



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

**CASE NO: 1414/2016 and
992/2016**

In the matter between:

SIPHO GCORA

First Applicant

KHUSELWA GOBO-GCORA

Second Applicant

**GOBO GCORA CONSTRUCTION AND PROJECT
MANAGEMENT CC**

Third Applicant

and

NELSON MANDELA BAY MUNICIPALITY

First Respondent

PUBLIC PROTECTOR OF SOUTH AFRICA

Second Respondent

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
..... DATE SIGNATURE	

JUDGMENT

POTGIETER J

Introduction

[1] The *fons et origo* of these proceedings are the Public Protector's investigation and report dated 29 January 2016 titled "*The Cost of Deviation*" ("the PP Report") into the complaint of the third applicant with regard to a contract to construct houses in Areas 9 & 10 at Kwa-Nobuhle Township, Kariega (formerly Uitenhage) pursuant to a tender for that purpose awarded to WK Construction (Pty) Ltd and WK Pipelines (Pty) Ltd ("WK") by the first respondent, the Nelson Mandela Bay Municipality ("the Metro").

[2] WK had subcontracted the third applicant, a registered Close Corporation ("the CC"), of which the first and second applicants were (prior to their final sequestration on 3 December 2013) the sole members, to erect some of the top structures. An irresolvable dispute arose between WK and the CC concerning payment which prompted the said complaint being lodged with the PP. The latter directed the Metro, as part of the remedial action ordered in the report, to make payment of the amount due to the CC.

[3] The plethora of subsequent litigation instituted by the applicants against the Metro, more fully dealt with below, was aimed at the implementation of this remedial action. In fact, the case being presented by the applicants in the present proceedings, some 7 years

after the PP Report was finalised, is effectively still aimed at the same issue, namely payment by the Metro of the amount claimed by the CC.

[4] The present proceedings, which were preceded by numerous applications brought by the applicant involving the Metro, concern three separate opposed applications, namely-

- (a) the main application by the Metro for an order declaring the applicants to be vexatious litigants in terms of section 2(1)(b) of the Vexatious Proceedings Act¹ (“the vexatious proceedings application”);
- (b) an interlocutory application by the Metro for leave to file a supplementary affidavit in support of the main application; and
- (c) a rule 30 application launched by the first applicant for an order, *inter-alia*, striking out the main application as an irregular step together with a range of other relief not strictly related to rule 30 proceedings.

Brief Background

[5] It is necessary to set out a brief background encompassing the litigation history involving the parties in order to place the present proceedings into context.

(i) The first application

[6] The litigation marathon involving the parties commenced with an application brought by the applicants in April 2016 under case number 992/2016 against the Metro and the PP to enforce the abovesaid remedial action in the PP’s Report (“the first application”). The matter came before Smith J on 12 April 2016 who postponed the application *sine die* and ordered that it be heard simultaneously with the application

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to review the PP's Report that the Metro intended bringing. The review application was subsequently launched on 29 April 2016 under case number 1414/2016. The PP; the liquidators of the CC; the trustees of the first and second applicants' insolvent estates; the MEC for Human Settlements in the Eastern Cape provincial government; as well as WK were all cited as parties in the review application.

(ii) *The second application*

[7] The review application spurred a rule 30/30A application brought under the review case number 1414/2016 by the first and second applicants (purportedly in their personal capacities and on behalf of the CC) against the Metro, to have the review application set aside together with a range of other relief ("the second application"). The matter was heard by Plasket J (as he then was) who dismissed the application on 30 August 2016 and directed that the section of the judgement dealing with the standing of the first and second applicants be brought to the attention of the Director of Public Prosecutions, Port Elizabeth. The court found in the relevant section of the judgement that, given their status as unrehabilitated insolvents and having been divested of their members' interests in the CC, the first and second applicants had neither personal standing nor standing to have brought the application on behalf of the CC. This conduct *prima facie* constituted a criminal offence in contempt of an earlier order granted by Chetty J in the matter of *Sholto-Douglas NO & Others v Gobo Gcora Construction and Project Management CC & Others*² interdicting the said applicants from authorising the initiation, pursuit or defence of any legal proceedings of any nature by the CC.

(iii) *The third application*

² ECP 27 June 2014 case no 1970/14

[8] The applicants thereafter brought an application under case number 1414/2016 to declare the abovesaid judgement of Plasket J null and void and of no force or effect (“the third application”). This matter was heard by Eksteen J who dismissed the application on 20 October 2016. The court found that it was not competent for a single judge to declare the judgement of a similar court null and void. The competent relief was for the aggrieved party to appeal against the impugned judgement of Plasket J. The court concluded that Plasket J was correct in finding that the first and second applicants had no standing to bring the application before that court. By parity of reasoning, they similarly had no standing to bring the proceedings that were being adjudicated by Eksteen J himself, which conduct was once again in breach of the order of Chetty J. The court also referred to a similar finding by Roberson J in the matter of *Gobo Gcora Construction and Project Management CC & Others v Cape Building and Truss Supplies & Another*³. Eksteen J accordingly referred the matter to the Director of Public Prosecutions, Eastern Cape.

(iv) *The fourth application*

[9] The applicants brought an application for leave to appeal which was dismissed by Eksteen J on 10 November 2016 (“the fourth application”).

(v) *The fifth application*

[10] The applicants then lodged an application for special leave to appeal on 9 January 2017 in the Supreme Court of Appeal. This application was dismissed with costs on 23 March 2017 for a lack of reasonable prospects of success (“the fifth application”).

³ Case no 2699/2011 dated 8 September 2016

(vi) *The sixth application*

[11] A subsequent application for leave to appeal to the Constitutional Court was dismissed with costs on 5 June 2017 on the ground that it bears no prospect of success (“the sixth application”).

(vii) *The seventh application*

[12] The abovesaid first application under case number 992/2016 that was earlier postponed *sine die* by Smith J was heard by Pickering J on 14 September 2017 together with the Metro’s review application under case number 1414/2016 as well as a further application under the latter case number (“the seventh application”) brought by the applicants to dismiss the review application. Judgement was delivered on 21 September 2017. Pickering J partly upheld the review and dismissed both the abovesaid applications brought by the applicants. Importantly, the finding by the PP that the CC suffered prejudice due to the conduct of the Metro as well as the remedial action aimed at compelling the Metro to pay the monies due to the CC, were all set aside. Each party was ordered to bear its own costs.

[13] It should be pointed out that the PP conceded at the hearing of the review application that in the absence of a contractual nexus between the Metro and the CC, the findings and remedial action relating to payment by the Metro of amounts due to the CC were susceptible to being set aside. It was specifically pointed out in the judgement of Pickering J that the averment of the Metro was not disputed that it had paid to WK all the monies that were due to it. This quite logically would have included any amounts that WK in turn owed to the CC in respect of the construction of the houses. The upshot of this was that any loss that the CC may have suffered was accordingly due

to the failure of WK to pay over to the CC that portion of the funds received from the Metro, that was due to the CC.

(viii) *The eighth application*

[14] The applicants brought an application for leave to appeal against the judgement and order handed down by Pickering J on 21 September 2017 (“the eighth application”). That application was dismissed on 22 November 2017 on the ground that there was no reasonable prospect that another court would come to a different conclusion. Each party was ordered to pay its own costs.

(ix) *The ninth application*

[15] The applicants brought an application for special leave to appeal in the Supreme Court of Appeal which was dismissed on 28 March 2018 on the ground that there was no reasonable prospect of success (“the ninth application”).

[16] The applicants did serve an application for leave to appeal to the Constitutional Court on the Metro, but did not file the same at the Constitutional Court. Although the Metro lists this among the applications that were launched by the applicants, this abortive attempt should not in my view be regarded or treated as a completed application for purposes of deciding the present application. It would accordingly be disregarded.

(x) *The tenth application*

[17] The first applicant furthermore launched an application for declaratory relief related to the review application on the basis that the Metro breached certain of its constitutional or statutory obligations and that its officials committed financial misconduct and perjury on several occasions (“the tenth application”). This application was heard by a Full Bench presided over by the Judge President together with a contempt of court application launched by the Metro. The application of the first applicant was in fact set out in his answering affidavit to the contempt application, which affidavit was styled “*answering affidavit and grounds for counter relief*”. The first applicant was found to have been in contempt of court and was sentenced to 6 months imprisonment conditionally suspended for 5 years and was ordered to pay the costs of the application as well as all reserved costs. His own application was dismissed. In assessing the basis for the counter relief sought by the first applicant, the Judge President stated in the judgment that “*Besides making conclusions of law relating to the violation of certain statutory provisions, the respondent [first applicant] has not placed any credible, admissible or relevant evidence in support of the counter relief he is seeking. The averments made in the supporting affidavit do not disclose a cause of action*”.

(xi) *The eleventh and twelfth applications*

[18] The applicants next brought two applications for the rescission of the abovesaid judgements of Justices Plasket, Eksteen and Pickering (“the eleventh and twelfth/rescission applications”). The two applications were heard simultaneously and were dealt with in one judgement (“the rescission judgment”) by Van Zyl DJP. The judgment was handed down on 16 April 2019. Both applications were dismissed with costs. The court referred specifically in the judgement to the issue of the joinder of the first and second applicants in the review application where they were not originally cited as parties (a matter which featured prominently in some of the subsequent applications brought by the applicants). The court indicated with reference to paragraph [29] of the review judgment (dealing with joinder) that Pickering J decided

to join the applicants as parties in the exercise of the court's common law discretionary power to effect a joinder on the basis of convenience. This was the expressed intention of Pickering J and the hearing proceeded on that basis with the applicants fully participating as parties, albeit the eventual order never expressly recorded the fact of the joinder. The court found no reason to correct the order in this respect given that the applicants were as a fact joined as parties and that no purpose would be served by such correction.

(xii) *The thirteenth application*

[19] The applicants sought leave to appeal the rescission judgement which was refused by Van Zyl DJP on 2 July 2019 ("the thirteenth application"). There was no appearance on behalf of the Metro at the hearing and as a result no order was granted as to costs. The first and second applicants appeared in person.

(xiii) *The fourteenth application*

[20] The applicants applied to the Supreme Court of Appeal for special leave to appeal the rescission judgement which application was dismissed with costs on 25 November 2019 ("the fourteenth application").

(xiv) *The fifteenth application*

[21] The applicants then launched a nullity application in respect of the judgements of Pickering J and Van Zyl DJP ("the fifteenth application"). This application was set down together with the then pending vexatious proceedings application of the Metro.

(xv) *The sixteenth application*

[22] The applicants also filed a Rule 30/30A application (“the sixteenth application”) in respect of the vexatious proceedings application on the ground that it was irregular for the Metro to rely on its answering affidavit in the review application as its founding affidavit in support of the vexatious proceedings application.

[23] The fifteenth (nullity) application served before Gqamana J who dismissed the same with costs on 2 June 2022 (“the nullity judgment”). The court held that the vexatious proceedings application was set down prematurely and ordered that it be postponed and be heard simultaneously with the applicants’ Rule 30/30 A (sixteenth) application on a later date.

(xvi) *The seventeenth and eighteenth applications*

[24] The applicants subsequently brought an application for leave to appeal the nullity judgement (“the seventeenth application”) which was dismissed with costs by Gqamana J on 3 August 2022. They then brought an application for special leave to appeal the nullity judgement (“the eighteenth application”) which is currently still pending before the Supreme Court of Appeal.

(xvii) *The Metro’s interlocutory application*

[25] The Metro brought an interlocutory application for leave to file a supplementary affidavit in the vexatious proceedings application in order to include references to the abovesaid seventeenth and eighteenth applications for leave to appeal the nullity judgement. The latter two applications were brought after the vexatious proceedings

application was launched and were therefore not dealt with in the latter application. This interlocutory application served before Kruger AJ on 24 November 2022 who ordered that it be heard together with the pending vexatious proceedings and Rule 30/30 A applications.

(xix) *Ambit of the present proceedings*

[26] As indicated, the present proceedings concern three separate opposed applications. These applications accordingly serve before me by virtue of the orders of Gqamana J in respect of the vexatious proceedings and Rule 30/30A (sixteenth) applications and of Kruger AJ in respect of the Metro's interlocutory application to file a supplementary affidavit. I now revert to the present proceedings.

Appearances

[27] Mr Gcora, the first applicant, appeared in person on behalf of the applicants. He filed extensive heads of argument and a bundle of unreported authorities. He ably argued the case on behalf of the applicants.

[28] Mr Rorke SC, together with Ms Rawjee, appeared on behalf of the Metro. They previously filed separate heads of argument in respect of the Metro's interlocutory application in anticipation of the hearing before Kruger AJ on 24 November 2022, which heads they relied upon for purposes of the present hearing. They have also filed heads of argument in the normal course in respect of the vexatious proceedings and Rule 30/30A applications.

[29] It is convenient to deal with the vexatious proceedings and interlocutory applications first, followed by the Rule 30/30A application of the applicants.

Vexatious proceedings and interlocutory applications

[30] As indicated, the vexatious proceedings application is brought in terms of section 2(1)(b) of the Vexatious Proceedings Act⁴ ("the Act") in order to have the applicants declared to be vexatious litigants. The general effect of such relief is to preclude the affected party from instituting legal proceedings against any person without the leave of the relevant court where the envisaged proceedings are to be instituted. Such leave may only be granted where such court is satisfied that there are *prima facie* grounds for the relevant proceedings and that they are not an abuse of the court's process.

[31] The Constitutional Court pointed out in *Beinash & Another v Ernst & Young and Others*⁵ that the purpose of the Act is to stop the persistent and groundless institution of legal proceedings by putting in place a screening mechanism. This is necessary to

⁴ Section 2 reads as follows in relevant part:

"2(1)(b) If, on an application made by any person against whom legal proceedings have been instituted by any other person or who had 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 grounds 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 leave of the court, or any judge thereof, or that inferior court, as the case may be, and such relief 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. (c) an order under paragraph (b) may be issued for an indefinite period or for such period as the court may determine, and the court may at any time, on good cause shown, rescind or vary any order so issued.

...
(3) The registrar of the court in which an order under subsection(1) is made, shall cause a copy thereof to be published as soon as possible in the Gazette.

(4) Any person against whom an order has been made under subsection(1) who institutes any legal proceedings against any person in any court or any inferior court without the leave of that court or a judge thereof or that inferior court, shall be guilty of contempt of court and liable upon conviction to a fine not exceeding £100 or to imprisonment for a period not exceeding six months."

⁵ 1999(2) SA 116 (CC) at para [15] ("*Ernst & Young*").

protect the interests of the victims of the vexatious litigant who have repeatedly been subjected to the costs, harassment and embarrassment of unmeritorious litigation. Also, to protect the public interest that the functioning of the courts and the administration of justice proceed unimpeded by groundless proceedings. The court concluded that the provisions of the Act were not unconstitutional.

[32] That court also considered the meaning of vexatious litigation in *Lawyers for Human Rights v Minister in the Presidency & Others*⁶. The court concluded with reference to *Bisset & Others v Boland Bank Ltd & Others*⁷ that vexatious litigation was “*frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant*”. The court further held that a frivolous complaint “... *is one with no serious purpose or value*” and that “[v]exatious litigation is initiated without probable cause by one who is not acting in good faith and is doing so for the purpose of annoying or embarrassing an opponent. Legal action that is not likely to lead to any procedural result is vexatious”.

[33] It is necessary to consider the respective cases of the parties in respect of the vexatious proceedings application against this background. The Metro’s interlocutory application will be dealt with in the course of the evaluation set out below.

(i) Case of the Metro

[34] It was submitted on behalf of the Metro that both requirements have been satisfied for an order in terms of section 2(1)(b) of the Act, namely persistency and the absence of reasonable grounds. The argument ran as follows. The applicants have lodged at least 17 unsuccessful applications in their feud with the Metro. Their sole objective

⁶ 2017(1) SA 645 (CC) para [19] (“*Lawyers for Human Rights*”).

⁷ 1991(4) SA 603(D) at 608D-F

being ultimately to obtain payment from the Metro of monies allegedly due by WK pursuant to the remedial action in the PP Report. The claim lacks reasonable grounds in view of the concession by the PP that the remedial action was without foundation given the absence of a contractual nexus between the Metro and the CC. The review application of the Metro was upheld as a result and the remedial action was set aside. The appeal processes in respect of the review application have been exhausted and the matter has been finalised. The objective of the present of litigation is to impermissibly resurrect the review application and thereby revive the remedial action. The presiding judges as well as the Metro's legal representatives and officials have been subjected to harassment and embarrassment as a result of the applicants' unmeritorious litigation. Furthermore, the ratepayers' money is being used to pay for the litigation.

[35] The Metro is left with no other option than to seek appropriate relief to stop the plethora of vexatious litigation brought against it by the applicants. The Metro therefore seeks an order in terms of the notice of motion and for costs, including that consequent upon the employment of two counsel, to be paid by the applicants.

(ii) *Case of the applicants*

[36] The applicants basically deny having instituted vexatious litigation in order to harass or embarrass the Metro. It was submitted on their behalf that all of the proceedings instituted by them were well-founded and prompted by unlawful or irregular conduct on the part of the Metro and its officials. The various judgements handed down are inconsistent and even contradictory which entitled the applicants to legitimately seek clarification through approaching the court by means of the various applications. By way of example, a question exists whether or not the first and second applicants were indeed joined in the review application. The statement by the review court that all monies owing to WK were paid placing reliance in this regard on annexure "L" and "M"

to the Metro's papers, needs clarification. The finding by the review court that the procurement process that resulted in the appointment of WK was irregular and unlawful, must be clarified. Similarly various paragraphs in the nullity judgement need clarification.

[37] The applicants furthermore list numerous issues arising from and aspects of the various applications and judgements which in their view should be clarified or interpreted in the interests of justice. It was submitted that they were entitled to such clarification instead of being muzzled for malicious reasons not disclosed to the court.

[38] The applicants therefore seek relief clarifying the issues raised in its opposing papers and heads of argument and an order dismissing the Metro's application and for mediation of the implications of the findings at paragraphs 8.1 – 8.1.5; 8.2.2; 8.2.3; 8.3.2 and 8.3.3 of the PP's Report which findings have not been set aside. The applicants also persist with the relief sought in paragraphs 2.2.1 – 2.2.7; 2.3 and 12 of the first applicant's answering affidavit dated 30 August 2022 in the vexatious proceedings application which relief has not been opposed by the Metro. These subparagraphs relate to a variety of matters, including alleged hearsay and incorrect statements in the Metro's affidavit in the review application; contempt of the PP by failing to implement the remedial action; violation of Act 95 of 1998 by paying WK an unregistered homebuilder; perjury by a Metro official; verification and/or interpretation of a number of paragraphs in the various court judgements and the PP report; and referral of the dispute to a referee or mediator for resolution.

[39] The applicants submitted in their heads of argument that the unending litigation results from the attitude and approach of the Metro in treating the applicants as if they were unequal before the law and of lesser worth than other people and twisting the law in any way that benefits it. There is no other appropriate place for the applicants to report such ill-treatment, except the courts.

Evaluation

(i) *Vexatious proceedings*

[40] The High Court has always possessed the inherent jurisdiction to prevent abuse of its own process in the form of frivolous or vexatious litigation.⁸ This power, however, only extends to preventing the abuse of the court's own process in order to protect the applicant before it. The court has no inherent power to impose a general prohibition curtailing a person's ordinary right of litigation in respect of all courts and all parties.⁹ This limitation was remedied by the Act which empowers the court to impose general restrictions on the institution of vexatious legal proceedings. It has been held that the provisions of the Act complement the common law to prevent vexatious litigation.¹⁰

[41] In evaluating the merits of the matter it is instructive also to refer, (in addition to the authorities already set out in paragraphs [31] and [32] above), to the following further enlightening dicta with regard to proceedings of the present nature. In *Fisheries Development Corporation v Jorgensen*¹¹ the court stated:

"Vexatious proceedings will also no doubt include proceedings which, although properly instituted, are continued with the sole purpose of causing annoyance to the defendant, 'abuse' connotes a mis-use, an improper use, a use mala fide, a use for an ulterior motive."

⁸ *Western Assurance v Caldwell's Trustees* 1918 AD 262 at 271; *Corderoy v Union Government* ("Corderoy") 1918 AD 512 at 517.

⁹ *Corderoy* (fn 8); *In re Anastassiades* 1955(2) SA 220 (W) at 225H.

¹⁰ *ABSA Bank Ltd v Dlamini* 2008(2) SA 262 (D).

¹¹ 1979(3) SA 1331(W) at 1339

[42] Innes CJ pointed out in *Corderoy*¹² that the power to limit the right to litigate on the basis that the relevant proceedings were vexatious, should be very cautiously exercised because it affects the elemental right of free access to the courts which should not be interfered with save in exceptional and necessary instances. As indicated in *Argus Printing & Publishing Co Ltd v Anastassiades*¹³:

“It seems clear from these decisions that the elementary right of free access to the courts should not be interfered with by the summary dismissal of an action without hearing evidence, on the ground that it is vexatious, unless it is manifest that the action is so unfounded that it could not possibly be sustained. It must be quite clear that failure of the action is a foregone conclusion”

[43] The Constitutional Court held in *Lawyers for Human Rights*¹⁴ that whether an application is manifestly inappropriate and vexatious depends on whether it was so unreasonable or out of line that it constitutes an abuse of the process of the court. After reiterating the statement of Mahomed CJ in *Beinash*¹⁵ that there cannot be an all-encompassing definition of “*abuse of process*” the court referred with approval to the following further dictum in *Beinash*¹⁶:

“What does constitute an abuse of the process of the Court is a matter which needs to be determined by the circumstances of each case. ... It can be said in general terms, however, that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective.”

¹² supra fn 8

¹³ 1954(1) SA 72 (C) at 74A.

¹⁴ supra fn 6 paras [20] and [21].

¹⁵ *Beinash v Wigley* 1997(3) SA721 (SCA) at 734F-G.

¹⁶ Id at 734D-G

[44] The court added that ultimately the enquiry on the appropriateness of the proceedings requires a close and careful examination of all the circumstances.

[45] There is eminent authority for the proposition that proceedings may be vexatious in effect although not in intent. It was pointed out in this regard in *In re Alluvial Creek Ltd*¹⁷ that:

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

[46] There are two threshold requirements for relief in terms of section 2(1)(b) of the Act: firstly, that the respondent has persistently instituted legal proceedings and secondly that such proceedings have been without reasonable ground.¹⁸

[47] The complaint of the Metro in the present matter relates to the abovesaid long line of at least 17 unsuccessful applications (and attempts to appeal the adverse judgements) brought against it by the applicants all relating to the remedial action in favour of the CC stipulated in the PP’s Report. Effectively, all of this litigation was aimed at reviving and enforcing that remedial action which was, however, reviewed and set aside by Pickering J some six years ago on 21 September 2017 in the Metro’s review application. The appeal process in respect of that judgement was finalised on 28 March 2018 when special leave was refused by the Supreme Court of Appeal. An

¹⁷ 1929 CPD 532 at 535; See also *NS v JN* [2022] JOL 55352 (SCA) para [21]

¹⁸ *Ernst & Young* fn 5 para [15]; *Cohen v Cohen* 2003(1) SA 103 (C) at para [17]

attempt to obtain special leave from the Constitutional Court was initiated but abandoned.

[48] It follows that any of the numerous subsequent attempts to revive the remedial action, including the applicants' approach to the present proceedings which clearly has the same objective, lacked any reasonable ground. The applicants, for example, indicated in their papers and during argument in these proceedings that they require clarification or interpretation of numerous aspects apparently arising from the aforesaid judgements. They also propose a settlement that entails the implementation of the remedial action that was set aside. It is readily apparent that these issues raised by the applicants could very well spawn further rounds of extensive litigation by the applicants against the Metro. It is also clear that the applicants have not accepted that all conceivable litigation concerning the relevant remedial action has long since been exhausted.

[49] Save for the application to enforce the remedial action which was still extant at that stage, none of the subsequent applications was well-founded. Unsurprisingly, they were all dismissed. The concession by the PP, which Pickering J found to have been properly made, that the remedial action concerning the CC was unfounded in the absence of a contractual nexus between the Metro and the CC, effectively put paid to the further litigation instituted by the applicants. On the strength of that concession, the review of the remedial action was a *fait accompli*. Any subsequent attempt by the applicants to revive the review or the remedial action was without reasonable ground. The requirement of section 2(1)(b) of the Act that the relevant litigation lacked any ground has accordingly been established.

[50] It is self-evident that the applicants have persistently instituted legal proceedings against the Metro in respect of the same subject matter. The overwhelming number

of unsuccessful applications, at least 17 in total, undoubtedly evinces the persistency of the litigation. This requirement has therefore also been satisfied.

[51] The relevant litigation is clearly vexatious in effect. The first and second applicants are unrehabilitated insolvents who litigated in person through the first applicant. The CC has been under provisional liquidation at some stage, although that order was subsequently discharged. There is no indication that the CC is possessed of any significant means. The first and second applicants are clearly in a similar financial position. The Metro on the other hand litigated throughout with the assistance of senior and junior counsel on instructions of a local firm of attorneys. The phenomenal costs that have no doubt been generated by the extensive level of litigation referred to earlier, must be covered with public funds generated from ratepayers. It is a matter of concern that regardless of various costs orders granted in its favour, there is no realistic prospect that the Metro would be able to recover any costs from the applicants who undoubtedly are well aware of this fact. For the applicants to simply forge ahead with a plethora of unmeritorious litigation under those circumstances, amount in my view to an abuse of process which renders the litigation vexatious also in intent and not merely in effect.

[52] In the circumstances, the Metro is entitled to relief that protects it against the unmerited litigation onslaught unleashed by the applicants against it. I am, however, not persuaded that the relief should reach beyond the present parties or that it should be general in effect. I therefore intend tailoring the relief to be granted accordingly.

[53] The Metro has only asked for costs in the event of the vexatious proceedings application being opposed. This has been the case. The opposition has been strenuous and extensive as had become the norm. The Metro is entitled to its costs in the circumstances.

(ii) *Interlocutory application*

[54] It remains for me to deal with the Metro's interlocutory application which is also opposed. The real purpose of this application is to place a supplementary affidavit before the court cataloguing the further two abortive applications for leave to appeal the nullity judgement of Gqamana J (the seventeenth and eighteenth applications listed above). These applications were brought by the first and third applicants subsequent to the vexatious proceedings application having been launched by the Metro. The relevant information was therefore not available when the latter application was launched and is clearly material and relevant to that application. The said two applications are matters of public record and the information thereanent contained in the supplementary affidavit cannot be in dispute. This information would facilitate a full ventilation of the vexatious proceedings application and ensure its adjudication upon all the relevant facts. The applicants cannot be prejudiced in my view by the admission of the further affidavit.

[55] The applicants have filed opposing papers in the interlocutory application, which the Metro does not wish to reply to. The opposing papers do not address the merits of the interlocutory application but instead contains an attack on Mr Ganyaza, the deponent of the supplementary affidavit. It questioned his authority to act on behalf of the Metro. Counsel for the Metro submitted that the applicants' bare denial of the authority of Mr Ganyaza was not supported by the evidence given the resolution which provides Mr Ganyaza with the necessary authorisation that is annexed to the affidavit relied upon by the Metro in the vexatious proceedings application. As such, the opposition was frivolous and vexatious and was ultimately aimed at resurrecting the remedial action in the PP Report that was set aside by Pickering J. In my view there is merit in the submission.

[56] Should leave to file the supplementary affidavit be refused, the Metro would be prejudiced by not having all the available and necessary evidence before the court for the proper consideration of its vexatious proceedings application. The relevant evidence is clearly important for purposes of the latter application in that it demonstrates that the applications for leave to appeal were brought in the face of direct contrary Constitutional Court authority in the matter of *Ndabeni*¹⁹ to the effect that the proper process to be followed where a High Court judgement or order is contested on the basis that it is a nullity, is an appeal and not an application for review as resorted to by the applicants. The latter option is only available in respect of Magistrate's Court orders. The first applicant was well aware of this authority. This is further indication that the applicants continued to engage in frivolous and vexatious litigation against the Metro.

[57] It is accordingly in the interests of justice for the supplementary affidavit to be placed before the court. The Metro is entitled to the necessary relief in this regard.

The applicants' Rule 30/30 A application

[58] This application is somewhat confusing and raises various issues that are unrelated to an application of this nature. Nonetheless, it appears that the principal ground for the application is the applicants' contention that the Metro is precluded from relying on its answering affidavit filed on 12 October 2021 in opposition to the applicants' nullity application that was decided by Gqamana J.

[59] The stance adopted by the applicants appears to be based on a misapprehension of the requirements of Rule 6. The contention of the applicants is that every application

¹⁹ *Municipal Manager: OR Tambo District Municipality & Another v Ndabeni* 2022(10) BCLR 1254 (CC) at para [23].

must consist of a notice of motion and a founding affidavit, at pains of being irregular. The notice of motion in the vexatious proceedings application is not accompanied by a founding affidavit. Instead, it purports to rely on an answering affidavit filed in different proceedings which have since been finalised. As such, the application was irregular and falls to be set aside.

[60] The response of the Metro was that the reliance on the earlier answering affidavit is established practice based on considerations of convenience and pragmatism. The purpose is to avoid unnecessary duplication of relevant information that was already on record. By way of illustration, reference was made to the matter of *Mangqo v MEC for the Department of Social Development, Eastern Cape*²⁰ where this practice was accepted by Sangoni J (as he then was).

[61] There was nothing untoward, in my view, for the Metro to rely on its said answering affidavit. The vexatious proceedings application was enrolled to be heard together with the nullity application. The answering affidavit in the latter proceedings was already before the court that was due to hear both applications. It would have been an unjustified duplication to produce a founding affidavit in support of the vexatious proceedings application, in substantially similar terms to the answering affidavit in the nullity application where both affidavits were to serve before the same court. It was therefore not irregular for the Metro to have relied on the said answering affidavit for the purposes of both opposing the nullity application and supporting the vexatious proceedings application. In fact, the first applicant resorted to a similar procedure in the contempt of court proceedings before the Full Bench where he relied on the answering affidavit in the contempt proceedings for the declaratory relief that he sought (the tenth application) in respect of the review application.

²⁰ [2012] JOL 29647 (ECM) para [3]

[62] There is no need in my view to deal with the various other unrelated sweeping relief being claimed in the present application. That includes a striking out of the index filed by the Metro, its heads of argument and even the address of its senior counsel in the nullity application; an order prohibiting the Metro from challenging any report by a statutory body; that the conduct of the Metro's legal team be reported to the Legal Practice Counsel; and relief against individual officials of the Metro for alleged transgressions. Apart from the fact that such further relief is irrelevant to the rule 30/30A proceedings, it is not supported by any evidence.

[63] It follows that the Rule 30/30A application falls to be dismissed.

Conclusion

[64] In my view the numerous applications referred to above which were brought by the applicants against the Metro were all fundamentally misdirected and unreasonable which fact must count against the applicants. It justifies the conclusion that the applicants are vexatious litigants as envisaged in section 2(1)(b) of the Act. In my view the Metro is entitled to the relief that it seeks in these proceedings as more fully set out in the draft order which was handed up by its counsel at the hearing.

[65] In the result, the following order shall issue:

- (a) The applicants' Rule 30 applications are dismissed with costs, including the costs of two counsel;

- (b) The first respondent is granted leave to file the supplementary affidavit of Monde Ganyaza in the vexatious proceedings application under case number 1414/2016 and its non-compliance with the Rules in this regard is condoned;
- (c) The applicants are declared vexatious litigants pursuant to the provisions of section 2(1)(b) of the Vexatious Proceedings Act, 3 of 1956 ("the Act");
- (d) The first, second and/or third applicants shall not institute any legal proceedings in any Division of the High Court of South Africa or in any inferior court against the first respondent relating in any way to the Public Protector's Report titled '*Costs of Deviation*', without the leave of the relevant inferior court or of the High Court or any judge thereof, as envisaged in section 2(1)(b) of the Act;
- (e) The applicants are directed to pay the costs of the vexatious proceedings application and the interlocutory application for the relief set out in paragraph (b) above instituted by the first respondent, including the costs of two counsel;
- (f) The Registrar is directed to cause a copy of this order to be published in the *Government Gazette*, as contemplated in section 2(1)(b) of the Act.

D.O. POTGIETER

JUDGE OF THE HIGH COURT

APPEARANCES

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For the Respondents: Adv Rorke SC and Adv Rawjee, instructed by Gray
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Date of hearing: 13 April 2023

Date of delivery of judgment: 16 May 2023