

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No 4383/02

In the matter between:

BRENDA COHEN

Applicant

and

ROY SELWYN COHEN

First Respondent

**THE MAGISTRATE, MAINTENANCE COURT
CAPE TOWN**

Second Respondent

JUDGMENT DELIVERED: 26 AUGUST 2002

GRIESEL J:

1]In this application the applicant is seeking an order against the first respondent in terms of **sec 2(1)(b)** of the Vexatious Proceedings Act 3 of 1956 (*'the Act'*). She also seeks an order directing that proceedings instituted by the first respondent against her in the maintenance court in Cape Town under Case No 01/816/95 be postponed pending the determination of this application. The relevant maintenance court magistrate has formally been joined herein as second respondent, but does not oppose the application and no relief is claimed against her. I shall accordingly refer to the first respondent herein simply as *'the respondent'*.

The Facts

2]The applicant, who is presently an estate agent, was formerly married to the respondent, a businessman, for some 21 years. On 10 February 1995 this court granted a decree of divorce, incorporating the terms of a consent paper, entered into between the parties on 4 November 1994. In terms of the consent paper, custody of the two minor children born of the marriage was awarded to the applicant. The respondent was obliged to pay maintenance to the applicant in respect of the minor children. In addition, the respondent had to pay maintenance to the applicant personally at the rate of R3 000 per month plus medical costs, servicing costs in respect of her motor vehicle, replacement thereof every five years, as well as levies payable in respect of her townhouse. The maintenance obligation would endure until her death or remarriage, *‘or until she should live together as husband and wife with another man for a period aggregating more than six months in any calendar year or alternatively nine months in any period of three years’* (*‘the **dum casta** clause’*).

3]Notwithstanding the terms of the consent paper, the minor children remained in the *de facto* custody of the respondent after the divorce. The position was later regularised when the respondent obtained an order by consent, awarding custody to him. Apart from that application, the parties

have been embroiled in numerous court applications since then, most of which related to the respondent's obligations to maintain the applicant. For present purposes the following brief synopsis will suffice.

4]In November 1995, some nine months after the divorce, the respondent approached the maintenance court, seeking to discharge his maintenance obligations in respect of the minor children as well as the applicant. With regard to maintenance for the applicant, the respondent asserted that the very reason for having agreed to personal maintenance for her had fallen away, because the minor children did not live with the applicant. On 23 February 1996, the court discharged the maintenance order in respect of the children, but refused the application to discharge the maintenance obligation in respect of the applicant.

5]The respondent appealed against the latter finding to this court, but on 22 November 1996 his appeal was dismissed with costs, the court (per VAN DEN HEEVER J, CHETTY J concurring) finding that there was '*no merit in the appeal*'.

6]Some five months later, on 11 April 1997, the respondent launched a fresh application in the maintenance court, once again seeking to discharge his maintenance obligation towards the applicant. The applicant brought a counter-application for an increase in the amount of maintenance payable. On

15 January 1998 the court refused to discharge the High Court order, but reduced the monthly amount from R3 000 to R1 500 per month.

7]Shortly afterwards, on 3 April 1998 the respondent brought an application to this court for variation of the custody order in respect of the two minor children, who had been living with him since the divorce. A deed of settlement to this effect was signed by both parties and an order was granted by agreement on 22 April 1998.

8]Having obtained a formal custody order in respect of the children, the respondent launched another application in the maintenance court a month later, claiming payment from the applicant in an amount of R4 000 per month as maintenance for each of the children. This amount, which exceeded the applicant's monthly income at the time, was reduced at the hearing to R1 000 per month. The applicant again brought a counter-application for an increase in the maintenance order in respect of herself. On 21 December 1998 the maintenance court granted the counter-application by increasing the applicant's maintenance from R1 500 to R3 500 per month, but declined to make any order in respect of the respondent's claim for maintenance in respect of the children.

9]Less than a week after this judgment the respondent approached the maintenance court with an identical application, namely a claim for maintenance for the minor children at the rate of R1 000 each, as well as an order discharging his maintenance obligation in respect of the applicant. The matter came before the maintenance officer on 8 January 1999. The record contains an endorsement to the effect that the respondent sought maintenance '*i.r.o. same application finalised on 21.12.98. Advised to go on appeal. Proceedings stopped.*'

10]The respondent followed this advice and on 20 January 1999 he noted an appeal to this court against the orders granted on 21 December 1998. However, when the appeal was set down for hearing on 18 February 2000 and heads of argument were called for, the respondent's attorneys indicated that the respondent was prepared to withdraw the appeal on condition that each party would pay their own costs. The applicant reluctantly accepted this proposal and the necessary notice of withdrawal of the appeal was filed on 23 December 1999.

11]Less than a month later, on 19 January 2000 the respondent instituted an action in this court, relying on the *dum casta* clause in his claim for a declarator that his maintenance obligations in respect of the applicant had ceased on the basis that she was living as husband and wife with another man. However,

on 30 October 2001 the action was dismissed by COMRIE J, having heard argument on a special plea to the effect that the *dum casta* clause had fallen away as a result of the maintenance court order of 21 December 1998.¹ Subsequently, on 14 December 2001, the trial judge granted the respondent's application for leave to appeal to the Supreme Court of Appeal and the appeal is presently pending in that court.

12]On 19 March 2002, and in parallel with the prosecution of the appeal, the respondent filed another complaint with the maintenance officer, claiming once again the discharge of the existing maintenance order in favour of the applicant. The respondent contends in his application that he requires a discharge of his maintenance obligations because '*due to changed circumstances*', he cannot afford to pay it. The applicant was accordingly subpoenaed in terms of sec 9(2) of the Maintenance Act, 1998 to appear in the maintenance court on 19 April 2002.

13]It was against this background that the applicant launched the present application, alleging that the proceedings instituted by the respondent are vexatious, as contemplated by the Act. She accordingly seeks an order in terms of sec 2(1)(b) of the Act, directing that '*save for the appeal to the Supreme Court of Appeal pending under Case No 010/2002 (CPD Case No*

¹ The judgment has since been reported s.v. *Cohen v Cohen* 2002 (2) SA 571 (C)

257/2000), no legal proceedings shall be instituted by first respondent against applicant in any court or any inferior court without the leave of this Honourable Court, or any Judge thereof’.

Relevant Legal Principles

14]At common law our courts enjoy an inherent power to strike out claims that are vexatious, by which is meant *‘frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant’*.²

15]As a complement to the common law, the Act provides the court with a mechanism for preventing the institution of vexatious legal proceedings. The present application has been brought in terms of **sec 2(1)(b)** of the Act, which provides as follows:

16]‘(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 reasonable ground instituted legal proceedings in any court or in any inferior court, whether against the same person or against different persons, the court may, after hearing that person or giving him an opportunity of being heard, order that no*

² *Fisheries Development Corporation of SA Ltd v Jorgensen & Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd & Others* 1979 (3) SA 1331 (W) at 1339E —F; *Bisset & Others v Boland Bank Ltd & Others* 1991 (4) SA 603 (D) 608B —E

legal proceedings shall be instituted by him against any person in any court or any inferior court without the leave of the court, or any Judge thereof, or that inferior court, as the case may be, and such leave shall not be granted unless the court or judge or the inferior court, as the case may be, is satisfied that the proceedings are not an abuse of the process of the court and that there is prima facie ground for the proceedings.'

17]The purpose of the Act, as well as its constitutionality, was discussed by the Constitutional Court in *Beinash and another v Ernst & Young and others*.³

With regard to the purpose of the Act the Court held as follows:⁴

18]'This purpose is "to put a stop to persistent and ungrounded institution of legal proceedings". The Act does so by allowing a court to screen (as opposed to absolutely bar) a "person (who) has persistently and without any reasonable ground instituted legal proceedings in any Court or inferior court". This screening mechanism is necessary to protect at least two important interests. These are the interests of the victims of the vexatious litigant who have repeatedly been subjected to the costs, harassment and embarrassment of unmeritorious litigation; and the public interest that the functioning of the courts and the administration of justice proceed unimpeded by the clog of groundless proceedings.'

³ 1999 (2) SA 116 at paras [15]—[21]

⁴ para [15] (footnotes omitted)

Discussion

19]From the foregoing it appears that the applicant has to meet two threshold requirements in order to obtain relief in terms of sec 2(1)(b) of the Act: she must show, firstly, that the respondent has '*persistently*' instituted legal proceedings and, secondly, that such proceedings have been '*without reasonable ground*'.

20]With regard to the first requirement, it appears from the synopsis that during a period of some 6½ years since November 1995 no fewer than nine different processes had been initiated by the respondent against the applicant—five of them in the maintenance court and all of them aimed at discharging his maintenance obligations towards her.⁵ At no stage was there more than a five-month clear period that had elapsed without the threat of some court procedure hanging over her head. Having regard purely to the frequency and timing of procedures, it is clear, in my view, that the respondent has certainly been '*persistent*'.

21]As far as the second requirement is concerned, it will appear from the above synopsis that, with one or two insignificant exceptions, the respondent found himself on the losing side in the ongoing saga between the parties.

⁵ I have omitted mention of the respondent's forensic triumph in the Small Claims Court where, on 8 April 1999 he succeeded in obtaining judgment against the applicant for R2 875, based on an oral agreement to contribute towards the expenses of their son's rugby tour to Argentina.

Although it may be accepted, as counsel for the respondent submitted, that unsuccessful litigation is not necessarily tantamount to vexatious litigation, the overall pattern becomes important where there is some history of litigation between the same parties.

22]The respondent's behaviour in relation to the latest application to the maintenance court is a telling example of his mindset. While his appeal to the Supreme Court of Appeal against COMRIE J's judgment is pending, he launches an application in the maintenance court, once again seeking the complete discharge of his maintenance obligation. In the papers before the maintenance court he pleads poverty, claiming that due to '*changed circumstances*', he cannot afford to pay the applicant the maintenance to which she is entitled. At the same time, however, the respondent discloses a property portfolio worth (according to him) R5 million. When asked by the applicant's attorney for supporting documentation and information to substantiate his claims of impecuniosity, he deliberately chooses to ignore such request. The explanation furnished in his answering affidavit is unconvincing, to say the least. He states:

23]'I did receive [the letter from the applicant's attorney]. However, my attitude was that I was not obliged to conduct a trial by correspondence and that I would place my evidence before the magistrate. ... In the event, rightly or wrongly, I took the view that the relevant evidence

should be placed before the court, thereby avoiding me becoming involved in a confrontation with applicant's attorney. In short I did not want to feel disadvantaged. It was not a case of my being obstructive or unco-operative...'

24]The only 'explanation' of his alleged changed circumstances furnished by the respondent is contained in a letter from his accountant, annexed to the answering affidavit in these proceedings.⁶ It is dated 17 April 2002 (i.e. after the launching of the maintenance court proceedings under Case No 01/816/95) and under the heading '*Re: Analysis of your personal financial statements for the years ended 28/02/2000 and 28/02/2001*', it baldly records:

25]'According to the abovementioned financial statements drafted by our firm, your net asset position deteriorated in the amount of R345129,00 during the period 1/03/2000 to 28/02/2001.

Additionally, the annual financial statements for the year 28/02/2001 reflect losses amounting to R143113.'

26]This letter raises more questions than it answers. What it does not do, is provide support for the respondent's contention that he is presently unable to afford to pay maintenance for the applicant in an amount of some R4 000 per month. It would have been a simple matter for the respondent, had the facts supported him, to controvert any inference that the 2002 proceedings are

⁶ Annexure 'RC2'

vexatious by simply furnishing a detailed schedule of his income, expenses, assets and liabilities in order to demonstrate, *prima facie* at least, his inability to afford his maintenance obligations. His refusal to do so may not be fatal to his eventual application to the maintenance court. It certainly does not assist him in these proceedings in his efforts to try and establish his *bona fides* and the reasonableness of the litigation instituted by him.

27]When this particular instance of apparent unreasonableness was raised with counsel for the respondent during the course of argument herein, counsel was driven to concede that perhaps the respondent's decision to launch the 2002 maintenance application as and when he did, had been ill-advised, even '*impetuous*'. After a short adjournment to take instructions, counsel announced in open court that the respondent had undertaken to withdraw the 2002 application. He further gave the assurance on behalf of the respondent that no further maintenance applications would be launched against the applicant until the final determination of the pending proceedings in respect of the *dum casta* clause. This belated undertaking was not accompanied, however, by any tender for wasted costs occasioned by the present application.

28]Having regard to the overall pattern of litigation between the parties, coupled with the respondent's success rate (or lack thereof) in the past litigation, the inference is irresistible, in my view, that such litigation had, by

and large, been instituted and prosecuted '*without any reasonable ground*'.

29]This inference is strengthened when one has regard to the surrounding circumstances. Firstly, the respondent is a relatively wealthy man, who has not needed to obtain fulltime employment since selling his diamond cutting business for R3 million in 1987 at the age of just over 40. He continues to live '*in a luxurious mansion*'⁷ in an upmarket suburb of Cape Town. According to the applicant (who, as mentioned above, is an estate agent) the respondent's fixed properties are worth between R5,5 and R7,5 million. (The respondent himself estimates the value of such properties at R5 million.)

30]The applicant has given numerous examples of obstructive behaviour and breaches by the respondent of his maintenance obligations over the years. I do not regard it as necessary for purposes hereof to burden this judgment with a recital of specific examples. Suffice it to say that the respondent himself, in his answering affidavit, concedes in the face of the history of the matter that he and the applicant '*have both at times displayed behaviour which might be fairly labelled intransigent*'.⁸

31]In my view, this concession amounts to an understatement. It is abundantly clear from the papers that the respondent is driven by a desire to rid himself of

⁷ As described by VAN DEN HEEVER J in the above mentioned appeal

⁸ Record p 174 para 4

his maintenance obligations vis-à-vis the applicant. In order to achieve that purpose, the respondent has employed various schemes and stratagems, some of which can only be described as abuses of the process of the courts. The applicant's evidence has a ring of truth about it where she quotes the respondent as having threatened: *'As long as there is breath in my body, I will fight you'*.

32]To these considerations must be added the fact that the respondent has, by and large, enjoyed a 'free run', in the sense that he has not been subject to any adverse costs orders, simply because the chosen forum has been the maintenance court. The applicant, conversely, has been obliged to appoint counsel and attorneys to represent her each step along the way and to incur legal expenses in the process in order to protect her rights, without any hope of recovering same. According to the applicant, she has spent some R60 000 in legal expenses in defending proceedings instituted by the respondent in the maintenance court.

33]Added to the foregoing, is the further consideration, highlighted by the applicant, that on each occasion when the applicant had to appear in the maintenance court, the respondent exercised his right to subpoena her employers to come to court in order to produce relevant information and documentation regarding her income. It requires only a moment's thought to imagine the

intense nuisance value for people in those positions in repeatedly having to waste valuable hours in the corridors outside the maintenance court.

34] Having regard to the history as a whole as it appears from the papers in this application, I am satisfied that the applicant has amply demonstrated that she has '*repeatedly been subjected to the costs, harassment and embarrassment of unmeritorious litigation*'.⁹ To my mind, she is entitled to invoke the protection of **sec 2(1)(b)** of the Act.

35] **Sec 2(1)(c)** of the Act provides that an order under paragraph (a) or (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. The applicant applies for an order for an indefinite period and in my view she is entitled thereto. The respondent will not suffer any great inconvenience or prejudice in the process. He will still be entitled, as of right, to prosecute his pending appeal in the Supreme Court of Appeal. If successful, he will be entitled to pursue his claim in this court for the discharge of his maintenance obligation, based on the '*dum casta*' clause. Furthermore, he may at any time, should circumstances justify it, approach this court or a Judge thereof for leave to institute proceedings against the applicant. In short, his future litigation against the applicant will not be barred; it will simply be screened. Having regard to the history of the matter, this is not a result that should cause the respondent either prejudice or surprise.

⁹ *Beinash and another v Ernst & Young and others, supra, loc cit*

36]With regard to costs, the applicant seeks a costs order on the scale as between ‘attorney and own client’. The Supreme Court of Appeal has expressed doubt as to whether an order in this form is justifiable ‘*where someone other than the own client or his privy is involved*’.¹⁰ In *Ben McDonald Inc v Rudolph* ¹¹ the term ‘*own client*’ in this context was called a ‘*misnomer*’ by VAN DIJKHORST J.¹² In the circumstances, I will simply award costs on the ‘ordinary’ attorney and client scale, to which the applicant, in my view, is entitled by reason of the vexatious nature of the litigation, as I have found.

Conclusion

37]In the circumstances, the following order is issued:

- a) **It is ordered in terms of sec 2(1)(b) of Act 3 of 1956 that save for prosecuting the appeal to the Supreme Court of Appeal under Case No 010/2002 (and thereafter, if necessary, the action under CPD Case No 257/2000), no legal proceedings shall be instituted by the first respondent against the applicant in any court or any inferior court without the leave of this**

¹⁰ see *AA Alloy Foundry (Pty) Limited v Titaco Projects (Pty) Limited* 2000 (1) SA 639 (SCA) 648H

¹¹ 1997 (4) SA 252 (T) 254B —C

¹² See also Cilliers *Law of Costs* para 4.08 (service issue 5)

Honourable Court or a Judge thereof.

- b) **It is recorded that the first respondent has withdrawn the proceedings instituted by him against the applicant in the Maintenance Court in Cape Town under Case No 01/816/95.**
- c) **The first respondent is ordered to pay the costs of this application on a scale as between attorney and client.**

38]__

39]B M Griesel