

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

CASE NO: 3300/2018 & 525/2018

Date heard: 10/09/2020

Date delivered: 05/11/2020

In the matter between

JACQUES GOUWS

Applicant

And

THE TAXING MISTRESS (PORT ELIZABETH)

First Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTION

Second Respondent

THE STATE ATTORNEY (PORT ELIZABETH)

Third Respondent

Coram: Smith J; Pakati J; Jolwana J

JUDGMENT

SMITH J:

Introduction

1. The applicant launched an application during March 2020 for an order suspending the taxation of a bill of costs pending a petition for leave to appeal to the Supreme Court of Appeal against a judgment of Ah Shene AJ, delivered on 15 November 2018. That judgment was in respect of two applications which had been consolidated and heard together, namely: case number 3300/2018, in which the applicant had sought various orders against the National Prosecuting Authority; and case number 525/2018, in which he sought the permanent stay of criminal proceedings against him. Ah Shene AJ struck case number 3300/2018 off the roll with costs due to lack of urgency, and dismissed case number 525/2018. No costs order was made in the latter case. His application for leave to appeal was dismissed on the 23 April 2019.

2. The respondents thereafter caused a notice of taxation to be delivered on 12 March 2020, and on 13 March 2020 the applicant delivered a notice to oppose the taxation and also launched these proceedings for the “provisional or permanent stay of the taxation”.
3. The respondents subsequently brought a counter-application for orders declaring the applicant a vexatious litigant in terms of section 2 (1) of The Vexatious Proceedings Act, 3 of 1956 (the Act), and declaring him to be in contempt of court. Their answering papers were filed out of time and, being satisfied that they had proffered an acceptable explanation for the late filing, we allowed the affidavits.
4. The application to declare the applicant a vexatious litigant is based on the contention that various legal proceedings, which he had instituted against persons who were connected to cases brought against him by his former neighbour, one Mr du Preez, are without any reasonable grounds and had been instituted solely for the purposes of intimidating and harassing those respondents.
5. In respect of the contempt of court application, the respondents contend that various statements in the applicant's founding and replying affidavits are contemptuous of the judiciary and brings it into disrepute.
6. The applicant appeared in person and Ms Ntsepe appeared for the respondents.

Contempt of court

7. As is the practice in cases involving allegations of contempt of court, I shall first deal with that issue before reverting to the main and counter-applications.
8. The crime of contempt of court consists in unlawfully and intentionally violating the dignity, repute, or authority of a judicial body, or interfering in the administration of justice in a matter pending before it. (Burchell and Milton: *Principles of Criminal Law*, 1st Ed. at page 672)
9. The dignity of the court is entrenched by the Constitution, and in this regard

section 165 (4) provides that, “organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.”

10. The interest which is served by punishing the crime of scandalising the court is not that of the aggrieved member of the court, but is rather a public one. In *S v Mamabolo* 2001 (5) BCLR 449 (CC), at para. 25, Kriegler J said that:

“The crucial point is that the crime of scandalising the court is a public injury. The reason behind it being a crime is not to protect the dignity of the individual judicial officer, but to protect the integrity of the administration of justice. Unless that is assailed, there can be no valid charge of scandalising the court.”

11. Although the constitutional entrenchment of the right to freedom of expression means that the test for the crime of scandalising the court is more exacting and a finding that the crime has been committed will not likely be made, the test remains whether “ultimately, the offending conduct, viewed contextually, really was likely to damage the administration of justice”. Even though the threshold for the test has been raised by the Constitution, there nevertheless remains “that narrow category of egregious cases where the crime in question will still be found to have been committed”. (*S v Mamabolo* (supra, at para. 45))

12. It is indeed so that the applicant's founding and replying affidavits are replete with serious, egregious, and scandalous statements of and concerning various judges of this division, as well as magistrates and legal practitioners. In order to avoid further unnecessary embarrassment to those individuals, I shall refrain from repeating any of those statements in my judgment and, in addition, intend to interdict their publication for any reason other than for the purposes of *bona fide* court proceedings. Suffice it to say that the applicant has accused those individuals of, *inter alia*, corruption, dishonesty, sexual deviancy and racism. The allegations are gratuitously scandalous and without any discernible factual bases. In addition, there is no conceivable connection to the factual matrix relevant to the relief sought in the notice of motion. In fact, only small portions of the affidavits are devoted to explaining the factual bases for the relief sought, and the

rest are no more than gratuitous slander of members of the judiciary and legal practitioners.

13. It was thus hardly surprising that the applicant did not contest the assertion that the impugned statements had the effect of scandalising the judiciary. At the hearing of the matter we were at pains to explain to him the import and grave consequences of those statements. We also allowed him an opportunity to consider whether he wished to persist with the accusations or to retract them. After a short break (at his request), he proffered an effusive apology and unconditionally retracted the statements.
14. There can be little doubt that this is one of those exceptional cases contemplated by Kriegler J in *Mamabolo*. The statements contained in the applicant's founding and replying affidavits are incontrovertibly egregious and scandalous. In fact it is difficult to conceive of a more flagrant and malicious attack on the judiciary. The context in which these statements were made also manifestly impugn the integrity of the judiciary as an institution.
15. Thus the issues which concerned Kriegler J, in *Mamabolo*, namely the appropriateness of the summary procedure adopted by the presiding judge and the fact that the impugned statements had been made after the conclusion of the litigation, do not arise in this matter. Here the issues were raised squarely by the respondents in their answering papers, and the applicant consequently had more than adequate opportunity to place his version before court. In the event, and as I have mentioned earlier, the applicant did not contest the assertion that the statements were contemptuous, but has retracted them unconditionally and has expressed his remorse.
16. In arriving at an appropriate sentence, we have taken into account, *inter alia*, the aforementioned factors. We do, however, also take into account that there is both a moral and constitutional duty on courts to ensure that their dignity and authority, as well as their capacity to carry out their functions, are always preserved and protected. (*Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) at para. 61.)

17. In *Mamabolo* (supra, at para. 16), Kriegler J remarked that even though the judiciary is “by far the weakest of the three pillars of government, yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of state and, ultimately, as the watchdog over the Constitution and its Bill of Rights - even against the state”.

18. Scandalous statements of the ilk made by the applicant in his founding and replying affidavits have the potential seriously to undermine the integrity, authority and efficacy of the courts in the eyes of the public. In the words of Kriegler J:

“In the final analysis it is the people who have to believe in the integrity of their judges. Without such trust, the judiciary cannot function properly; and where the judiciary cannot function properly the rule of law must die. Because of the importance of preserving public trust in the judiciary and because of the reticence required for it to perform its arbitral role, special safeguards have been in existence for many centuries to protect the judiciary against modification one of the protective devices is to deter disparaging remarks calculated to bring the judicial process into disrepute.”

(*Sv Mamabolo* (supra, at para, 19))

19. The respondents agitated for a sentence of five years’ imprisonment, with three years suspended for a period of five years on certain conditions. I do, however, not believe that any purpose would be served by sentencing the applicant to a period of direct imprisonment. In my view, a wholly suspended period of imprisonment will adequately serve all the elements of an effective and fair punishment in the circumstances. And one can only hope that this sentence will effectively convey to the applicant the serious nature of his transgressions and that he will take the admonition to heart, unlike that silent “host of phantom listeners” in Walter de la Mare’s haunting supernatural poem, *The Listeners*, who left the frustrated Traveller smiting in vain upon the shut door, unable to deliver his message. Our message could not be any clearer or delivered in a more effective manner.

20. I now return to the application for the stay of the taxation.

Stay of taxation

21. In his notice of motion, the applicant seeks an order provisionally staying the taxation of a bill of costs pending the lodgement of his petition for leave to appeal. The petition will be lodged with the Supreme Court of Appeal, leave to appeal having been refused by Ah Shene AJ. Elsewhere in his papers he purports to make out a case for the permanent stay of taxation. He is of course not legally entitled to such relief.

22. It is trite that in order to succeed with his application for the stay of the taxation, the applicant was required to establish, *inter alia*, that there are reasonable prospects that leave will be granted and to provide a reasonable explanation why he still has not filed his petition more than a year after his application for leave to appeal was refused. His papers fell short in both respects. He has simply not averred any facts to establish a *prima facie* right (though open to some doubt), and even on a generous reading of his averments, it is difficult to understand exactly why he has not been able to lodge the petition. He has also made no attempt to address the other requirements for interim relief, namely the balance of convenience and the absence of an alternative remedy.

23. Other than launching into a tirade of far-fetched and defamatory statements against members of the court, the only allegation that even remotely seeks to provide an explanation for his failure to submit the petition is the rather oblique assertion that during his incarceration (and for a period of 30 days) he had been tortured, drugged against his will, deprived of sleep, taunted and intimidated. He alleged that this experience has reduced him to a “lobotomized” state. It is not clear how this experience had prevented him from submitting the petition, since according to him it occurred during the period between 14 April 2019 and 15 May 2019.

24. Even assuming that the national lockdown could explain why he was unable to take any steps from the time that he had lodged this application - which was during March 2020 - up until when this matter was heard on 10 September 2020,

he still had more than sufficient opportunity to lodge the petition.

25. Even though allowance has to be made for the fact that the applicant is a lay person and would accordingly not have been able to prepare his papers with the eloquence and erudition expected of legal practitioners, the nature of the relief he seeks does not require any legal knowledge. All that was required of him was to explain the circumstances which had prevented him from submitting the petition to the Supreme Court of Appeal. If he had been able to establish a compelling reason for the delay, it may well have compensated for the failure to establish the more onerous and exacting requirement, namely the prospects of the Supreme Court of Appeal granting leave. But, alas, he has failed in both respects.

26. Ms Ntsepe has argued that it is manifestly apparent from the fact that the applicant has still not prepared his petition for submission to the Supreme Court of Appeal (more than five months after he launched the application) that the application is not *bona fide* and he does in fact not intend to lodge it. This submission is not without merit. When the matter was argued on 10 September 2020, we were at pains to make him understand that, at best for him and even if he were to succeed with this application, he would still only be entitled to an order suspending the taxation pending a ruling on his petition to the Supreme Court of Appeal. He then requested that he should be allowed at least three months within which to submit the petition. If regard is had to the fact that the matter was argued on 10 September 2020, by the time that this judgment will be delivered he would in any event have had at least one and a half months to lodge his petition. And Ms Ntsepe has informed the court that the Taxing Mistress has indicated that the respondents are unlikely to be allocated a date for taxation before December 2020. The applicant will thus in any event have had at least another three and a half months within which to submit the petition. This begs the question as to why he needed the relief in the first place. In the circumstances, I am of the view that he has failed to make out a case for the relief he seeks in the main application, and that application accordingly falls to be dismissed, with costs.

Vexatious proceedings

27. Section 2 (1) (a) of the Act provides as follows:

- (a) If, on an application by the state attorney or any person acting under his written authority, the court is satisfied that any 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 the person or giving them an opportunity of being heard, order that no legal proceeding 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 the 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 there is *prima facie* ground for the proceedings.

28. As I have mentioned earlier, the application for the applicant to be declared a vexatious litigant is based on the assertion that he has persistently and without any reasonable grounds instituted legal proceedings against various individuals connected to litigation between him and his erstwhile neighbour, Mr du Preez. According to the third respondent, those proceedings were instituted for no other purpose than to harass and intimidate those individuals.

29. In order to succeed with the application, the third respondent was required to show that the impugned proceedings amount to an abuse of the process of the court and that there were no *prima facie* grounds for the institution of the proceedings. The Act does not provide for an absolute bar to the institution of legal proceedings, but merely a screening mechanism in respect of a person who has persistently and without any reasonable grounds, instituted legal proceedings in any court. The screening mechanism is intended to protect the interests of victims of the vexatious litigation who have been “repeatedly 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 cloud of groundless proceedings.” Thus an applicant's right of

access to court is regulated and not prohibited. (*Beinash and Another v Ernst & Young and others* 1999 (2) SA 116 (CC) par. 13).

30. The impugned litigation arose from the acrimonious relationship between the applicant and Mr du Preez. Mr du Preez had instituted criminal charges against him for assault, malicious injury to property (in respect of which it was alleged he had damaged Mr du Preez's motor vehicle), and contempt of court, which related to the applicant's alleged contravention of an interdict granted by this court. The criminal case was prosecuted in the magistrate's court.
31. Mr du Preez also issued summons against the applicant, claiming damages in respect of an alleged assault and damage to his property. He had instructed attorneys Burmeister, De Lange and Soni (BDLS), and in particular Mr Craig De Lange of that firm, to represent him.
32. He thereafter lodged an application in this court for interdictory relief against the applicant, which had elicited a similar application by the applicant. Those applications were consolidated and heard by Revelas J who delivered judgment on 11 December 2014, interdicting certain conduct by the applicant. It was since the delivery of that judgment that Revelas J has also been the target of the applicant's contemptuous and scandalous statements.
33. The applicant thereafter instituted various legal proceedings against almost every person who had been remotely linked to the litigation between him and Mr du Preez. In particular:
 - a. in case 1877/2016 the applicant instituted a claim against Mr du Preez, claiming the sum of R2m on the ground that he had corruptly influenced public authorities such as the South African Police Services; The Prosecuting Authority; the Sheriff of the court, as well as judges of this court;
 - b. in case number 1893/28 he instituted civil action, claiming an amount of R400 000 from Ms Kariena van Schalkwyk, an attorney who was at all material times employed by BDLS. That claim was on the ground that the

defendant allegedly sanctioned investigations against the applicant in connection with allegations of cruelty to animals, leading to him being arrested;

- c. in case number 1938/2016 he instituted legal action against BDLS wherein he claimed damages for pain, humiliation, separating him from his children, defrauding him, and sabotaging his divorce action. He also accused them of causing him “hunger, malnourishment, pain, mental anguish, distress, and nervous system shock”;
- d. in case number 2084/2016 he claimed from BDLS the sum of R1.8m on the ground that they had “provoked, insulted, intimidated, blackmailed, extorted, abused, pestered and encroached” upon his human rights, and “corrupted” the prosecutor to set bail conditions. He averred that this was a strategy intended to prevent him from defending himself;
- e. in case number 2101/2016 he instituted civil action against Pierre Kitching Attorneys, a firm of attorneys which had acted on his behalf in matters against Mr du Preez. He claimed the sum of R500 000 on the grounds that they had “incited and manipulated” him into selling his vehicle and had paid the money into their trust account;
- f. in case number 2413/2016 he instituted proceedings against one Stefanus Vermaak, a member of the South African Police Services who had investigated a motor vehicle collision in which the applicant was involved. He claimed the sum of R1.2m on the grounds that the defendant had allegedly spat in his face, thereby causing him, inter alia, “neuropathic pain and damage, body aches and chills”. Apparently, no further steps have been taken by the applicant since this claim has been instituted;
- g. in case number 632/2017 he instituted civil proceedings against one Dr Anthony Ferreira, the medical practitioner who had treated Mr du Preez for injuries that he allegedly suffered as a result of the assault on him by the applicant and had prepared the J88 form. The applicant claimed

R500 000 from this defendant. The defendant filed an exception to the applicant's claim, which was upheld, with costs. The applicant subsequently withdrew the claim during July 2017;

- h. in case number 944/2017 he instituted action against EC Scratch and Dent, a vehicle repair shop which had provided a quotation in respect of damages to Mr du Preez's vehicle allegedly caused by the applicant. He claimed the sum of R400 000 on the ground that the defendant had inserted false information on the quote "*as a tool of blackmail, extortion, intimidation and victimization*". He also alleged that the defendant was a friend of du Preez, who was "an administrative prostitute" and had ensured that the defendant was protected from any action by the South African Police Services and the National Prosecuting Authority;
- i. in case number 1286/2017 he instituted proceedings against one Charmaine McCannes, the control prosecutor at the time when the criminal cases were instituted against him. He claimed a sum of R350 000 on the grounds that the defendant had failed "to honestly and objectively" study the police dockets in the criminal cases and that the decision to prosecute was not taken with due care. He also alleged that the proceedings were instituted against him at the behest of Revelas J, who had made a false statement in order to motivate for the institution of criminal proceedings. He also alleged that Revelas J had improperly interfered in the proceedings, to his detriment ;
- j. in case number 1802/2017 he instituted proceedings against Adv. Nicky Mullins, one of the advocates who had acted on behalf of Mr du Preez on the instructions of BDLS. He claimed the sum of R1.2 on the grounds of the defendant partaking in "the atrocious miscarriage of justice" against him, and that he acted maliciously "to the superlative degree" and had caused him pain and suffering; and
- k. in case number 31/2018 the applicant instituted application proceedings seeking an order compelling Magistrate Abigail Beeton to deliver judgment in the criminal cases. Magistrate Beeton has since recused

herself from those cases.

34. The third respondent contends that the applicant's continuous and persistent institution of legal proceedings against these and other people amount to an abuse of the court's process. They furthermore contend that it is manifest, *ex facie*, the court documents that the proceedings were instituted in bad faith and without any reasonable grounds. In addition, they assert that the general tone of the pleadings in those matters (which they aver is contemptuous and scandalising) establishes that the applicant is *mala fide* and warrant an order declaring him to be a vexatious litigant.

35. In all the aforementioned matters, even on a generous interpretation of their contents, the pleadings do not contain the necessary averments to sustain the relief sought by the applicant. Not only do they not conform to the prescripts of Adjective Law in respect of their form and content, but they are also substantively untenable. And what makes matters worse for the applicant is that the belligerent and scandalous language used in those pleadings evinces a thinly disguised intention to scandalise, harass and defame. Nary has an opportunity been lost for the applicant to abuse the pleadings to scandalise and insult the objects of his rancour. There can thus be little doubt that those proceedings were born out of the applicant's seething bitterness and misguided determination to wreak vengeance on those whom he perceived to have caused him suffering.

36. The Shorter Oxford English Dictionary defines the term "vexatious" as:

"(1) causing or tending to cause fixation, annoyance, or distress; annoying, troublesome. (2) Of an action: instituted without sufficient grounds for winning, purely to cause trouble or annoyance to the defendant."

37. In my view there can be little doubt, even on a generous interpretation of the pleadings in the aforesaid matters, that they fall foul of the abovementioned definition.

38. I am accordingly satisfied that the impugned proceedings were not instituted with

the legitimate purpose of pursuing bona fide legal remedies in respect of injustices suffered by the applicant, but rather with the sole and malicious intention to defame, harass and scandalise those whom he had perceived to be his enemies. And as Ms Ntsepe has correctly pointed out, the applicant has been vocal about his intention to institute future proceedings against other persons who he believes have caused him harm.

39. As I have said earlier, the order sought by the third respondent will not prevent the applicant from instituting future legal proceedings in circumstances where a judge in chambers or a magistrate is convinced that the proceedings to be instituted will not amount to an abuse of the process of the court.

Costs

40. The respondents have asked for costs to be awarded on a punitive scale in the main application as well as the counter-applications. The grounds for awarding costs on a punitive scale in the contempt of court proceedings are self-evident. I am, however, not convinced that there are sufficient grounds for awarding costs on that scale in respect of the applications to stay taxation proceedings and to have the applicant declared a vexatious litigant.

Order

41. In the result the following order issues:

- a. The late filing of the second and third respondents' answering affidavit is condoned.
- b. The applicant's application for stay of taxation proceedings is dismissed.
- c. The applicant is declared to be in contempt of court and is sentenced to 18 months' imprisonment, wholly suspended for a period of three years, on the condition that the applicant is not convicted of contempt of court committed during the period of suspension.
- d. The applicant is declared a vexatious litigant in terms of Section 2 (1)(a) of the Vexatious Proceedings Act, 3 of 1956, on the following terms:

- (i) The applicant cannot institute legal proceedings in any court, against any person without the written leave of the court before which he intends to institute legal proceedings.
 - (ii) A written application by the applicant, for leave to institute legal proceedings, may be granted if a judge or magistrate (as the case may be) of the court before which leave is sought is satisfied that the proceedings intended to be instituted are not an abuse of the process of court, and that there are a *prima facie* grounds for the proceedings.
 - (iii) The Registrar of this court is directed to publish this order in the Government Gazette in terms of the provisions of Section 2 (3) of the Vexatious Proceedings Act, 3 of 1956.
- (e) No person is permitted to copy or distribute, or publish the contents of the affidavits filed in cases numbers 525/2018 and 3300/2018, save for copying or distribution by the parties, for the prosecution of this matter before this court or any other competent court.
- (f) The applicant is directed to pay costs as follows:
- (i) The applicant shall pay the costs in respect of the contempt of court proceedings on the scale as between attorney and client.
 - (ii) The applicant shall pay the costs relating to the applications for stay of the taxation and in terms of the Vexatious Proceedings Act, 3 of 1956, on the party and party scale.

I agree.

B.M. PAKATI
JUDGE OF THE HIGH COURT
I agree.

M. S. JOLWANA
JUDGE OF THE HIGH COURT

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