought is not granted to the applicant.¹⁰ This is not such a case.

THE VEXATIOUS PROCEEDINGS (CASE 17234/2021)

D. INTRODUCTION & BACKGROUND

[36] The vexatious proceedings are Part B of proceedings in respect of which interim relief was granted by this Court in October 2021. The applicant seeks relief declaring the first respondent and Mr S[...] vexatious litigants in terms of the Vexatious Proceedings Act, as well as prohibitory interdictory relief in relation to current proceedings between the parties. In order to appreciate the relief sought it is necessary to set out further events that occurred subsequent to those discussed above in relation to case 6239/2021.

⁹ *Du Plessis v Pienaar and Others* 2003 (1) SA 671 (SCA) at para [5].

¹⁰ See *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis & Another* 1979 (2) SA 457 (W) at 462H – 463B.

[37] On or about 19 June 2021 the first respondent caused the Bellville Magistrate's Court to issue two summonses to the applicant in cases SC 250/2021 and SC 251/2021. The applicant confirms that she received letters of demand prior to the summonses. In both summonses she was cited as co-defendant with Mr S[...] . According to the particulars of claim in SC 250/2021 the claim, which is for R11 385, is in respect of money lent to Mr S[...] for four car payments which he neglected to pay back. In the case of SC 251/2021, the claim of R19 700 is in respect of money lent to Mr S[...] for accommodation, food, airtime, electricity, water and phone which he neglected to pay back. The matters in SC 250/2021 and SC 251/2021 were heard on 4 October 2021, where the applicant was in attendance, and were dismissed by the Commissioner as against the applicant but were upheld as against Mr S[...] .

[38] Subsequently, the applicant received two further letters of demand from the first respondent, one in respect of an amount of R16 200 advanced to Mr S[...] in June and July 2021, and the other in respect of a further amount of R16 200 advanced to him in August and September 2021. As at the time of launching these proceedings, the applicant had not yet received summonses in those matters.

[39] On or about 25 August 2021 Mr S[...] initiated litigation against the applicant seeking spousal maintenance, and an inquiry was set down for 27 September 2021 but was subsequently postponed to November 2021 for reasons not disclosed to this Court. In addition, Mr S[...] has instituted a case in the CCMA against the applicant, although the details of that claim have also not been provided in these proceedings.

[40] Relying on all that is discussed above, the applicant seeks an order declaring the first respondent and Mr S[...] vexatious litigants in terms of section 2(b) of the Vexatious Proceedings Act. She also seeks a range of prohibitory interdictory relief in relation to the proceedings already instituted by the first respondent (SC 100/2021, SC 101/2021, SC 048/2021, SC 250/2021 and SC 251/2021), and proceedings instituted by Mr S[...] for spousal maintenance and in the CCMA, to the effect that those proceedings may only proceed after leave is sought and obtained from the Deputy Judge President of this Division.

[41] The applicant states that the first respondent and Mr S[...], in collusion with one another, have embarked on a course to institute persistent and ungrounded legal proceedings against her. She states that their *modus operandi* is for the first respondent to institute court proceedings in the various courts, which are attended by both the first respondent and Mr S[...], where the latter readily consents to the claims and an easy judgment is entered against him to the detriment of the applicant. The intention, says the applicant, is to obtain a warrant of execution so that the applicant's assets, which belong in the joint estate, may be attached and sold. Put simply, the applicant states that the loans are all 'bogus' and 'a sham', and are an attempt by both respondents to extort money from her whilst the divorce proceedings are pending. She also states that this amounts to an abuse of court processes.

[42] In substantiation of her claims, the applicant delivered a further affidavit before the hearing of the proceedings, which was admitted with the consent of the first respondent. The applicant annexed to the further affidavit a copy of a digitally transcribed recording of a conversation between her, her attorney Mr Visagie and Mr S[...] which occurred in a passage at the Bellville Magistrate's Court, during one of the court appearances between the married couple. Mr Visagie has deposed to a confirmatory affidavit confirming the conversation and the events surrounding it.

[43] According to the applicant, before the conversation was recorded, Mr S[...] stated that he wished to bring an end to all the litigation between him and the applicant, and that he had decided to end his litigation relationship with the first respondent. It was after this point of the conversation that Mr Visagie started to digitally record the conversation. The applicant states that the transcript reveals that, contrary to the acknowledgements of debt, the first respondent never gave money to Mr S[...] ; that the first respondent forced Mr S[...] to sign the acknowledgements of debt; and that this was a scheme perpetuated by the two with the intention to defraud the applicant. At the same time the applicant and Mr Visagie state that Mr S[...] confirmed to them that in respect of the one claim (SC 048/2021) the first respondent had only advanced to him an amount of R12,000, and not R20,000 as reflected in the summons.

[44] The applicant adds that, after the dismissal of the case against her on 4 October 2021, the first respondent made clear that he still intends to execute and attach her assets because she was married in community of property to Mr S[...] . He also proposed 50% settlement of his claims.

[45] The first respondent opposes the relief sought on the basis, firstly, that the provisions of the Vexatious Proceedings Act do not relate to proceedings already instituted - they only provide protection against the institution of future vexatious proceedings. Secondly the first respondent denies that the litigation instituted by him constitutes 'persistent litigation' and/or is 'without reasonable cause'.

E. THE APPLICABLE LAW RE VEXATIOUS PROCEEDINGS

[46] Section 2(1)(b) of the Vexatious Proceedings Act provides as follows:

"If, on 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 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."

[47] An applicant who seeks the protection of the above provisions must establish, first, that the respondent has in the past instituted legal proceedings in a court against her, or any other person or persons persistently and without reason; and

secondly, that further litigation has been brought against her or is reasonably contemplated.¹¹

[48] Since this the return day of a *rule nisi* and interdict, the application can only be granted if the applicant establishes the requirements for a final interdict as set out long ago in *Setlogelo v Setlogelo*¹², namely: (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of similar protection by any other ordinary remedy.

[49] As stated in *National Director of Public Prosecutions v Zuma*¹³, motion proceedings, unless concerned with interim relief are all about resolution of legal issues based on common cause facts. Unless the circumstances are special, motion proceedings cannot be used to resolve factual issues because they are not designed to determine probabilities.¹⁴ Similarly, the question of *onus* does not arise, irrespective of where the legal or evidential onus lies.¹⁵

[50] It is generally undesirable to endeavour to decide an application upon affidavit where the material facts are in dispute¹⁶, and a final interdict may be granted on application if no *bona fide* dispute of fact exists.¹⁷

[51] In terms of the *Plascon-Evans*¹⁸ rule where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order.¹⁹ It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in

¹¹ *Member of the Executive Council for the Department of Co-operative Governance and Traditional Affairs v Maphanga* (652/2018) [2019] ZASCA 147; [2020] 1 All SA 52 (SCA); 2021 (4) SA 131 (SCA) (18 November 2019) at para [12].

¹² *Setlogelo v Setlogelo* 1914 AD 221 at 227.

¹³ *National Director of Public Prosecutors v Zuma* 2009 (2) SA 277 (SCA) paras [26] – [27].

¹⁴ *NDPP v Zuma* para [26].

¹⁵ *NDPP v Zuma* para [27].

¹⁶ Harmse *Civil Procedure in the Supreme Court*, B6.45

¹⁷ *Plascon-Evans* supra.

¹⁸ *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

¹⁹ Harmse *Civil Procedure in the Supreme Court*, B6.45.

rejecting them merely on the papers.²⁰ The Court has to accept those facts averred by applicant that were not disputed by respondents, and respondents' version insofar as it was plausible, tenable and credible.²¹

[52] On the other hand, it is equally undesirable for a court to take all disputes of fact at their face value. If this were done a respondent might be able to raise fictitious issues of fact and thus delay the hearing of the matter to the prejudice of the applicant.²² In every case the court should examine the alleged disputes of fact and determine whether in truth there is a real issue of fact that cannot be satisfactorily resolved without the aid of oral evidence.²³

F. DISCUSSION RE VEXATIOUS PROCEEDINGS

[53] As I have stated, the first argument on behalf of the first respondent is that the provisions of the Vexatious Proceedings Act do not relate to proceedings already instituted - they only provide protection against the institution of future vexatious proceedings. As a result, insofar as the application seeks relief in respect of proceedings already instituted it is incompetent.

[54] In this regard the first respondent is supported by the case of *Absa Bank Limited v Dlamini*²⁴ in which the following was stated:

“An analysis of the Act and the aforesaid authorities (and the authorities mentioned therein) seems to enforce of the view that: (a) the court has no inherent jurisdiction at common law to prevent the future institution of vexatious proceedings; and (b) the

²⁰ *Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd* 2017 (2) SA 1 (SCA); *National Director of Public Prosecutions v Zuma* [2009] 2 All SA 243; 2009 (2) SA 279 (SCA).

²¹ *Airports Company South Africa Soc Ltd v Airports Bookshops (Pty) Ltd t/a Exclusive Books* [2016] 4 All SA 665 (SCA).

²² *Petersen v Cuthbert & Co Ltd* 1945 AD 420 428. A hollow denial or a detailed but fanciful and untenable version does not create a dispute of fact: *Truth Verification Testing Centre CC v PSE Truth Detection Centre CC* 1998 (2) SA 689 (W) 698; *Rosen v Ekon* [2000] 3 All SA 23 (W) 39; *Ripoll-Dausa v Middleton NO* [2005] 2 All SA 83 (C), 2005 (3) SA 141 (C).

²³ *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) pars 234-239. It has variously been called a “genuine” or “bona fide” dispute.

²⁴ *Absa Bank Limited v Dlamini* (41460/07) [2007] ZAGPHC 241; 2008 (2) SA 262 (T); [2008] 2 All SA 405 (T) (23 October 2007) at paras [24] – [25].

provisions of the Act only aim to protect a person or persons against the institution of future vexatious proceedings in any court or inferior court and does not relate to any proceedings already instituted. Consequently, the Act does not afford protection against vexatious proceedings, or an abuse of process in respect of legal proceedings, which have already been instituted. The provisions of the Act consequently do not, *inter alia*, allow for vexatious proceedings which have already been instituted, to be stayed or struck out nor to prevent or terminate legal processes which emanated or might emanate from such proceedings.

...The only protection for a litigant against a vexatious proceeding or proceedings, or an abuse of a process or processes concerning a legal proceeding or proceedings which had already been instituted, has to be derived from the common law...”

[55] The Supreme Court of Appeal supported this view in *Member of the Executive Council for the Department of Co-operative Governance and Traditional Affairs v Maphanga*²⁵, stating that the ordinary wording brings within its purview actual or prospective litigation brought or threatened by a person who has persistently, and without any reasonable ground, instituted legal proceedings in any court or inferior court, whether against the same or any other person or persons.

[56] On the application of the above case law, the provisions of the Vexatious Proceedings Act are applicable only insofar as the applicant seeks relief in respect of future proceedings that may be instituted by the first respondent or Mr S[...] in any court. That relief is sought at paragraph 19 of the notice of motion, where the applicant seeks an order declaring and ordering that no legal proceedings may be instituted by the two gentlemen against the applicant in this court or any lower court without first obtaining the necessary permission.

[57] Insofar as the applicant seeks relief prohibiting the respondents from proceeding with legal proceedings already instituted unless they first seek leave of the Deputy Judge President of this Division, she could only obtain that relief in terms

²⁵ *Member of the Executive Council for the Department of Co-operative Governance and Traditional Affairs v Maphanga* (652/2018) [2019] ZASCA 147; [2020] 1 All SA 52 (SCA); 2021 (4) SA 131 (SCA) (18 November 2019) at para 12.

of the inherent powers of this court in common law.²⁶ The High Court does possess inherent jurisdiction to prevent the abuse of its own process in the form of vexatious litigation - claims that are “frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant”.²⁷ In fact, it is the duty of the High Court to prevent abuse when the court finds that an attempt is being made to use the machinery devised for the better administration of justice for an ulterior motive.²⁸

[58] However, the limitations of the common law relief cannot provide assistance to the applicant in this case because the power of this Court to prevent an abuse of the processes of the court by a vexatious litigant cannot not go beyond the immediate requirements of the case that is before me.²⁹ The Court does not have common law inherent power to impose a general prohibition curtailing a party’s (in this case the first respondent’s and Mr S[...]’s) ordinary right of litigation in respect of all courts and all parties.³⁰ The common law remedy only serves to prevent the abuse of this Court’s process, without being concerned with the process of other courts. The result of this limitation in *Corderoy v Union Government (Minister of Finance)* was that the appeal court narrowed the application of the relief granted from being exercised in other courts, to only the proceedings of that High Court.

[59] It therefore appears that there remains a *lacuna* in the remedy provided by the Vexatious Proceedings Act in this regard because, according to the case law, there is no effective remedy for a litigant in the applicant’s predicament. She seeks relief in relation to existing litigation, but which is not before this Court. Only the Vexatious Proceedings Act provides relief for litigation that is before another court, but it only provides relief in respect of prospective litigation, not existing litigation.

[60] Given this *lacuna*, and this Court’s constitutional responsibility, in terms of section 173 of the Constitution to protect and regulate its own process and to develop the common law, taking into account the interests of justice, I am of the view that this is an occasion to come to the assistance of the applicant by providing relief;

²⁶ *Absa v Dlamini* at para 32.

²⁷ *Cohen v Cohen and Another* 2003(1) SA 103 (CPD).

²⁸ *Hudson v Hudson* 1927 AD 259 at 268.

²⁹ *Corderoy v Union Government (Minister of Finance)* 1918 AD 512 at 519.

³⁰ *Corderoy* and *Absa v Dlamini* at para 19-20.

provided that the applicant makes out a case that the proceedings are indeed vexatious in the sense contemplated in the common law.

[61] The common law standard for vexatious proceedings has been stated as follows:³¹ It must be so manifest that the action is unfounded that it could not possibly be sustained; it must be quite clear that the failure of the action is a foregone conclusion; a court must be satisfied that the likelihood of the case succeeding stands altogether outside the region of probability and is vexatious because it is impossible. It is a very high standard, understandably because it affects the elemental right of free access to the courts in terms of section 34 of the Constitution, and as a result, courts have been cautioned to be slow to interfere except in exceptional and necessary instances and only in a clear case.³²

[62] With the above legal background, I now turn to the parties' arguments. The first respondent disputes that the litigation he has instituted is persistent, stating that the proceedings he has instituted are premised on different causes of actions. He states that the litigation could only be persistent if it was based on the same cause of action or the same underlying facts.

[63] The court *a quo* in *Maphanga* held as follows regarding the requirement of 'persistent' institution of legal proceedings:

"Taking account of the language, the context and, in particular, the purpose of the legislation and the background to its preparation, the word must mean recurring legal proceedings and not sheer doggedness in seeing a single matter through to finality. Because the legislation limits the right of access to the courts, it must be restrictively interpreted in a way which least intrudes on that right. What is thus required is repeated institution of legal proceedings."³³

³¹ See *Corderoy v Union Government (Minister of Finance)* at 517. See also *Fisheries Development Corporation of SA Ltd v Jorgensen*; *Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd* 1979 (3) SA 1331 (W) at 1338. See also *Argus Printing & Publishing Co Ltd v Anastassiades* 1954 (1) SA 72 (W) at 74.

³² *Corderoy v Union Government (Minister of Finance)* 1918 AD 512 at 520.

³³ At para 19.

[64] The SCA judgment of *Maphanga* agreed with the above restrictive interpretation, stating that the meaning envisaged in the present context must be a ‘recurring’ or ‘constantly repeated or continuous’ institution of legal proceedings in a court.

[65] I do not agree with the first respondent’s argument that what is envisaged by ‘persistent’ for purposes of the Act, or in the case law above is necessarily the same cause of action or the same underlying facts. The facts in *State Attorney v Sitebe*³⁴ dispel that notion. There, similar to the matters launched by the first respondent in the Small Claims Court, the same litigant launched various claims of a similar nature. Although they were different claims, the relief sought was similar. The court concluded that Mr Sitebe was a vexatious litigant.

[66] The preferable approach in my view is to bear in mind the interests that the Act aims to protect, which were summarised by the Constitutional Court in *Beinash and Another v Ernst & Young and Others* as follows: “[T]he 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”.³⁵ It is notable that these priorities are in the same vein as those stated in *State Attorney v Sitebe* where the court stated that it will consider “the general character and result of the action and not merely whether there may not have been possible causes of action in some of the case; also that though the number of occasions is comparatively small, there may be exceptional circumstances justifying the making of an order”.³⁶

[67] In my view, on application of the above case law, the first respondent has displayed persistence in instituting litigation against the applicant and Mr S[...] in the matters currently pending between the parties. The common cause facts establish the applicant’s apprehension that the first respondent has no intention of abating his conduct, which doubtlessly has the result that the applicant is harassed by means of

³⁴ *State Attorney v Sitebe* 1961 (2) SA 159 (N).

³⁵ *Beinash (CC)* para [15].

³⁶ *State Attorney v Sitebe* at 160H.

his litigation. I am not persuaded by the first respondent's explanation that it is necessary to institute the proceedings as frequently as he does because he wants to avoid prescription. There is also no explanation for why he has issued legal processes in different areas. It is understandable why the applicant feels harassed by the frequent and bombarding fashion in which he continues to advance the proceedings, especially given the fact that, until the matters in SC 250/2021 and SC 251/2021, she received no prior notice of these proceedings.

[68] However, it is in regard to the requirement that the litigation should be without reasonable cause that the applicant's case faces difficulty. In this regard, the applicant places significant reliance on the digital recording mentioned earlier. However, the transcribed recording is not altogether clear, and contains many gaps and ellipses, and in material respects which are disputed by the first respondent. Moreover, there is no confirmatory affidavit from Mr S[...] in regard to the transcript despite the fact that the papers in these matters were served upon him. For his part, the first respondent has, also 'transcribed' what he says is a denial of the contents of the applicant's transcript by Mr S[...] . However, this denial is also without a confirmatory affidavit from Mr S[...] .

[69] In any event, what clearly appears from the transcribed recording provided by the applicant is that Mr S[...] stated as follows: "*the loan thing is a true story*", "*he got me a loan*", "*there is no scams*". At the same time, Mr S[...] stated that he never received cash from the first respondent in respect of any of the acknowledgements of debt. He stated that he was forced to sign the acknowledgements of debt.

[70] He acknowledged, however, that the first respondent gave him accommodation, paid for his 'caddy' in circumstances where Mr S[...] was 'in the red'; and the first respondent bought food for him. In this respect, I note that this information is corroborated by the first respondent's version.

[71] What this establishes is that Mr S[...] disputes the circumstances suggested by the acknowledgments of debt, especially the suggestion that any money exchanged hands. He, however, does not dispute the services provided to him by the first respondent. It is not clear from the transcript whether Mr S[...] disputes that

he owed something in return to the first respondent. However, the fact that the first respondent advanced these services remains and is the basis on which he has instituted his claims.

[72] Given that Mr S[...] has not deposed to an affidavit before this Court, the full circumstances of what is alleged to be a scam by the applicant have not been set out adequately for purposes of granting a final order. Apart from the first respondent, it is Mr S[...] who would be able to give a full account of the circumstances of these claims. Ultimately, the problem is that the applicant relies on hearsay because she has no actual knowledge of whether or not the claims are legitimate.

[73] On the other hand, the first respondent explains that, after Mr S[...] was separated from the applicant he (first respondent) assisted by providing Mr S[...] with accommodation, food and money to help him through the difficult period, which he was to repay upon demand. The reason he instituted so many matters in the Small Claims Court is because of its limited monetary jurisdiction. He further states that although he was aware that the applicant and Mr S[...] were married, he did not know that they were married in community of property. Once he learned that fact, he caused proceedings to be also be sent to her, which is why she received the letter of demand and was joined in the later matters of SC 250/2021 and SC 251/2021.

[74] In my view, this explanation, which is in part corroborated by the transcript, provides some reasonable basis for launching the proceedings, although it does not necessarily mean that the proceedings will be successful. Having regard to the first respondent's explanation, it cannot be said at this stage that his claims are unfounded and could not be sustained. That is for the courts to determine when surveying the evidence. In fact, as I have already mentioned, the claims in SC 250/2021 and SC 251/2021 were upheld in respect of Mr S[...] after evidence was led, lending credence to the first respondent's version that the claims are legitimate. The fact that the first respondent has now joined the applicant in those proceedings is not, on its own, proof of abuse of court processes. After all, in case 6239/2021 the applicant bemoans the fact that she was not joined in the previous proceedings.

[75] It has accordingly not been established that the first respondent's claims are without reasonable cause.

[76] As regards Mr S[...] 's maintenance and CCMA claims, because of the paucity of information provided by the applicant, this Court does not have sufficient evidence of 'persistent litigation' on his part against the applicant. Neither has this Court been placed in a position to determine whether those claims have been instituted without reasonable cause. The mere fact that Mr S[...] has instituted them does not render them vexatious.

[77] Apart from the fact that the applicant has failed to establish a clear right to obtain the relief she seeks, she also has alternative relief in the lower courts. As indicated by the outcome in SC 048/2021, those courts are adequately able to come to her assistance. The fact that the first respondent may institute review of those proceedings is a consequence of the legal avenues accorded to him by the Small Claims Court Act. It is not necessarily an indication of vexatious proceedings, and also does not mean that he will be successful. It may be that, in due course the applicant may be able to mount a case based on vexatiousness. However, I am not persuaded that a case has been made out in that regard.

[78] There is also no information placed before Court as to why the divorce proceedings have not been finalised. In my view, that issue is related to the remedies available to the applicant.

[79] There is no reason as to why costs should not follow the result. I am, however, not persuaded that costs should be granted on a punitive scale given that I have found that the first respondent's conduct has been persistent, and given the fact that the applicant received no notice before the barrage of litigation involving her commenced in the lower courts.

[80] For all the reasons given, the following order is granted:

- a. In case 6239/2021, the application is dismissed, with costs.

b. In case 17234/2021, the application is dismissed, with costs. The interim order granted on 14 October 2021 is discharged.

N MANGCU-LOCKWOOD
Judge of the High Court