

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

REPUBLIC OF SOUTH AFRICA

CASE NO: 056881/2023

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
(4)	DATE: 30 June 2023
(5)	SIGNATURE: <i>ML SENYATSI</i>

In the matter between:

FIRSTRAND BANK LIMITED

NATASHA PARBHOO

RHOEEDA HASSAN

CAROL HARDIJZER

SUE MORAR

AND

PERRONET DU PLESSIS

GLORIDA MARTIN

FIRST APPLICANT

SECOND APPLICANT

THIRD APPLICANT

FOUTH APPLICANT

FIFTH APPLICANT

FIRST RESPONDENT

SECOND RESPONDENT

JUDGMENT

SENYATSI J

- [1] This is an opposed urgent application to suspend, Part A of the relief, any further proceedings, including interlocutory proceedings under case number **2022/ 27359** and proceedings under case number **23/ 051815** pending the finalisation of Part B.
- [2] The applicants seek an order to the effect that pending the finalisation of Part B:
- (a) the respondents ability to unilaterally set down matters on Court Online or any equivalent system is suspended;
 - (b) should the respondents wish to set a matter down, the Registrar needs to be satisfied that prior written permission has been obtained from the Deputy Judge President (“DJP”) of this Division;
 - (c) if for any reason the respondents are able to set down a matter without the prior written consent of the DJP, then in such a case, the applicants are permitted to have the matter removed from the roll upon presentation of the

court order granted in terms of this application through an e-mail correspondence to the court's or judge's registrar, and do not have to appear before open court to do so;

(d) The Registrar to be permitted to give effect to the suspension of any further proceedings pending the determination of Part B and

(e) The Respondents pay the applicants costs jointly and severally, the one paying the other to be absolved.

[3] The respondents oppose the application on the basis that it denies them their constitutional right of access to justice. It should be stated at this stage that the respondents are lay people and unrepresented in these proceedings.

[4] The brief background to this matter is intriguing. The first respondent, Mr Du Plessis, is the employee of the first applicant, a public company in the banking and other related financial services sector. The second to the fifth applicants are all employees of the bank. Mr Du Plessis is therefore their colleague.

[5] On 10 August 2022, Mr Du Plessis laid a complaint with the first applicant about the alleged harassment, bullying and intimidation by the first applicant and its employees. The first applicant dealt with the complaint internally in terms of its grievance procedures. A hearing was then scheduled to take place on 12 September 2022. At the hearing, Mr Du Plessis came in

the company of Ms. Martin and insisted that she should represent him because he was not fit to represent himself due to the mental health issues he was experiencing. He was informed that Ms. Martin was not allowed to represent him due to her being an external person not employed by the Bank and the fact that she was not a legal representative. Mr. Du Plessis was asked to secure the medical certificate to confirm his mental health challenge. The hearing was postponed to afford him the opportunity to secure the required medical certificate.

- [6] The internal hearing concerning Mr. Du Plessis's grievance never took place. Instead, an urgent court application was issued in terms of which Mr. Du Plessis and Ms Martin sought a declaratory order under case number **2022/27359** that the decision by the Bank to refuse the use of external representation was unlawful and an infringement on Mr Du Plessis right to be heard in a fair and equal manner and the order to the effect that Ms Martin be allowed to act as an external representative for Mr Du Plessis. The respondents also sought in the motion proceedings brought on an urgent basis payment of R35 million in respect of the alleged delictual damages caused by the Bank for the alleged defamation and false conviction of rape against Mr Du Plessis. The Bank opposed the application and the matter was struck from the roll with costs for lack of urgency. The Bank had raised several preliminary issues as a defence to the urgent application. The court

hearing the matter did not consider the merits but simply struck the matter from the roll. The merits of the matter under that case number remain unresolved.

- [5] On 22 November 2022, the applicants delivered notice in terms of Rule 47(1) of the Uniform Rules and sought security for costs for the sum of R300 000. In response thereto, the respondents delivered Rule 35(5) and sought delivery of various documents.
- [6] On 18 January 2023, the respondents served an urgent interlocutory application on the applicants which was set down on the roll of 31 January 2023. The interlocutory application sought to challenge the allegations made by the applicants in their answering affidavit delivered on 10 November 2022. The interlocutory relief sought was for an order for the Bank to pay Mr. Du Plessis R35 000 per month until the end of “trial”; an order that the respondents should not provide security for costs; a restraining order against the applicant from alleging that the respondents are engaging in vexatious litigation; an order that the bank pays “special circumstances cost for discovery due to misrepresentation” amounting to R145 000.00, as well as a declaratory order that the applicants answering affidavit misrepresented the facts.
- [7] The Bank opposed the interlocutory application and various preliminary points were raised in the Banks’ opposing affidavit. The preliminary points

raised included *inter alia*, that there were no grounds for the interlocutory application to be heard on an urgent basis; that the Court lacked the jurisdiction to grant a significant portion of the relief sought; that material disputes of facts arose in the interlocutory application and that a punitive costs order against the respondents ought to be made.

[8] After having received the applicant's preliminary affidavit, the respondents delivered a notice of removal of the matter on 30 January 2023 which was a day before the hearing of the interlocutory application. The respondents indicated that the matter was now set down on the unopposed motion roll as the applicant had delivered preliminary affidavit rather than a "replying affidavit". This was done despite the fact that the applicants had delivered a notice of intention to oppose on the 24th of January 2023.

[9] The respondents set the matter down on the unopposed motion roll of the 13th of February 2023 and served a notice titled "Final set down-interlocutory-Unopposed" which notice was accompanied by affidavits filed by the respondents.

[10] On the 8th of February 2023 the applicants' attorneys addressed correspondence to the respondents, notifying them that it was premature to set the interlocutory application down on the unopposed motion roll on 15th February 2023 as the applicants' time frame to deliver an answering

affidavit would not have lapsed by that date. The applicants demanded that the matter should be removed from the roll, failure which the applicant would seek an order of punitive costs against the respondents.

[11] Notwithstanding this correspondence, the respondent failed to have the matter removed from the unopposed motion roll of the 13th of February 2023. The matter came before Wepener J and he ordered that the matter be removed from the roll and that the respondents pay the applicants wasted costs on an attorney and client scale.

[12] On 2nd March 2023, the respondents delivered a further urgent application still under case number 22/27359, again on an urgent basis. The relief sought in the application includes a declarator that the prejudice and harm suffered and that substantial redress in due course will not be a possibility; the relief in respect of the personal loss of Mr. Du Plessis “is facing the loss of his home and will now become indebted to the Bank for paying his medical aid and the first Applicant no longer receives his benefits as the 1st Respondent has applied an unpaid leave policy on the first Respondent own choice made.”

[13] The matter was set down on the urgent roll of 22 March 2023. In anticipation of that hearing, the respondent had served on the 10 March 2023, subpoenas on several employees of the Bank. In terms of those subpoenas, the respondent sought a number of documents . The applicants

in these proceedings contend that the subpoenas are vexatious and constitute an abuse of court process, given the nature of the proceedings set down for hearing on 22 March 2023, which is an urgent motion application.

[14] The applicant delivered a notice in terms of Rule 30 on 17 March 2023 and gave notice to the respondents and an opportunity to remove the irregular subpoenas that were served on the Bank's employees. The respondents failed to do so. The matter came before Makume J on 22 March 2023 and was struck from the roll for lack of urgency with a punitive costs order on the scale between attorney and client against the respondents.

[15] On 24 March 2023, the respondents filed leave to appeal the court orders handed down by Wepener J and Makume J. The orders themselves are not appealable as the merits of the main application have not been finalized. During the address by Ms. Martin, she contended that she was appealing against the cost orders. I need not say much about her contention.

[16] On 30 March 2023, the respondents served a further urgent application on the applicants under case number **23/ 051815** and set it down for hearing on the urgent roll of 6 April 2023. In terms of that application, the respondent sought, *inter alia*, the following relief:

(a) that the matter be heard in accordance with the Equality Act;

(b) an explanation as to why Makume J humiliated the respondents by not hearing their application and ordering costs against the respondents;

(c) an order of contempt of court for non-compliance with the subpoenas of 10 March 2023 and the writs of arrest arising from the non-compliance and

(d) an explanation from the court as to why the interlocutory application was removed from the unopposed motion roll.

[17] The urgent application was also opposed by the applicants and on 5 April 2023 the applicants delivered an affidavit setting out a number of preliminary issues that it sought to raise during the hearing on the 6 April 2023. The applicants contended in their opposing affidavit that:

(a) there were no grounds to justify the application being heard on the urgent roll;

(b) Ms. Martin had been mis-joined to the application; and

(c) there is no merit to the relief sought by the respondents.

[18] The application came before Dippenaar J on 6 April 2023 and was struck from the roll for lack of urgency. The respondents were once more ordered to pay the costs.

- [19] Notwithstanding having three costs orders against them, the respondents persisted with their conduct. The respondents delivered a further urgent application against the applicants on 20 April 2023. The application sought a declaration that the Bank breached section 34 of the Basic Conditions of Employment Act, 1997 by making unauthorised deductions on Mr. Du Plessis's remuneration. The matter was enrolled on 26 April 2023 and was struck from the roll with costs due to lack of urgency.
- [20] Undeterred by a number of costs orders against them, the respondents filed an application with the Constitutional Court on 10 May 2023 where they sought, *inter alia*, that matters under case number **22/27359** be transferred to the Constitutional Court and that the respondents obtain direct access to the Constitutional Court. The application is opposed by the applicants and is pending before the apex Court.
- [21] Another urgent application was filed by the respondents on 18 May 2023 in terms of which the relief sought is identical to the relief sought in the 26 April 2023 matter. The matter set down for hearing on 23 May 2023 was also struck from the roll due to lack of urgency.
- [22] As if the series of the urgent applications that were struck from the roll with costs were not enough to deter the respondents from repeated conduct, they launched another urgent application on 31 May 2023. The relief sought is intelligible because it was not accompanied by the founding

affidavit. The respondents were warned to remove the matter from the roll and they failed to do so. At the hearing of the matter, the respondents did not attend the hearing which was set down for 9 June 2023. The applicants' counsel was informed by court that the respondents sent an email to court indicating that they were withdrawing the matter in order to amend their papers. There was no notice of removal filed with the applicants and consequently, the matter was struck from the roll with costs. The court in that matter ordered that the respondents be prohibited from setting the matter down again pending the outcome of the Part A application.

[23] In total since October 2022, nine applications were launched by the respondents. Eight were set down, out of which seven were urgent applications. In all the applications, the applicants incurred the costs of briefing their attorneys and counsel, Mr Peer and of course all the seven applications were struck from the roll with costs.

[24] The issue for determination is whether the applicants have made out a case for the relief sought in terms of the notice of motion brought in terms of section 2(1)(a) of the Vexatious Proceedings Act, 1956 ("the Act"). The applicants contend that the applications are vexatious and amount to the abuse of the court process.

[25] Vexatious litigation is regulated in terms of the Act and section 2 provides as follows:

“2 (1)(a) If, on an application made by the State Attorney, powers of or any person acting under his written authority, the court is satisfied that any person has persistently and without any reasonable grounds instituted legal proceedings in any court or in any inferior court, proceedings whether against the same person or against different persons, the court may, after hearing the person or giving him an opportunity of being heard, order that no legal proceedings shall be instituted by him against any person in any court or any inferior court without the leave of that court, or any judge thereof, or that inferior court, as the case may be, and such leave shall not be granted unless the court or judge or the inferior court, as the case may be, is satisfied that the proceedings are not an abuse of the process of the court and that there is *prima facie* grounds for the proceedings.

- (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 other person or giving him an opportunity of being heard, order that no legal proceedings shall be instituted by him against any person in any court or any inferior court

without the leave of that court, or any judge thereof, or that inferior court, as the case may be, and such leave shall not be granted unless the court or judge or the inferior court, as the case may be, is satisfied that the proceedings are not an abuse of the process of the court and that there is *prima facie* ground for the proceedings.”

[26] As the relief sought may potentially limit the respondents’ access to court in accordance with section 34 of the Constitution, in a seminal decision by the Constitutional Court in Beinash and Another v Ernst and Young and Other¹ in considering the provisions of the Act Mokgoro J stated as² follows:

“[13] The Act requires the fulfilment of two conditions before a vexatious litigant can institute legal proceedings. A judge has “to be satisfied that the proceedings are not an abuse of the process of the court and that there is *prima facie* ground for the proceedings.” In other words, the applicant is required to show that he or she has a *bona fide* claim and that his or her claim is *prima facie* meritorious.

The applicants did not contend that the requirement that the proceedings have *prima facie* merit was unreasonable. They did, however, take issue with the requirement that an applicant would need to demonstrate that the

¹ [1998] ZACC19; 1999(2) SA 116 (CC)

² In para 13.

proceedings would not constitute an abuse of the court's process. They argued that it was inescapable that the judge, confronted by an application to proceed by a person bearing the mark of a vexatious litigant, would have regard to the prior history of the applicant, and would be influenced by the propensity that he or she had demonstrated in the past to litigate vexatiously or with some extraneous purpose. It was argued that this would load the dice, so to speak, against the applicant. This kind of propensity-based reasoning, it was submitted, is what our law tries to avoid. It is therefore permissible that the relief aimed at in section 2 of the Act may be sought and granted in appropriate circumstances. The judicial oversight is required and courts are expected to ensure that the right of access to court is not limited by a mere allegation of the proceedings being vexatious. As I am not in this Part A required to make a final determination, it is not necessary for me to venture any further.

[27] In Price Waterhouse Coopers Inc v Pienaar and Other³ Nziweni AJ held as follows on the unrestricted right of access to court in terms of section 34:

“[34] The courts do recognise that litigants may have unrestricted access to justice. To deprive a litigant access to justice may occasion injustice, unfairness and may offend the constitutional right of access to justice. Section 2(1)(b) of the Act passed constitutional

³ [2021] ZAWCHC 184 at para 34.

muster in the Constitutional Court case of Beinash and Another v Ernst & Young and Others 1999 (2) SA 116 (CC).

The following was stated in the Beinash matter at paragraphs 19 and 20:

‘[19] While such an order may well be far-reaching in relation to that person, it is not immutable. There is escape from the restriction as soon as a prima facie case is made in circumstances where the judge is satisfied that the proceedings so instituted will not constitute an abuse of the process of the court. When we measure the way in which this escape-hatch is opened, in relation to the purpose of the restriction, for the purposes of section 36(1)(d), it is clear that it is not as onerous as the applicants contend, nor unjustifiable in an open and democratic society which is committed to human dignity, equality and freedom. The applicant’s right of access to courts is regulated and not prohibited. (my own emphasis and underlining). The more remote the proposed litigation is from the causes of action giving rise to the order or the persons or institutions in whose favour it was granted, the easier it will be to prove bona fides and the less chance there is of the public interest being harmed. The closer the proposed litigation is to the abovementioned causes of action, or persons, the more difficult it will be to prove bona fides, and rightly so, because the greater will be the possibility that the public interest may be harmed. The procedure which the section contemplates therefore allows for a flexible proportionality balancing to be done, which is in harmony with the analysis adopted by this Court and ensures the achievement of the snuggest fit to protect the interests of both applicant and the public.

Requiring the potential litigant under these circumstances to discharge this evidentiary burden is not unreasonable. It is justifiable when confronted by a person who has “used the procedure [ordinarily] permitted by the rules of the court to facilitate the pursuit of the truth for a purpose extraneous to that objective.’ Having demonstrated a propensity to abuse the process of the courts, it hardly lies in the mouth of a vexatious litigant to complain that he or she is required first to demonstrate his or her bona fides. In this respect, the restriction is precisely tailored to meet its legitimate purpose.”

[28] In the instant case, it is clear from the series of urgent applications launched by the respondents that despite the cost orders, which presumably have not yet been taxed and paid by them, there is no intention by the respondents to follow the due process of addressing their matters in the ordinary course. This conduct unfortunately has placed undue pressure on the urgent court where the applications launched are clearly not urgent . This is why the series of applications were struck from the roll with costs as they clearly did not meet the requirements on urgency.

[29] The courts in the previous struck off applications sent a clear message to the respondents which was that their applications should be placed on the ordinary roll. The message was in my view, treated by the respondents

with disdain. In the normal litigation, the unsuccessful applicant in the urgent court, would follow a normal process and join the proverbial queue to have the matter finally adjudicated upon.

[30] This is however, not a normal litigation. The respondents are laypeople without legal expertise. They do not appreciate the seriousness of the costs orders against them. I say so because if they did, they would not be bringing constant urgent applications. It should be placed on record that this matter was set down for hearing on the 20 June 2023 but could not continue. The reason advanced by Ms. Martin was that they were denied access to the court online filing system by the legal representatives of the applicants. The matter had to be postponed to 23 June 2023 so that the respondents could file their opposing papers.

[31] At the beginning of the hearing on 20 June 2023 Mr. Du Plessis, the first respondent, was the first one to appear virtually through a facility supplied by the court in the court building. He indicated that he would not wish to continue in the absence of his representative, meaning Ms. Martin. When miss Martin appeared virtually in the same court room with Mr. Du Plessis, I asked her whether she was a legal representative of Mr Du Plessis she said that she was capable of representing him although she is not a qualified lawyer.

- [32] At the hearing on the 23rd of June 2023, Mr Peer on behalf of the applicant, submitted that Ms Martin acted for Mr Du Plessis as if she was a legal representative in violation of section 33 of the Legal Practise Act 28 of 2014 and that she acted as such and treated other presiding officers involved in the various unsuccessful urgent applications with contempt and that she should be stopped. However, Ms Martin is involved in the current litigation as a second respondent. I allowed each respondent to address me and must confess and the record will demonstrate this it was an emotionally charged address by both respondents.
- [33] Having considered the submissions made by the parties in this matter, I am of the view that the subsequent actions that may be brought related to the main action that has not yet been finalised need to be managed. I say so because by having access to the Court Online, the respondent seems to take pleasure in bringing applications on an urgent basis without any regard to the pressure that they put on the applicants as well as the urgent court and the applicant. This conduct by the respondents is vexatious and must be stopped. Accordingly in my view, the applicants have succeeded in discharging the *onus* that they are entitled to the reliefs sought.
- [33] The Urgent Motion Court is entitled to regulate its process by way of the Uniform Rules and Practise Directives and as a result the application must succeed.

ORDER

[34] The following order is made:

34.1. The applicants' non-compliance with the Uniform Rules of Court and applicable Practice Directives relating to forms, service, time periods and set down is condoned and the matter is dealt with as a matter of urgency under Uniform Rule 6(12).

34.2. Pending the finalisation of Part B:

34.2.1.the respondents are prohibited from launching any further proceedings (including interlocutory proceedings under case number 22/27359) and setting down any further proceedings (including that under case number 23/051815) unless leave of the Deputy Judge President ("DJP") of the division in question is obtained permitting the institution and/or set down of such legal proceedings, respectively; and

34.2.2.all current proceedings under case number 22/27359 and 23/051815 are suspended and may only be pursued further with leave of the DJP of the above Honourable Court.

34.3. Pending the finalisation of Part B:

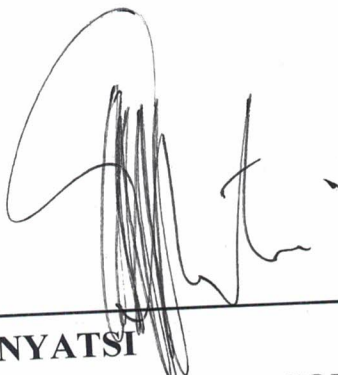
34.3.1.the respondents' ability to unilaterally set down matters on Court Online or any equivalent system is suspended.

34.3.2.should the respondents wish to set a matter down, the Registrar needs to be satisfied that prior written permission has been obtained from the DJP of the division in question.

34.3.3.if for any reason the respondents are able to set down a matter without the prior written consent of the DJP, then in such case, the applicants are permitted to have the matter removed from the roll upon presentation of the court order granted in terms of this application through email correspondence to the court's or judge's registrar, and do not have to appear before open court to do so.

34.4.The Registrar is to give effect to prayer **34.3.1.** and a copy of this order should be brought the Registrar's attention.

34.5.The respondents pay the applicants' costs jointly and severally, the one paying the other to be absolved.

A handwritten signature in black ink, appearing to be 'ML Senyatsi', written over a horizontal line.

ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/ their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 30 June 2023.

DATE URGENT APPLICATION HEARD: 23 June 2023

DATE JUDGMENT HANDED DOWN: 30 June 2023

APPEARANCES

Counsel for the Applicant: Adv Y Peer

Instructed by: ENS Africa

First

Respondent (in person): Mr P Du Plessis

Second

Respondent (in person): Ms G Martin