

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

**CASE NO: 20/33629
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
NOT REVISED**

In the matter between:

S First Applicant

M Second Applicant

and

T Respondent

JUDGMENT

MITCHELL, AJ

- [1] The first applicant is the biological mother and the respondent is the biological father of the minor child, “**K**”, who is presently 5 years of age. K was born from a relationship between the first applicant and the respondent which lasted from January 2014 until October 2017. The first applicant ended the relationship shortly after she found out

that she was pregnant with K. The second applicant is K's maternal grandmother.

- [2] Where reference is made in this judgment to "the applicant" this is a reference to the first applicant and where reference is made to "the parties", this is a reference to the first applicant and the respondent collectively. Where reference is made to "the applicants", this is a reference to the first and second applicants collectively.

The relief sought and issues to be determined

- [3] The application before me was issued on 23 October 2020. In the notice of motion, the following final relief is claimed:

- "1. *That the Respondent be declared a vexatious litigant;*
2. *It is ordered that no legal proceedings shall be instituted by the Respondent against the First or Second Applicants in any court without the leave of that court;*
3. *Such abovementioned leave shall not be granted unless the court is satisfied that the proceedings to be instituted are not an abuse of the process of the court and that there is prima facie grounds for such proceedings;*
4. *In the event that the court grants such permission, the*

Respondent is to provide security for costs to the First and Second Applicants in an amount to be determined by the Registrar;

5. *It is ordered that no complaints and/or charges will be laid against the First or Second Applicants by the Respondent in respect of matters involving the minor child unless leave has been granted to do so by this Honourable Court;*

6. *Such abovementioned leave shall not be granted unless the above Honourable Court is satisfied that the complaint and/or charge to be laid against the First or Second Applicant is not an abuse of the process and that there is prima facie grounds for such complaint and/or charge to be laid;*

7. *In the event that the court grants such permission, the Respondent is to provide security for costs to the First and Second Applicant/s in an amount to be determined by the Registrar;*

In the alternative to prayers 2 to 7 hereinabove:

8. *Prior instituting (sic) any further legal proceedings against the First or Second Applicant/s, the Plaintiffs must first attain written*

permission of the Deputy Judge President of the above Honourable Court;

9. *In the event that the Deputy Judge President grants such permission, the Respondent is to provide security for costs to the First and Second Applicant/s in an amount to be determined by the Registrar;*
10. *The Respondent is interdicted from proceeding with and/or instituting any further legal proceedings against the First and Second Applicants unless the Respondent has the written permission from the Deputy Judge President to proceed with and/or institute such litigation, in which event the Deputy Judge President is to be satisfied that the proceedings to be proceeded with and/or instituted do not constitute an abuse of process and that there are prima facie grounds for such proceedings;*
11. *The Respondent to pay the costs of this application on an attorney-client scale;*
12. *Further and/or alternative relief;*

In the alternative to prayers 1 to 10 hereinabove:

13. *That the Respondent be interdicted from laying complaints and/or charges against the First or Second Applicants in*

respect of matters involving the minor child unless leave has been granted to do so by this Honourable Court."

The judgment and order granted by Makume J on 11 October 2022

[4] On 30 September 2022, the applicants brought an application against the respondent for relief in identical terms to the relief sought in the present application, save that:

2.1 the application was brought as a matter of urgency and the applicants sought an order that the non-compliance with Rule 6(12)(a) be condoned; and

2.2 the relief was sought "*as a final order, alternatively an interim order pending the outcome of the main application on the ordinary roll*".

[5] The urgent application was enrolled before Makume J on 6 October 2022, less than 2 weeks before the present application was due to be heard on 17 October 2022.

[6] On 11 October 2022, Makume J handed down his order and judgment in the urgent application. The judgment and order of Makume J did not form part of the papers before me in the present application. During the course of argument I requested the legal representative on behalf of the applicants to upload onto CaseLines the judgment and

order of Makume J together with the applicants' notice of motion in the urgent application. This was duly done.

[7] The relevant portions of the judgment of Makume J read as follows:

"[14] At the commencement of this hearing I enquired from Applicant's Counsel why this Court should deal with the issue of declaring the Respondent a vexatious litigant when the matter is already set down for hearing on the 17th October 2022 which is in less than two weeks from time from now. Counsel for the Applicant correctly conceded that they are not persisting with that prayer but will seek an interim order interdicting the Respondent from instituting or laying criminal charges or complaint against the Applicant pending the outcome of the hearing set down for the 17th of October 2022."

And further:

"[18] This application is not urgent and should have been struck off the roll on the basis that the action itself to declare the Respondent a vexatious litigant was long set down for hearing on the 17th of October 2022. There was accordingly no reason to rush to this Court."

[19] However, even if I am found to be incorrect the Applicant should fail on the basis that she has not demonstrated a prima facie

right, one of the requirements for interdictory relief, she has alternative

relief because the matter is set down for hearing on the 17th of October 2022. Her argument of reasonable apprehension that the Respondent will continue to lay charges against her is speculative."

And further:

"[21] The Applicant has earlier abandoned the prayer on declaration of vexatious litigation and only seeks an interdict that the Respondent should not lay any complaints or charges against her in connection with the minor child. Applicant has failed to make a proper case for those prayers. In any case such prayers are wide and infringe on the Respondent's section 34 rights.

[22] In the result I make the following order:

(a) The application is dismissed with costs."

[8] The affidavits before me were voluminous. In reply to the respondent's answering affidavit to the applicant's fourth supplementary affidavit the applicant said as follows:

"... I also refer to the urgent application (under case number 22/26805, which is available on Caselines). For ease and for

content to this criminal charge, I attach hereto the affidavits filed in the urgent application marked as annexures "RA1", "RA2", and "RA3" (being the Founding Affidavit, Answering Affidavit, and Replying Affidavits respectively). This matter was struck from the urgent roll for lack of urgency (and not on the merits)."

[9] Makume J did not, as contended for by the applicants, strike the matter from the urgent roll for lack of urgency. He dismissed the application and ordered the applicants to pay the costs. The first reference to the order and judgment of Makume J appeared in the applicant's reply to the respondent's answering affidavit to the applicant's fourth supplementary affidavit, which reply was deposed to on 27 January 2023, being the same day that this matter was heard. An unsigned copy of the affidavit was uploaded to CaseLines on 26 January 2023. Had I not granted the applicant leave to deliver her fourth supplementary affidavit the existence of the Makume J order would not have come to my attention because it was not previously referred to in the previous affidavits and no reference was made to it in the applicant's counsel's heads of argument.

[10] The facts on which the applicant sought to rely in support of the relief claimed in the urgent application before Makume J were not materially different from the evidence before me in the present application. It seems therefore that the applicant now seeks to have a second bite at the cherry, so to speak, and to have another Court arrive at a different

conclusion to that reached by Makume J on essentially the same material facts.

[11] I accordingly find that the application before me is *res judicata*, having been determined by Makume J.

[12] If I am wrong in finding that the application is *res judicata*, I turn to address the relief sought. The applicants sought relief declaring the respondent to be a vexatious litigant and relief consequent upon the declaratory order (paragraphs 1 to 12 of the notice of motion). In the alternative to the declaratory order, the applicants sought final interdictory relief (paragraph 13 of the notice motion).

[13] In the application before Makume J, where final interdictory relief was sought, alternatively an interim interdict pending the determination of the present application, Makume J found that the applicant had failed to demonstrate a *prima facie* right and that her claim of a reasonable apprehension that the respondent would continue to lay charges against her was speculative.

[14] The requirements for a final interdict are the following:

14.1 There must be a clear right on the part of the applicants. What this means is the applicants must show on a balance of probabilities the rights which they seek to protect. Any factual disputes must be resolved in terms of the Plascon-Evans rule.¹

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- 1 Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A), at 634E-G.
Final relief may only be granted if the facts as stated by the respondent together with the admitted facts in the applicant's affidavits justify the granting of final relief.

14.2 There must be an injury actually committed or reasonably apprehended. The applicants must adduce evidence and proof of some actions which interfere with the applicants' rights or at least a well-grounded apprehension that such an act may occur.

14.3 There must be no other satisfactory remedy available to the applicants.

[15] Makume J had already determined that the applicants had not met the requirements of an interim interdict. The applicants had relied on the same facts in the application before me. They had not met the requirements of final interdictory relief and the numerous affidavits demonstrate disputes of fact which must be resolved in accordance with the Plascon-Evans rule.

The Children's Court proceedings

[16] The proceedings in the Children's Court and complaints flowing from the applicant's alleged breaches of the Children's Court's order lead to the present application.

[17] On 3 September 2018, the respondent brought an application to the Children's Court, Randburg, in terms of Section 53 of the Children's Act 38 of 2005 ("the CA"). K was about 4 months old at that time and the respondent was yet to meet K.

[18] The applicant alleged in her founding affidavit that the Children's Court application was brought by the respondent as one for a child in need of care in order to enable him to bring the matter before the Children's Court without having to prove that he had any parental rights in respect of K or that he had the requisite *locus standi* to approach the Children's Court.

[19] The respondent denies that he brought to the attention of the clerk of the Children's Court that K may be in need of care. He brought his application by completing a Form 2 as prescribed in terms of Regulation

6(1) of the Regulations relating to Children's Courts and International Child Abduction, 2010.

[20] Regulation 6(1) of the regulations relating to Children's Courts and International Child Abduction, 2010 provides the following under the heading "**Bringing matter to court**":

"6(1)A A person referred to in section 53 of the Act, who intends to bring a matter to court in terms of that section, must notify the clerk of his or her intention to do so on a form which corresponds substantially with Form 2 of the Annexure."

[21] Section 53(2)(b) of the CA provides that any person acting in the interests of the child may approach the Children's Court.

[22] In terms of Section 45(1)(b) of the CA, the Children's Court may adjudicate upon, amongst other things, any matter involving the care of, or contact with a child.

[23] In his affidavit supporting his application to the Children's Court, and under the heading "Please state IN FULL THE CIRCUMSTANCES of your application and what remedy is sought", the respondent stated the following:

"I would love to see my daughter, I have not seen her before in my life, ever. I would love to see her at least once or twice a week. I would love my family to meet my child, I would ask she drop off the baby once a week or I fetch her once a week. I also ask we see a family therapist, my aim is to see my baby, build a bond, see her and be a father in her life."

[24] Nowhere in the respondent's application to the Children's Court, is any mention made by the respondent that K is a child in need of care. His application to the Children's Court was an application to enable him to have contact with K.

[25] I am satisfied that the respondent approached the Children's Court as a person acting in the interest of K. Moreover, as K's biological father, the respondent clearly had the requisite *locus standi* to approach the Children's Court in the interest of K. The applicant conceded this much in her replying affidavit in which she stated:

"Insofar as the Children's Court matter is concerned, I fully understand and appreciate that the Respondent is entitled to approach same as the biological father, and that ultimately any costs order in respect of mala fide conduct therein can be determined by the Children's Court".

[26] This statement by the applicant in her replying affidavit contradicted her contention in her founding affidavit that the respondent lacked the requisite *locus standi* to approach the Children's Court for relief in respect of K.

[27] Despite the voluminous affidavits before me there is no indication that there is a dispute between the applicant and the respondent as to whether the respondent has acquired parental responsibilities and rights in respect of K in terms of Section 21 of the CA when he brought the application referred to above to the Children's Court. It is common cause that the respondent is K's biological father. Accordingly, the applicant's contention that the respondent brought his application to the Children's Court on the basis that K may be in need of care and protection to avoid having to show that he had parental responsibilities and rights in respect of K is incorrect. I am satisfied on the affidavits before me that the respondent's approach to the Children's Court was neither *mala fide* nor vexatious but was an attempt on his part to obtain contact with his child.

[28] In terms of Section 50 of the CA, a Children's Court may, *inter alia*, before it decides a matter, order any person to carry out an investigation

that may assist the court in deciding the matter and to furnish the court with a report and recommendation thereon.

[29] On 19 September 2018, the Children's Court ordered that Tutela Family Care Linden (which is an organisation that provides professional social and support services and statutory services in the Randburg area) carry out an investigation and furnish a report from a social worker and make recommendation in respect of K.

[30] After having investigated K's circumstances, Mr Mudavanhu, a social worker at Tutela Family Care Linden, provided a written report in terms of Section 50 of the CA to the Presiding Officer of the Children's Court.

In his report he stated, *inter alia*, the following:

"No reports or claims off (sic) child abuse, neglect or abandonment were made by the biological father of the child concerned, therefore it is difficult to determine if the child concerned is a child in need of care and protection."

[31] The respondent's denial that he brought his application to the Children's

Court as one for a child in need of care, is supported further by Mr Mudavanhu's report referred to above. The Order of the Children's

Court dated 19 September 2018 directing that an investigation be carried out, similarly makes no reference to the investigation being in respect of whether K may have been in need of care and protection.

[32] Accordingly, there was nothing untoward in the respondent's conduct in approaching the Children's Court for contact with his child.

The interim order of the Children's Court granted on 28 October 2019

[33] On 28 February 2019, the clerk of the Children's Court issued a notice in terms of Section 57 of the CA notifying the applicant that her compulsory attendance was required at the proceedings of the Children's Court on 26 March 2019. On 28 October 2019 the Children's Court granted an interim order which reads as follows:

"INTERIM ORDER

- 1. Matter is referred to the Family Advocate for mediation of a parenting plan.*
- 2. The Applicant (Biological Father) will have supervised contacts (sic) with the child.*
 - 2.1 The visits will be supervised by the Social Worker appointed by both Parties. The Respondent may also be present during the visits.*

2.2 *The visits will be on every alternate Saturday for three (3) hours from 13h:00 to 16h:00 at a venue to be arranged and agreed to by the Parties. (The Respondent and the Social Worker).*

MAGISTRATE"

The applicant's alleged breaches of the interim order of the Children's Court granted on 28 October 2019 and the respondent's criminal complaint

[34] On 1 October 2019, the Office of the Family Advocate issued a Confirmation of Non-Attendance of Mediation in terms of Section 33(2) of the CA, and Mr J.M Maphunye, Family Law Assistant of the Family Advocate Johannesburg produced a memorandum in which he stated, *inter alia*, the following:

"2. *On or about the 26th of March 2019 the above honourable Court referred the above matter to the Office of the Family Advocate to assist the parties with the drafting of a parenting plan, in respect of their minor child namely, K.*

3. *The referral letter from the above honourable Court was received by our office on **12 April 2019** and a file was subsequently opened.*

4. *Pursuant to the above, an appointment date for mediation*

was set for 04 September 2019. On the aforementioned date, only the applicant attended. The Respondent failed to attend, and as a result the matter was postponed until 01 October 2019. Our office attempted several times, with no luck, to get hold of the respondent.

5. *On 01 October 2019, the respondent, once more, failed to attend and only the applicant attended. Several further attempts to get hold of the respondent have also been unsuccessful.*

6. *In light of the above, we do hereby refer the matter back to Court and proceed to close our file."*

[35] The reference in the Family Advocate's memorandum to the respondent is a reference to the applicant in the proceedings before me as the applicant was the respondent in the proceedings before the Children's Court.

[36] In his answering affidavit, the respondent alleged that the applicant's failure to attend the meetings which were arranged to take place with the Family Advocate on 4 September 2019 and 1 October 2019 amounted to her "*disrespecting the court processes*". The applicant failed to address the allegations relating to her failure to attend the offices of the Family Advocate and provided no explanation for such failure. Absent any explanation, it appears to me that the applicant

breached the interim order of the Children's Court by failing to attend the meetings at the offices of the Family Advocate.

[37] The respondent had hoped to have contact with K on 23 November 2019. This would have been his first contact with her, however the contact session did not take place.

[38] There is a dispute as to the reason why the respondent did not have contact with K on 23 November 2019. The applicant contended that the failed contact session arose because her attorneys had been unsuccessful in their attempts to uplift a copy of the order from the Children's Court which was required by the supervising social worker, Ms Commerford, in order to clarify her mandate. Furthermore, the applicant stated that *"there was no agreement reached in respect of who would supervise the visitations between the Respondent and the minor child."*

[39] The respondent denied the applicant's allegations. He said that the applicant had defied the order by wilfully failing to bring K to the contact session. As a result, on 23 November 2019 the respondent laid a complaint of contempt of court against the applicant at the Randburg police station. The respondent said that this complaint was made because the applicant had *"without just cause failed to allow the supervised access and contact despite the Children's Court having ordered her to do so"* and that he *"was justified to report the First Applicant's defiance of the Children's Court Order to the police."*

[40] In support of his contention that the applicant had wilfully failed to comply with the order of the Children's Court by not ensuring that he have contact with K on 23 November 2019, the respondent relied on a letter sent by Ms Commerford to the parties' legal representatives on 25

November 2019. The letter reads as follows:

"Dear Sir

SUPERVISED CONTACT: MR. T AND HIS MINOR CHILD

According to my understanding the supervised contact between Mr. T and his minor child was to take place on Saturday 23 November from 13:00 – 16:00 at the [...]Church,[...] , Krugersdorp.

The agreement was that both parents would pay 50% in advance of the supervision fees. Mr T paid his fees, but no fees were received from Ms S.

Mr Larkins confirmed telephonically that the Presiding Officer at the Magistrate's Court Randburg issued a verbal instruction that Mr. T should have contact with his child under supervision of a social worker for three hours.

I spoke to Ms S telephonically on 22 November 2019 and I informed her of my telephone conversation with Mr. Larkins. I

also confirmed now that I know that both attorneys agree that there was such an instruction made by the Court, I am satisfied to continue with the supervised contact. Ms S and I discussed that her mother will be present during the contact, and that she will be sitting in one corner of the room. I asked Ms S not to sit in the room where the supervised contact will take place as her mother and I are both present. Ms S also informed me that she will bring her own security people along. We discussed that Ms S is welcome to bring her own security people if they are not in the room or in the close vicinity where the contact is taking place. They are welcome to be outside the room, or on the premises in a manner that is not obvious.

On the morning of 23 November 2019, I sent a WhatsApp to Ms S asking what the plan for the contact is, but she never replied. Her cellular phone was switched off.

The supervised contact did not take place. I will be available Saturday 30 November 2019 and again on 7 December 2019. Should you require me to continue with the supervision of the contact, please advise me by Wednesday 27 November 2019 as I have an AGM to attend and need to confirm my attendance. Ms S is also required to pay her portion of the supervision by Wednesday, otherwise I accept that my services are no longer required for the supervised contact.

Regards

Sent electronically and not signed.

Sophia Commerford

Social Worker”

[41] It was common cause that Ms Commerford had accepted her appointment as the supervising social worker on 18 November 2019, subject to payment of her consultation fee and subject to her receiving a copy of the Children’s Court order. However, it is clear that as of 22 November 2019, Ms Commerford anticipated that the supervised contact session would take place on 23 November 2019.

[42] The respondent expected supervised contact to proceed on 23 November 2019. It was reasonable for him to have concluded that the applicant had wilfully breached the Court order when she did not bring K to the contact session, especially when viewed against the contents of Ms Commerford’s letter of 25 November 2019. Accordingly, I am satisfied that the respondent did not act vexatiously when he laid a complaint against the applicant at the Randburg police station on 23

November 2019. Whether or not the applicant in fact breached the order wilfully when she did not take K to the contact session on 23 November 2019 or whether the contact did not take place due to a simple misunderstanding, is not a question that I must decide.

[43] During the course of argument, Ms de Wet who appeared for the applicants rightly conceded that if the applicant was to contravene an order of the Children's Court, the respondent would be within his rights to report the matter to the South African Police Services.

[44] In her founding affidavit the applicant alleged that on 28 November 2019, she received a call from a certain Sergeant Mongatane ("Sgt Mongatane") from Randburg SAPS who requested her to sign a warning statement and that on 2 December 2019 Sgt Mongatane called her attorney and advised *inter alia* that the applicant was required to make a statement. This was in regard to the complaint / charge which the respondent laid against the applicant on 23 November 2019. Furthermore, the applicant stated that on 6 January 2020 she received a call from one Colonel Lessing ("Col. Lessing") who presented himself as Sgt Mongatane's superior and insisted that the applicant attend at the police station and sign a warning statement, failing which the Randburg SAPS "*would submit a file to the prosecutor confirming that I failed to provide a warning statement.*"

[45] It appears from the affidavits before me that the applicant accepted neither the invitations of Sgt Mongatane or Col. Lessing to attend to sign a warning statement.

[46] The respondent eventually had contact with K for the first time on 7 December 2019 under the supervision of Ms Commerford. He had waited nine months since the granting of the interim order of the

Children's Court to have contact with K. By that stage, K was about 19 months old and the respondent had yet to meet his daughter, K.

[47] The respondent had three further contact sessions with K on 15 February 2020, 29 February 2020 and 22 March 2020 under the supervision of another social worker, Ms Anne Fick. The contact session which took place on 22 March 2022 was cut short by Ms Fick who reported that the respondent had acted inappropriately during the contact session.

[48] The respondent's attempts to establish a relationship with K were frustrated further due to the national lockdown resulting from the coronavirus pandemic, including that two further contact sessions which were scheduled to take place on 28 March 2020 and on 9 May 2020 had to be cancelled due to the lockdown.

[49] On the latter occasion, the applicant had been stopped by police officials from the Krugersdorp SAPS while transporting K in her motor vehicle to the contact session which was scheduled to take place at Ms Fick's offices in Krugersdorp. The police advised the applicant that in accordance with the lockdown regulations she was not permitted to travel with K in her motor vehicle, and they escorted the applicant to her home.

[50] On 12 May 2020, the applicant alleged that a certain Sgt Mololeke from Krugersdorp SAPS attended at her residence and informed her that she

had to sign a warning statement relating to contempt of court proceedings. Sgt Mololeke is alleged to have also informed the applicant that the second applicant was required to sign a warning statement as *"the Respondent had stated in his complaint that during the contact sessions with the minor child the Second Applicant would 'shout at him' and 'cut the sessions short'".* Furthermore, Sgt Mololeke is alleged to have requested Ms Fick on 18 May 2020, to attend SAPS to provide a report on what had transpired on 21 March 2020.

[51] It is not apparent from the affidavits before me whether Sgt Mololeke was acting on the complaint made by the respondent on 23 November 2019 or a subsequent complaint against the applicant or both the applicants.

[52] The applicant said in her founding affidavit that her attorneys *"attempted to contact Mololeke in order to obtain clarity in respect of the proceedings that had been instituted against the second applicant and I, and to arrange a time and place within which to receive such documentation"*. It is similarly not clear from the papers before me which documentation it is alleged the applicant was to receive from Sgt Mololeke. The Court is simply being asked to speculate.

[53] On 3 June 2020, the applicant was served with a criminal summons by Sgt Mongatane. This was as a result of the complaint which the respondent had laid against the applicant at the Randburg police station on 23 November 2019.

[54] On 5 August 2020, according to the applicant, she appeared in the Randburg criminal court and the matter was postponed to enable copies to be obtained on 23 November 2019. There is no indication in the applicant's founding affidavit that the respondent laid more than one criminal complaint against the applicant.

[55] Accordingly, it appears from the affidavits before me that at the time that the applicants launched the present application, the respondent had initiated one court application against the applicant, namely his application to the Children's Court, and that he had laid a single complaint on 23 November 2019 at SAPS.

[56] There was in addition an application brought by the respondent to set aside a protection order granted *ex parte* against him by the applicant on 18 May 2018 in terms of the Domestic Violence Act 116 of 1998. The respondent did not oppose the domestic violence application and a final protection order was granted against him on 31 May 2018. The *ex parte* domestic violence application was brought some eight days after K was born. The respondent in the present application said that he chose not to oppose the domestic violence application even though he disputed the applicant's allegations, as at that point he was "*still confident that we could make the relationship work out between us*". The respondent subsequently launched an application to set aside the protection order, which application was dismissed. As it turns out, however, the applicant also launched an application to vary the

protection order to widen its scope, which application was also dismissed.

[57] The applicant's founding affidavit does not indicate any further legal proceedings brought against her or the second applicant, whether civilly or criminally other than those referred to above.

[58] The applicants rely on the provisions of the Vexatious Proceedings Act, No. 3 of 1956 ("the VPA") to have the respondent declared a vexatious litigant.

[59] Section 2(1)(b) of the VPA provides as follows:

"2(1)(b) 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 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."

[60] The Constitutional Court considered the purpose of the VPA in Beinash and Another v Ernst and Young and Another 1999 (2) SA 116 (CC), in which the Court found, in the words of Mokgoro J, *inter alia* that:

"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."

And further

"The vexatious litigant is one who manipulates the functioning of the courts so as to achieve a purpose other than that for which the courts are designed."

And further

"An order restricting a litigant is only made in circumstances where the court is satisfied that the malfeasant has 'persistently and without reasonable grounds instituted legal proceedings'."

[61] There is no case made out in the applicants' founding affidavit that justifies a finding that the respondent is a vexatious litigant or for the interdictory relief sought in paragraph 13 of the notice of motion. The respondent's application to the Children's Court and the complaint that he laid against the applicant on 23 November 2019 do not at all amount to "*persistent legal proceedings*" as envisaged by the provisions of the VPA. Instead, they were the actions of a father seeking contact with his child. The launching of the proceedings in the Children's Court and the complaint made to SAPS was not ungrounded and the respondent did not seek to manipulate the functioning of the courts with an ulterior motive. The respondent's application to the Children's Court was an application to have contact with K. The criminal complaint against the applicant was to enforce the order of the Children's Court based on his *bona fide* belief that the applicant had breached the order. His application to set aside the protection order, the granting of which he did not oppose initially, was in response to the

domestic violence proceedings brought against him by the applicant and not a proceeding that he had initiated from the outset.

The further four supplementary affidavits delivered by the applicant

[62] The applicant attempted to flesh out her case in no less than four supplementary affidavits. On 17 October 2019, this application was enrolled for hearing before Francis J. It was postponed to enable the applicant the opportunity to bring an application for leave to deliver three supplementary affidavits which she had deposed to respectively on 25 February 2021, 15 October 2021 and 28 October 2021. Leave to deliver the supplementary affidavits was granted by Opperman J on 6 June 2022. In her application before Opperman J, the applicant stated that *"The respective supplementary affidavits were necessitated by pertinent and material information having come to light after the founding affidavit had been deposed and delivered. Such relevant events and information are material and needed to be placed before the above honourable court."*

[63] By similar reasoning, the applicant sought leave to deliver a fourth supplementary affidavit deposed to by her on 24 January 2023, which application I granted.

[64] The critical question is whether the applicant demonstrated in her four supplementary affidavits (read together with her founding affidavit and her replying affidavit) that the respondent had persistently brought

proceedings against the applicants without any ground for doing so. As appears from what I set out below, the applicants have failed to do so.

[65] Among the “*events and information*” to which reference is made in the applicant’s supplementary affidavits are the following:

65.1 On 24 November 2020, the Children's Court granted a further interim order awarding the respondent amended contact rights to K and directing that paternity testing be carried out on K.

65.2 On 8 December 2020, the applicants launched a two-part application against the respondent in this Court. In the first part the applicant effectively sought an order to stay the operation of the Children’s Court order of 24 November 2020. In the second part, the applicant sought to review and set aside the Children’s Court order.

65.3 The application for relief in terms of part A of the applicant’s notice of motion came before Windell J who on 10 December 2020, granted an order. The relevant portion of the order reads as follows:

"...

2. *That in the best interests if (sic) the minor child, it is ordered that before the Second Respondent is to have any contact with the minor child, the Second Respondent is to:*
 - 2.1. *have completed a comprehensive clinical assessment by a clinical psychologist, with such assessment and/or feedback from the clinical psychologist being made available to the Applicant and the respective court. Such assessment should focus on personality testing as well as screening for any pathology;*
 - 2.2. *commence with a treatment plan as set out by the clinical psychologist following the comprehensive assessment be it therapeutic processes or referral to a psychiatrist for mediation;*
 - 2.3. *have completed a follicle drug screening test, with such results being made available to the Applicant and the respective courts; and*
 - 2.4. *have completed a parental guidance course.*

3. *That this this order will operate pending the hearing and adjudication of the review application that is brought in terms of Part B hereof;*

...”

65.4 The order of Windell J was granted in the respondent’s absence.

The respondent contended that the application was not brought to his notice. The applicant alleged that various attempts had been made by her legal representatives to confirm that the respondent had received the application. These attempts were detailed in the applicant’s first supplementary affidavit. Despite this, there is no evidence on the affidavits before me that the respondent had received the application or was aware of the application before Windell J granted her order.

65.5 The respondent is alleged to have laid a further complaint at SAPS against the applicant for her alleged failure to bring K to a contact session with him on 12 December 2020. The applicant stated that on 13 December 2020, two police officers arrived at her residence to arrest her. The police officers were allegedly unaware of the order granted by Windell J some three days earlier. They advised the applicant that the “*court administrators had confirmed to them the correctness of the respondent’s allegations*”.

65.6 Even if the respondent made a further complaint against the applicant with SAPS on 12 December 2020, there is no evidence that the respondent was aware of the order of Windell J when he is alleged to have made the complaint.

65.7 The evidence before me indicates that the respondent became aware of the order of Windell J on 15 December 2020 when he sent an e-mail to Windell J's registrar. Attached to the respondent's email was a document headed "*Notice of Application for Leave to Appeal*". The relevant portion of the respondent's e-mail reads as follows:

"Good Afternoon Antoinette. Kindly please find the attached application for notice of appeal. This is an urgent application. I humbly request that the matter is presented to the judge of the High Court as a matter of urgency, and that you kindly set a date on the roll as a matter of urgency."

65.8 Windell J's registrar responded to the respondent's e-mail on the same day. Her response reads as follows:

"Thank-you for your e-mail together with the relevant attachments which this office received earlier today. Please note that if you wish to set aside the interim order granted by Windell J on Thursday, 10 December 2020 on

an urgent basis – you should approach the urgent court to do so.

Ms Beata Weirzbica is the secretary to Judge Siwendu who is the senior urgent court judge on duty this week. Ms Weirzbica's e-mail address is[...].

Should you wish to appeal the interim order granted by judge Windell in the ordinary course, you may approach this office for a date of hearing before Judge Windell in the upcoming term which starts on 18 January 2021."

65.9 The respondents "Notice of Application for Leave to Appeal" was signed by the respondent and not by an attorney. It appears that same was prepared by the respondent absent any legal representation and without the opportunity of legal advice. He did not understand the difference between an appeal, the effect of an interim order, an order granted in his absence or any of the process that should have been followed. It is further clear to me that the respondent has relied on the assistance of Legal Aid. The applicant on the other hand has been represented by a large and prominent firm of attorneys and an experienced counsel. Presently, the applicant is represented by Legal Aid.

65.10 On 6 September 2021, the respondent (as applicant) launched an urgent application for relief to rescind the order of Windell J

and that the order be set aside *"for lack of service of the Notice of Motion on the Applicant herein"*.

65.11 The respondent's rescission application came before Adams J on 15 September 2021 who struck the application from the urgent roll for lack of urgency.

65.12 The applicant contended that the respondent launched his urgent review application *"well-knowing that the review application was pending and that his time to rescind the order of Windell J had lapsed."* As such, she stated that *"The Respondent litigated maliciously and vexatiously and yet again abused the court processes"* and *"The ill-conceived urgent application brought by the Respondent is yet another example of how the Respondent continuously and frivolously litigates against me and abuses the court processes."*

65.13 I am not persuaded that the respondent's rescission application was brought maliciously or vexatiously. That is in any event a finding which only a Court hearing the rescission application can make and Adams J did not decide the merits of the application.

65.14 The applicant further alleged that the respondent acted vexatiously by sending voluminous e-mail communications

directly to the applicant's legal representative despite having been requested to only communicate through his legal representatives. Even if this was proven to be correct, such communications would not amount to "*persistent legal proceedings*" as envisaged by the VPA.

[66] The applicant's first three supplementary affidavits at most show that the respondent had launched one further application against the applicant, namely his application to rescind the order of Windell J and had possibly laid one further criminal complaint against the applicant on

12 December 2020 at a time that he was unaware of the order of Windell J.

[67] The order that was granted by the Children's Court on 24 November 2020 (and suspended by the order of Windell J), was in respect of one and the same proceedings that the respondent instituted to have contact with K. During argument, Ms De Wet who appeared for the applicants submitted that each occasion on which the respondent attended at the

Children's Court amounted to a new application by him. I disagree with Ms de Wet's argument. The orders of the Children's Court to which reference is made relate to one case before the Children's Court that had been ongoing.

[68] In her fourth supplementary affidavit, the applicant alleged that on 20 January 2023, she attended at the Randburg Criminal Court with her legal representatives *"in order to postpone the recent charges brought against me by the respondent for allegedly being in contempt of a court order."* In this regard, the respondent stated that this was *"in respect of the case of her not complying with the court order of the Children's Court on which I have laid a complaint"* and further *"I give the above explanation so as to ensure that the Honourable Court does understand that I have not laid any other complaint with the members of the SAPS against the 1st applicant."*

[69] The applicant further alleged that on 20 January 2023, a certain Constable Masemola ("Const. Masemola"), appearing to be a member of the South African Police Services, was escorted by the respondent to the applicant's place of residence where he (Const. Masemola) informed the second applicant that the SAPS had a summons for the applicant to appear in court in March 2023. Attempts to obtain a copy of the summons from SAPS by the applicant are alleged to have been unsuccessful. At the time of deposing to her fourth supplementary affidavit, the applicant alleged that she had not yet received the summons and she had no knowledge of its contents. Const. Masemola is alleged to have spoken to the applicant on 20 January 2023 and to have informed her that he was there to serve a summons on the applicant because the respondent's mother *"wants to see her grandkids"* Once again, however, the court is being asked to speculate

on matters without having the benefit of any documentary evidence or any support from any members of SAPS. The respondent denied that he had caused such a summons to be instituted against the applicant. He stated, *inter*

alia, "I do confirm that my mother has already attended to the Children's Court to make an application for access and contact with the minor child. I however do not have any information regarding the service of the application on the 1st applicant."

[70] I am satisfied that no case has been made out by the applicants for the relief sought in the notice of motion. Furthermore the applicant's claim for costs, let alone a special order for costs, is without any merit.

Reference by the applicant to additional affidavits

[71] The applicant sought to rely on voluminous additional affidavits filed in other applications without reference to specific portions in the affidavits upon which reliance is placed:

71.1 annexed to the applicant's first supplementary affidavit were *inter alia* the notice of motion and founding affidavit with annexures thereto in respect of the urgent application which the applicant enrolled before Windell J, spanning a total of 233 pages.

71.2 annexed to the applicant's second supplementary affidavit were, *inter alia*, the notice of motion, founding affidavit and

answering affidavit with annexures thereto in respect of the urgent rescission application which came before Adams J, spanning a total of 715 pages.

71.3 the respondent filed an answer to the applicant's fourth supplementary affidavit in this application, and the applicant filed a reply (to which reference is made above) by uploading same to CaseLines on 27 January 2023. Annexed to the applicant's said reply, were the founding affidavit (*sans* the notice of motion), answering affidavit and replying affidavit filed in respect of the urgent application that was enrolled before Makume J, spanning 94 additional pages.

[72] It is an abuse by a litigant to refer to voluminous additional affidavits filed in other applications without reference to specific portions in the affidavits before me on which reliance will be placed. To expect a court to consider a substantial amount of documents without any indication of the relevance or what portions are to be relied on is an invitation which I do not accept.

Costs

[73] The applicant advanced no reasons why, if unsuccessful, costs should not follow the result. Had the respondent sought attorney and client costs I would have been inclined to grant such an order.

[74] I make an order in the following terms:

1. The applicant is given leave to deliver a fourth supplementary affidavit;
2. The application is dismissed;
3. The applicants are ordered to pay the costs of the respondent.

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by e-mail.

A MITCHELL

**ACTING JUDGE OF THE HIGH COURT GAUTENG DIVISION,
JOHANNESBURG**

Date of Hearing: 27 JANUARY 2023

Judgment Delivered: 13 JUNE 2023

APPEARANCES

On Behalf of the Applicant: ADV L DE WET

Instructed By: Norton Rose Fulbright

On Behalf of the Respondent: MR M HLUNGWANE

Legal Aid South Africa