

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

CASE NO: 26805/2022

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED.

11/10/2022

In the matter between:

S [....] K [....]

1st Applicant

S [....] M [....]

2nd Applicant

And

T [....] S [....] 1 M [....] 1

Respondent

JUDGMENT

MAKUME, J:

[1] The Applicants seek an order that this matter be enrolled as an urgent matter and thereafter that the following relief be granted against the Respondent.

- a) That the Respondent be declared a vexatious litigant.
- b) That Respondent not be permitted to institute any legal proceedings against the Applicant in any Court without leave of the Court.

c) That Respondent be prohibited from laying any complaint and or charges against the Applicant in respect of matters involving the minor child unless leave has been granted by the Court.

[2] The papers are voluminous the parties have both filed Answering and Replying Affidavits.

[3] An application to declare any person a vexatious litigant is intrusive and goes to the heart of depriving such a person of his constitutional rights to access to justice and fair dispute resolution. (See Section 34 of the Constitution).

[4] At the heart of the dispute in this matter is access rights to a minor child a girl K [...] 1 M [...] S [...] born on the 10th May 2018 out of an intimate relationship between the first Applicant and the Respondent.

[5] It is common cause that the relationship has gone sour. The parties are now tussling about each other's right to access over the minor child.

[6] It appears from the papers that litigation commenced in and around September 2018 when the minor child was about four months old. The Respondent approached the Children's Court in Randburg seeking an order in terms of Section 53 of the Children's Act of the 2005. He alleged before that Court that the minor child was or maybe in need of care.

[8] What follows thereafter is a series of Court applications and criminal charges laid by the Respondent against the first Applicant on the basis that the Applicant was refusing or denying the Respondent access and contact to the minor child.

[9] On the 28th October 2019 the Children's Court made an interim order in the following terms:

9.1 The matter was referred to the Family Advocate for mediation of a parenting plan.

9.2 The Respondent was granted Supervised contact with the minor child

9.3 the contact would be supervised by a Social Worker appointed by agreement between the parties.

9.4 The contact sessions would be for 3 hours every alternate Saturday from 13h00 until 16h00.

[10] Supervised contact commenced under the guidance of Ms Sophia Commerford during 2019. However, on the 28th November 2019 the Respondent laid a criminal charge against the Applicant at the Randburg SAP complaining that the Applicant is in contempt of a Court order, notwithstanding that supervised contact took place even after the Respondent had laid contempt of Court proceedings.

[11] On the 24th November 2020 the Children Court made another order which order the Applicant challenged by way of an Urgent Application in the High Court. On the 10th December 2020 Windel J granted the following order which order set aside the order of the Children's Court. That order reads as follows:

11.1 That in the best interest of the minor child it is ordered that before the Respondent is to have any contact with the minor child the Respondent is to:

- a) Have completed a comprehensive clinical assessment by a Clinical Psychologist with such assessment and or feedback from the Clinical Psychologist being made available to the Applicant and the respective courts. Such assessment should focus on personality testing as well as screening for any Pathology.
- b) Commence with a treatment plan as set out by the Clinical Psychologist following the Comprehensive assessment be it therapeutic process or referral to Psychologist for medication.
- c) Have completed a hair follicle drug screening test with such results being made available to the Applicant and the respective Court.

- d) Have completed a parental guidance course.

[12] That order effectively ended any supervised contact that had been granted by the Children's Court. That order still stands to date. In the meantime, as far back as 2019 the criminal case for contempt of Court was withdrawn by the Prosecutor in the Randburg Magistrate Court.

[13] Despite that withdrawal the Respondent kept on making enquiries and the police would now and then phone the Applicant and or her mother to report at the police station to make a warning statement. It was as a result of that, that the Applicant commenced proceedings to declare the Respondent a vexatious litigant. That matter is set down for hearing on the 17th October 2022 in this Court.

[14] At the commencement of this hearing I enquired from Applicant's Counsel why this Court should deal with the issue of declaring the Respondent a vexatious litigant when that matter is already set down for hearing on the 17th October 2022 which is in less than 2 weeks' time from now. Counsel for the Applicant correctly conceded that they are not persisting with that prayer but will seek an interim order interdicting the Respondent from instituting or laying criminal charges or complaint against the Applicant pending the outcome of the hearing set down for the 17th October 2022.

[15] In his defence the Respondent maintains firstly that the application is not urgent secondly that the Applicant in order to succeed must prove a prima facie right, reasonable apprehension of harm, balance of convenience and lastly that she has no satisfactory or alternatively relief.

[16] In the second defence the Respondent says that he opened a criminal case once at Randburg police station as a result of the Applicant having failed to comply with the interim order granted by the Children's Court on the 28th October 2019 and that after the case was withdrawn provisionally he has been making follow ups with the Prosecution to find out the basis on which the case was withdrawn.

[17] What is clear in this matter is that the Applicant has rushed to this Urgent Court after the withdrawal of charges had been reinstated by the Prosecutor for her to appear in the Randburg Court on the 5th October 2022. It is not the Respondent who made that decision.

URGENCY AND MERITS

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

[19] However, even if I am found to be incorrect the Applicant should fail on the basis that she has not demonstrated a prima facie right one of the requirements for interdictory relief, she has alternative relief because the matter is set down for hearing on the 17 October 2022. Her argument of reasonable apprehension that the Respondent will continue to lay charges against her is speculative.

[20] It is trite law that the purpose of the Vexatious Proceedings Act is to put a stop to persistent and ungrounded institution of legal proceedings. **Mokgoro J in Beinash and Another vs Ernest and Young and Another 1999 (2) SA 116 (C) at page 122 G-H** writes as follows:

“This purpose is to put a stop to persistent and ungrounded institution of legal proceedings. The Act does so by allowing a Court to screen (as opposed to absolutely bar) a person (Who) has persistently and without any reasonable ground instituted legal proceedings in any Court or inferior Court. This screening mechanism is necessary to protect at least two important interests. There are the interests of the victim of the vexatious litigant who has repeatedly been subjected to costs harassment and embarrassment of unmeritorious litigation and the public interest that the functioning of the courts and the administration of Justice proceeds unimpeded by the Clog of groundless proceedings.”

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

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

- a) The application is dismissed with costs.

Dated at Johannesburg on this day of October 2022

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

DATE OF HEARING : 06 OCTOBER 2022

DATE OF JUDGMENT : 11 OCTOBER 2022

FOR APPLICANT : ADV L DE WET

INSTRUCTED BY : MESSRS MORTONROSE FULBIRGHT
SOUTH AFRICA INC

FOR RESPONDENT : ADV M HLUNGWANE

INSTRUCTED BY : LEGAL AID SOUTH AFRICA