

SOUTH AFRICA / JUDGMENT

De Filippo v Micillo (23724/2016 ; 11709/2017) [2024] ZAWCHC 290 (16 September 2024)

[2024] ZAWCHC 290

COURT

Western Cape High Court, Cape Town

BEFORE

P. S. Van Zyl

CASE / FILE NUMBER

23724/2016 ; 11709/2017

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In the High Court of South Africa

(Western Cape Division, Cape Town)

Case no.: 23724/2016

& 11709/2017

In the matter between:

MANFREDI DE FILIPPO

(substituted for GIANCARLO DE FILIPPO)

Applicant

and

ALESSANDRA MICILLO

Respondent

JUDGMENT DELIVERED ON 16 SEPTEMBER 2024

Delivered electronically via email

VAN ZYL AJ:

Introduction

1. This is an interlocutory application for orders holding the respondent in contempt of court for the third time in the course of the litigation between the parties, and declaring her a vexatious litigant under section 2(1)(b) of the Vexatious Proceedings Act 3 of 1956 (“the Act”). The applicant also seeks an order directing the respondent to pay the costs of the postponement on 13 March 2024 of the action pending between the parties.[1]
2. The respondent did not deliver an answering affidavit in opposition to the application, but presented oral evidence at the hearing of the matter. The papers include extensive correspondence between the parties, as well as transcripts of relevant proceedings that took place over the years.
3. I start by referring to the relevant legal principles.

Contempt of court

4. Contempt of court, in the present context, has been defined as “the deliberate, intentional (i.e. wilful), disobedience of an order granted by a court of competent jurisdiction”. [2]
5. Wilfulness is an essential element of the act or omission alleged to constitute contempt. [3] In addition to the element of wilfulness, there must be an element of mala fides. [4] Once it is shown that the order was granted (and served on or otherwise came to the notice of the respondent) and that the respondent had disobeyed or neglected to comply with it, both wilfulness and mala fides will be inferred. [5] Thus, once the applicant has proved the order, service or notice, and non-compliance, an evidentiary burden rests upon the respondent in relation to wilfulness and mala fides, that is, to advance evidence that establishes a reasonable doubt as to whether non-compliance with the order was wilful and mala fide. [6]
6. Even though the defaulting party may be wilful, such party may still escape liability if they can show that they were bona fide in their disobedience. Where the defaulting party has genuinely tried to carry out the order and has failed through no fault of his or her own, or has been unable but not unwilling (for example, by reason of poverty), to carry out the order, proceedings for committal will fail. [7]
7. As far as penalty is concerned, the law postulates that where a respondent displayed an unacceptable degree of arrogance and perceived inviolability and disregard for the rule of law, the penalty has to be commensurate with the degree of contempt, the intention with which it was committed, and the interests affected. It has to act as a deterrent, and be punitive. [8]

Vexatious proceedings

8. A High Court has the inherent jurisdiction to prevent vexatious litigation, as being an abuse of its own process. This power,

however, must be exercised with great caution, and only in a clear case, as the courts of law are open to all.[9]

9. In the absence of statutory authority, the Court did not originally possess the power to impose a general prohibition preventing the abuse of its process. It could only do so in respect of a particular matter serving before the Court.[10] In *Corderoy*[11] the Appellate Division held that when there has been repeated and persistent litigation between the same parties in the same cause of action and in respect of the same subject matter, the court can make a general order prohibiting the institution of such litigation

without the leave of the court, but that power extended only to prevent the abuse of its own process without being concerned with the process of other courts, and to protect the applicant before it without being concerned about other parties who were not before it. It was therefore held that, in the absence of statutory powers, the Courts do not possess the inherent power to impose a general

prohibition curtailing plaintiff's ordinary right of litigation in respect of all courts and all parties.

10. The promulgation of the Act remedied this situation, and empowered the Court to impose general restrictions on the institution of vexatious legal proceedings.
11. Section 2 of the Act provides, in relevant part, as follows:

"Powers of court to impose restrictions on the institution of vexatious legal proceedings"

(1)

(a) ...

- (b) If, on an application made by any person against whom legal proceedings have been instituted by any other person or who has reason to believe that the institution of legal proceedings against him is contemplated by any other person, the court is satisfied that the said person has persistently and without any reasonable ground instituted legal proceedings in any court or in any inferior court, whether against the same person or against different persons, the court may, after hearing that person or giving him an opportunity of being heard, order that no legal proceedings shall be instituted by him against any person in any court or any inferior court without the leave of 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.
- (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.

(2) ...

- (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 be liable upon conviction to a fine not exceeding one hundred pounds or to imprisonment for a period not exceeding six months.”
12. In *Fisheries Development Corporation of SA Ltd v Jorgensen and another*[12] it was held that, in its legal sense, “vexatious” means “frivolous, improper, instituted without proper ground, to serve solely as an annoyance...”. The Court proceeded that “[v]exatious proceedings would 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.”
13. In *Corderoy supra* the Court stated (prior to the promulgation of the Act, but the principle remains apposite) that the power in question is one which

should be very cautiously exercised because it affects the elemental right of free access to courts, with which the courts should be slow to interfere except in exceptional and necessary instances and only in a clear case.[13]

14. In *Golden International Navigation SA v Zeba Maritime Co Ltd*[14] this Court said the following:

“[26] I am mindful of the fact that the court's power to strike out a claim on the basis that it is vexatious or an abuse of its process is an exceptional one which must be exercised with very great caution, and only in a clear case. However, I respectfully disagree with dicta that go further by requiring that this conclusion 'must appear as a certainty and not merely on a preponderance of probability'. (My emphasis.) This requirement appears to originate from a dictum in the minority judgment of Holmes JA in the African Farms and Townships case. The two cases cited by the learned judge of appeal in support of this proposition do not, however, provide such support. Furthermore, the proposition flies in the face of our rules of evidence, by which a preponderance of probability in favour of a litigant is sufficient to decide any civil case in favour of such litigant. (Even the most serious criminal charge is decided beyond reasonable doubt, and not with 'certainty'.) I accordingly respectfully decline to follow the authorities that appear to lay down such a requirement.”

15. The Act does not define a vexatious action, but authorises the Court to prohibit legal proceedings by any person who has persistently and without any reasonable ground instituted legal proceedings. To obtain relief in terms of section 2(1)(b) of the Act, the applicant thus has to meet two threshold requirements: firstly, that the respondent has persistently instituted legal proceedings and, secondly, that such proceedings have been instituted without reasonable grounds.[15]

16. In *Absa Bank Ltd v Dlamini*[16] the Court discusses the principles that find application in matters of this nature and comes to the following conclusion:

"[32] Consequently, in summary, the following appears to be the position: the only manner by which the institution of future vexatious

proceedings can be prevented is to rely on the provisions of the Act; the only manner to stay, strike out or otherwise deal with vexatious proceedings which have already been instituted, or to deal with any process or action or inaction leading up to, or during or subsequent to, any legal proceeding or proceedings already instituted, and which constitutes an abuse of process, or generally brings the administration of justice into disrepute, shall be done in terms of the applicable common-law principles and the court's inherent power to apply same."

17. For the purposes of the Act the element of persistency is a necessary one.[17] In *State Attorney v Sitebe*[18] the Court held that, in considering a general prohibition on litigation in terms of the Act, the Court will consider the general

character and result of the action and not merely whether there may not have been possible causes of action in some of the cases, as well as exceptional circumstances where the number of occasions is comparatively small.

18. In *Heugh v Gubb*[19] the Court was hesitant to apply the Act to a litigant who, through financial stringency, drew his pleadings himself and had had two summonses set aside as being defective and irregular. The Court did, however, warn that if a further defective summons were to be issued, the Court might well come to a different conclusion, particularly if any part of the costs of legal proceedings awarded to the applicants were to be unpaid.

19. In *Caluza v Minister of Justice*[20] the Court set aside an action with costs by reason of non-compliance with the provisions of Rule 47 requiring the furnishing of security for costs within a reasonable time, and referred the papers in the case to the Deputy State Attorney with a view to instituting

proceedings under the Act.

20. Attempts to have the Act declared unconstitutional have been unsuccessful. In *Beinash v Ernst and Young*[21] the Constitutional Court held that the Act achieves its purpose of putting a stop to the persistent and ungrounded institution of legal proceedings by allowing a court to screen (as opposed to absolute barring) a person who has "persistently and without any reasonable ground" instituted legal proceedings in any court or inferior court. It also added that the screening mechanism is necessary to protect two important interests, namely the interest of the victims of the vexatious litigant who have repeatedly been subject to costs, harassment and embarrassment of unmeritorious litigation, and the public interest that the functioning of the courts and the administration of justice should proceed unimpeded by the clog of groundless proceedings. The Constitutional Court also held that, although the procedural barrier serves to restrict access to courts in the face of the

provisions of section 34 of the Constitution of the Republic of South Africa, 1996, the limitation imposed is justifiable in terms of section 36 of the Constitution.

21. Against this background, I turn to the facts giving rise to the current dispute.

Summary of the

facts

The main action

22. The parties are embroiled in an action which involves an ownership dispute.[22] The applicant, the plaintiff in the action, has been substituted[23] for the erstwhile plaintiff, Mr Giancarlo de Filippo (the current plaintiff's father), who passed away on 9 August 2018.
23. The facts giving rise to the dispute are, briefly, the following: Mr Giancarlo de Filippo and the respondent[24] had a romantic relationship. They lived together from 2009 to 2014, when Mr de Filippo terminated the relationship.
24. While the parties were still together, two immovable properties were purchased in Cape Town, namely 1[...] C[...] Road, Constantia ("K[...] C[...]") and [...] B[...] Avenue, Contantia ("B[...]"). The purchase of both properties was funded by Mr de Filippo, and acquired in the respondent's name for reasons that are not relevant for the purposes of this application.
25. B[...] was sold after the termination of the parties' relationship. The respondent retained the proceeds of the sale. She also continued to reside at K[...] C[...] with Mr de Filippo's consent. She is still residing there.
26. The applicant, as plaintiff, alleges the existence of an oral agreement between the parties to the effect that Mr de Filippo had agreed to fund the purchase of the properties to be registered in the respondent's name, on condition that they would eventually be sold and the proceeds paid to Mr de Filippo. The applicant thus seeks an order that the proceeds of the B[...] property be paid to him, and that the K[...] C[...] property be sold and the proceeds paid to the applicant.
27. The respondent, as defendant in the action, denies the existence of the oral agreement. She contends that the properties were donated to her.
28. On 25 April 2017 Mr de Filippo obtained an order ("the anti-dissipation order"), inter alia interdicting the respondent from alienating K[...] C [...], and from disposing of the proceeds from the sale of B [...], pending the outcome of the action. The action was instituted shortly thereafter.
29. The parties have since been engaged in several interlocutory applications – the majority brought at the respondent's behest - which have delayed the commencement of the trial.

30. Since 2016, when the litigation between the parties commenced, attorneys have come on record for the respondent on eight occasions, and she was, at different times, represented by at least five advocates, three of whom were senior counsel.
31. On the last two occasions when the trial was set down (being 12 March 2024 and again on 29 July 2024), the respondent was unrepresented. This caused, on each occasion, a postponement to assist her in obtaining legal representation, to no avail.
32. It is as well to deal at this juncture with the reasons proffered by the respondent for her failure to engage legal representation. In her oral evidence before this Court in opposition to this application,[25] the respondent explained that she had approached various attorneys, but that they were not willing to assist her. She provided a list of the attorneys that she approached, but could not be specific as to exactly when she asked for assistance from each of them. It transpired that the respondent had requested those attorneys to assist her on a contingency basis as, so she stated, she could not afford legal representation.
33. Under cross-examination the respondent admitted that she had in 2019 sold an apartment in France, ten kilometers from Monaco, for which Mr Giancarlo de Filippo had paid €1 455 000,00 in 2009. The latter had purchased the apartment in a real estate company of which he and the respondent were the only shareholders, with him holding a usufruct and the respondent the remaining interest, a scheme that enabled her to reunite the usufruct with the remaining interest upon his death in 2018 and resulting in her becoming the legal owner of the company and its significant asset. She was at liberty to use or dispose of the apartment as she saw fit.
34. The respondent was adamant that the sale price and the whereabouts of the proceeds of the sale were none of the applicant's or this Court's business, and refused to disclose what she had done with the funds. The impression with which the Court was left was that the respondent was of the view that her overseas funds were to be left untouched, and that she was unwilling to use them to defend the action in South Africa. The proceeds are, in her mind, safely out of reach overseas.
35. Taking into account the current exchange rate, and assuming that the apartment was sold for the same amount as that for which it had been purchased (she has not protested that it was sold for less), the probabilities are that the respondent has access to some R28 million from the sale.
36. The respondent's evidence also indicated that she did not trust or "like" lawyers who displayed anything but the fullest confidence in her case. It appeared that several of the firms that she had consulted conveyed doubts about the merits of her case to her. This resulted in her not engaging them.

37. According to the respondent, most of her legal representatives had failed her either because they were in cahoots with the applicant's legal team or intimidated by the applicant's senior counsel – allegations without substance that have been repeated throughout correspondence and affidavits before this Court, as well as before the Honourable Justice Cloete at the time when the matter was declared trial ready, and before the Honourable Acting Justice Sidaki when the trial was set down for hearing on 12 March 2024.[26]
38. It is clear from the record, as well as from the evidence she gave at the hearing of this application, that the respondent has long since decided that she was not going to get a fair trial. It seems that the principal basis for that belief is simply that the possibility exists of her defence in the action not being upheld.

The rescission applications and the variation application

39. During 2017 the respondent applied for the rescission of the anti-dissipation order.
40. In a judgment[27] dated 8 September 2017 the Court (the Honourable Acting Justice Golden presiding) dismissed, with costs, the first rescission application.
41. The Court further declared the respondent to be in contempt of the disclosure orders of Baartman J of 25 April 2017, as well as of a further disclosure order granted by Golden AJ herself of 31 May 2017, and ordered the respondent to pay a fine, which order was suspended for a period of two years. Golden AJ ordered the respondent to pay the costs of the contempt application on the attorney-and-client scale.
42. The Court ordered the proceeds of the sale of the B[...] property to be held in the trust account of Bowman Gilfillan Inc, the respondent's fourth set of attorneys, pending the finalisation of the action between the parties.
43. In determining the first rescission application, the Court remarked as follows:[28]

"It is not in dispute that the Respondent did not comply with the Order granted by Baartman J on 25 April 2017. In paragraph 8 of her founding affidavit in the rescission application the respondent alleges that she had received negligent advice and ineffectual representation from her attorney and advocate which compromised her constitutional right of access to the court, and that her legal representatives had prejudiced her constitutional right to privacy, by their conduct. This, she states, is the basis of her rescission application."

44. The Court held:[29]

"It is fair to state that the Respondent was trying to avoid compliance with the 25 April 2017 Order, in particular, the obligation to make full disclosure of the proceeds of the B[...] property sale and the bank account where the proceeds were held. The rescission application was a means to achieve this end."

Given the Respondent's attitude in this matter, her persistent refusal and/or reluctance to be completely forthright with this Court with regard to the proceeds of the sale of the B[...] property and her bank accounts, the serious contradictions in her affidavits, and the timing of the rescission application, the application is not, in my view, a bona fide one."

45. On 25 May 2018 the Court (the Honourable Acting Justice Holderness presiding) dismissed, with costs, the respondent's subsequent

application for the variation of the anti-dissipation order.[30]

46. On 9 February 2024 the respondent instituted another application for the rescission of the anti-dissipation order, making no mention at all in her papers of the fact and fate of the first rescission application. She asked, too, that the trial be struck from the roll pending the determination of the second rescission application, and that the taxation of various costs orders granted against her over the preceding years be stayed. The application was instituted by way of the long form, just over a month before the trial was initially set down for hearing in 12 March 2024.

47. On 13 March 2024 the Court, having declined to determine the second rescission application, postponed the trial because the respondent (who had – as I have mentioned earlier - by then dispensed with the services of attorneys representing her on eight occasions) was again unrepresented. The trial was subsequently set down for hearing on 29 July 2024, together with the pending interlocutory applications, including this application.

48. The second rescission application was dismissed on 29 July 2024, with costs on a punitive scale.[31] The application was wholly without merit. It made offensive allegations, without substantiation, against officers of this Court, and relied on matter that is res iudicata. It further sought relief that was moot (the taxation process sought to be stayed had by then been finalized) or not competent (it sought the removal of the trial from the roll). The second rescission application, like its predecessor, was not a bona fide one. It was instituted shortly before the commencement of the trial on 12 March 2024, despite its clear lack of merit, and was yet another attempt to delay the determination of a dispute which has its genesis almost eight years ago.

Further interlocutory litigation

49. I return to events prior to 2024. Following the dismissal of the variation application, the respondent gave notice of an intention to amend her plea in the action. The applicant opposed the amendment on the basis that it would render the plea excipiable. The amendment was nevertheless allowed on application. An application for leave to appeal was dismissed by this Court and, subsequently, by the Supreme Court of Appeal. However, the applicant's exception to the amended plea was upheld by the Honourable Justice Mangcu-Lockwood on 22 February 2022.[32] The Court dismissed, with costs, a special plea of issue estoppel raised by the respondent.

50. In the same judgment, the Court formally substituted the applicant for Mr Giancarlo de Filippo, with retrospective effect from 11 October 2018 (following the respondent's allegations that no proper substitution had taken place); dismissed an application by the respondent in terms of Rule 15 to have the 11 October 2018 substitution of the applicant for Mr Giancarlo de Filippo set aside; and ordered the respondent to pay the costs of the failed Rule 15 application, as well as of a failed Rule 30 application, which was an unsuccessful attempt to prevent the taxation of the cost orders granted against the respondent up to that date.
51. The Court subsequently dismissed, with costs, the respondent's application for leave to appeal against the order dismissing the special plea of issue estoppel. The respondent's subsequent petition for leave to appeal to the Supreme Court of Appeal suffered the same fate.

Events leading up to the commencement of the trial on 12 March 2024

52. On 3 November 2023 Cloete J issued a certificate of trial readiness. At the time, the applicant formally placed the following on record: "The Plaintiff records that he is prejudiced by the Defendant's continuous attempts to delay the finalisation of this matter. The Defendant records that she does not agree but that she too wishes the matter to be finalised as quickly as possible. The Acting Deputy Judge President has thus granted permission for an expedited trial date, preferably in the first term of 2024."
53. The transcript of the proceedings indicates that Cloete J emphatically urged the respondent to obtain legal representation, and the services of an interpreter, without delay. The respondent was further warned to desist from making unsubstantiated, offensive allegations against the attorneys and advocates involved in the matter, whether on her own behalf or on behalf of the applicant.
54. Cloete J directed the applicant to take various steps to ensure that the matter was ready to commence on the set-down date, and to assist the respondent – unrepresented at the time – in preparing for trial. The respondent was directed to supplement the trial bundle in due course, if necessary. The applicant duly complied with all of these directions.
55. The Registrar allocated 12 March 2024 as the expedited trial date. It soon became apparent, however, that the respondent was not keen on going to trial. On 12 January 2024 the respondent sent an e-mail to the applicant's attorneys in which she stated: "Additionally, I have been tasked with filing a Notice of Motion to request the set-aside of judgments against me, stemming from the Court Order dated April 25, 2017 obtained by agreement between the parties but without my knowledge and without my consent. This order was obtained through fraudulent misconduct due to a serious conflict of interests on the part of your legal representatives with the complicity of my own legal representatives and evidences will be attached to my affidavit in support of the Motion."

56. This was a reference to the second rescission application. I have already indicated that that application was subsequently dismissed, with costs on a punitive scale.
57. On 17 January 2024 the applicant's attorneys replied that they were awaiting delivery of the second rescission application.
58. On 26 January 2024 they wrote a letter to the respondent in which they reminded her that the certificate issued by Cloete J recorded that the respondent wanted the matter "finalised as quickly as possible" and that, at the behest of Cloete J, the Acting Deputy Judge President granted permission for the matter to be set down on an expedited date. The applicant had by that stage complied with his obligations under the certificate in preparation for trial, and the respondent had to comply with her obligation of supplementing the trial bundle. If it was the respondent's intention to appoint a legal representative to represent her at the trial, she was urged to do so timeously to ensure that the matter proceed on the allocated date. The letter concluded as follows: "Should you attempt to have the trial postponed because the legal representative(s) that you may wish to appoint did not have sufficient time to prepare, or for any other reason, this letter will be disclosed to the Court."
59. The respondent indicated in an e-mail dated 29 January 2024 that she wished for a swift resolution of the matter "but not necessarily with the trial". As reason for not wanting to go to trial, she claimed various unidentified previous irregularities, misconduct on her legal representatives' and the applicant's legal representatives' part, and a gross conflict of interest which allegedly led her seriously to doubt that she would receive a fair trial. She claimed that there were alternative ways, which she did not identify, to conclude the matter. She concluded by saying: "I urge you to reconsider the approach taken in your recent letter and to engage in a more constructive and fair dialogue. It is in the best interest of all parties involved to ensure a just and equitable resolution to this matter." [33]
60. On 5 February 2024 the applicant's attorneys sent another e-mail to the respondent in which they said that "(w)e look forward to receiving the supplementary trial bundle from you by no later than 12 February 2024". She responded on the same date, claiming (amongst other things) that during the pre-trial meeting she had expressed to the applicant's senior counsel and attorney all her concerns about facing a trial, and that she had asked the senior counsel whether he was still ready to go to trial "considering that before that, he had to afford and dealing with all my allegations", to which he did not answer. On the respondent's version this was tantamount to attempted blackmail.
61. In response, on 8 February 2024 the applicant's attorneys noted the respondent's intention to bring an application "asking to set aside all the proceedings (trial and taxation)", and reminded her that in 2017 already she had unsuccessfully attempted to set aside the anti-dissipation order.

62. In the meantime, after numerous postponements, the costs orders made by Golden AJ and Holderness AJ were again set down for taxation on 9 February 2024. On that day the respondent instituted the second rescission application, which also sought an order staying the taxation of the costs orders.

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The applicant's attorneys reminded the Taxing Master that the taxation of the applicant's bills of costs had been dragging on since 2018 and that he had been prejudiced by a delay of about five years:

"Despite this inordinate delay, we have complied with all directions issued by the various Taxing Masters over the years, including the most recent request to furnish proof of payments, as confirmed by our cost consultant who attended the taxation on 19 January

2024. We understand that upon presentation of the proof of payments, you accepted same as being in order. In contrast, Ms Micillo had undertaken to deliver a rescission application by 19 January 2024 to rescind the costs orders awarded against her, which she failed to do.

We were further advised by our cost consultant that a postponement was granted until tomorrow to allow Ms Micillo to obtain legal representation for purposes of objecting to the items in our client's bills of costs. It would appear that Ms Micillo has not done so."

63. On 9 February 2024 the respondent managed to persuade the Taxing Master to postpone the taxation scheduled for that day and to allow her an opportunity to lodge the second rescission application at the Registrar's office. As a result, the taxation was postponed yet again, to 15 March 2024, when it was finally dealt with.
64. Since by 12 February 2024 the respondent had not supplemented the trial bundle as ordered by Cloete J, the applicant's attorney wrote to the respondent on 15 February 2024 regarding her failure in this regard, and concluded that it was accepted that she did not intend to supplement the trial bundle. The respondent wrote back, stating: "...did you note that I filed a Notice of Motion last Friday, e-mailed to you the same day and delivered to your office last Monday the 12th of February? ... Said that, the reason why I haven't supplemented your trial bundle has already been explained by my e-mail to you on the 5th February 2024"
65. The applicant's attempts to have the trial commence on 12 March 2024 came to naught. On 13 March 2024 Sidaki AJ, having declined to determine the second rescission application, postponed the trial to 29 July 2024 for the reason that the respondent was still unrepresented, even though there was no proper postponement application before him.
66. The transcript of the proceedings of 12 and 13 March 2024 before Sidaki AJ is again replete with the respondent's unsubstantiated and defamatory accusations against her own and the applicant's legal representatives. It is also foundational to the application for her to be held in contempt of court. Whilst giving his judgment postponing the trial, Sidaki AJ expressly directed the respondent to get legal representation immediately, granting a postponement

specifically to give her an opportunity to do so. He pointed out that the respondent had been cautioned on various occasions by the applicant's attorneys to ensure that her legal representation was ready for trial.

67. Sidaki AJ gave firm directives to the respondent to appoint legal representatives without delay and to have them liaise with the applicant's legal representatives to secure the commencement of the trial on 29 July 2024. It is clear from the transcript of the proceedings that the respondent understood this. She confirmed that she understood and that she would give effect to

the directives.

Events after 13 March 2024

68. On 14 March 2024, a day after Sidaki AJ postponed the trial, the respondent sent an e-mail to the Taxing Master in which she requested "a postponement of our scheduled appointment, which is currently set for tomorrow, March 15, 2024", claiming that the matter regarding her "Notice of Motion to set aside the taxations due to fraudulent misconduct is still pending and has not yet been discussed and decided before the court".
69. The Taxing Master nevertheless requested all parties to be present at the following day's taxation. When it became clear that the taxation would go ahead, the respondent insisted that the proceedings be recorded. The taxation thus proceeded in court. The transcript of the proceedings illustrates that the respondent again made offensive remarks about the applicant's legal representatives, notwithstanding Cloete J's warning in this respect.
70. In a letter dated 19 March 2024 the applicant's attorneys referred the respondent to their letter of 26 January 2024, and urged her to appoint a legal representative timeously to ensure that the trial could proceed on 29 July 2024. She was also referred to the directive issued by Sidaki AJ on 13 March 2024 ordering her to secure legal representation expeditiously. She was reminded that the trial had been postponed to 29 July 2024, a date to which she had agreed, and that she and her legal representatives therefore had four months within which to prepare for the trial. The letter concluded with a request to be informed of the identity of her legal representatives.
71. On 2 April 2024 the applicant's attorneys sent an e-mail in which they reminded the respondent that they were awaiting confirmation of the appointment of her legal representative.
72. On 18 April 2024 the applicant's attorneys reminded the respondent that she had still not responded to them, and requested her to advise whether she intended appointing legal representatives. They also said that if she had already appointed legal representatives, she should provide their particulars.
73. In an e-mail of 18 April 2024 the respondent simply responded by saying: "I am busy working on it. I will keep you update (sic)."

74. Further correspondence followed between the parties between late April 2024 and early June 2024 in an attempt to meet with the Acting Deputy Judge President to ensure that there were no problems in the management of the trial. In the course of the correspondence the applicant's attorneys commented that if the respondent failed to appoint legal representatives by a certain date, the applicant would lodge another application for her to be held in contempt.
75. As matters turned out, the parties were not able to meet with the Acting Judge President. Instead, on 3 June 2024, the applicant's attorneys received an e-mail from her Registrar, Ms Potgieter, which reads as follows: "Please find draft order attached. The Acting Judge President directed that you obtain a date in July 2024."
76. In an e-mail dated 6 June 2024, which was copied to Ms Potgieter, the respondent wrote the following:

"I don't understand the draft order that, once again, has been unilaterally written by your office. I remaind (sic) that Judge Sidaki make (sic) an order for a date for trail (sic) for the 29th July

2024. He also directed you to provide an approach for both of us, with the Deputy Judge President or the Judge President Goliath to discuss several administrative issues. Before trail (sic), we have to deal with my Notice of Motion in a separate hearing and obviously before a Trail (sic). Please provide me with explanation on the attached Draft Order, thank you."

77. Also on 6 June 2024, the applicant's attorneys responded to the respondent, informing her that they did not prepare the draft order but that it had been sent to all the parties by the Office of the Acting Judge President. They also informed Ms Potgieter that the date of 29 July 2024 had already been allocated for the hearing of the matter by agreement between the parties and referred her to Sidaki AJ's order.

78. The respondent replied on the same day:

"You never received a draft order FROM ME!

1- As you know, I have to represent myself

2- My witnesses are in Europe and is necessary for the Court to organise consequencelly (sic) and other issues have to be discuss (sic) with the JP.

3- Interpreter issue

Is evident that you are doing all is in your power to avoid this as I referred also to Judge Sidaki. If you don't want to let me approach the JP for evident reasons, another Urgent Rule 37 is required by me. Please reply in terms of urgency".

79. The respondent sent another e-mail to Ms Potgieter in which she again levelled accusations at the applicant's legal representatives: "I apologise for disturbing you, but I'm being denied access to justice by the opposing legal team, and this is not the first time, as detailed in my

Notice of Motion. I am attaching all recent correspondence between the parties and Mr. Booyesen, wherein a meeting with Acting Judge President Goliath has been requested in agreement between the parties. As a foreign (sic) (Italian citizen and resident) defendant who is not legally represented, who lacks a good command of the English language and knowledge of South African law, this meeting is necessary to resolve administrative issues. I kindly ask you to consider my request as it is in agreement between the parties.”

80. Ms Potgieter informed the respondent that neither the Acting Judge President nor any other judge could assist her with legal advice. She concluded as follows: "Please apply for legal-aid or brief an attorney to assist you. You may see the Chief Registrar, Ms David if you so please."
81. In a letter dated 7 June 2024 the applicant's attorneys reminded the respondent that, at her insistence, they had approached the Acting Judge President for a meeting with the parties, in response to which she ordered them to proceed with the trial, and all other applications (including the Respondent's "Notice of Motion"), on 29 July 2024. They noted with concern that the respondent again intended to represent herself, and reminded her that before the trial date of 12 March 2024 they had urged her to obtain legal representation on more than one occasion. They pointed out that, this notwithstanding, the trial was postponed on 13 March 2024 at her request to enable her to obtain legal representation.
82. The applicant's attorneys pointed out that Sidaki AJ went so far as to direct the respondent to obtain legal representation forthwith, but that she had again failed to do so notwithstanding the fact that she had acknowledged this directive on more than one occasion. She was, therefore, in contempt of court.
83. By then the respondent's only reply to the repeated requests for the particulars of her legal representatives to enable the applicant to make arrangements concerning the "administrative issues" referred to by her in her e-mails, was that she was "working on it".
84. The practice directives require the parties to file a joint early allocation practice note and since the trial date was only weeks away, this had to be done as soon as possible. The applicant's attorneys prepare a note for the respondent's consideration. After much to-ing and fro-ing about it, the respondent replied some days later that:

"I will insert my concerns into the practice note and by then, I will also answer to your letter of the 7t June 2024 h.14:12.

I asked for a meeting with you due to the fact that after our last Rule 37 meeting before Judge Cloete last November 2023, other matters that I consider quite 'disturbing' have occurred after our Rule 37 hearing before Judge Cloete last November 2023, and for this reason, I believe another Rule 37 meeting before a Judge is necessary considering the new facts occurred and my consequently new requests needs (sic) to be expose (sic) on the Rule 37. I thought it would be possible to avoid this procedure by approaching the Deputy Judge President or the Acting Judge President together as directed by Judge Sidaki Please let me know in terms of urgency. if you want to consider my above request which are necessary to ensure that my rights to a fair trial are

respected."

85. On 12 June 2024 the respondent returned the early allocation practice note prepared by the applicant's attorneys to them with her comments. Due to the argumentative and unhelpful nature of her contributions, the applicant delivered his own note, and the respondent was advised to deliver her own.
86. When the trial eventually commenced on 29 July 2024, the respondent was unrepresented. I have explained earlier that her evidence as to the reasons for her situation was unsatisfactory.
87. On 29 July 2024 and 30 July 2024 the respondent's second rescission application was argued, as well as the present application. Although there was an attempt at running the trial on 31 July 2024, the respondent sought, and was granted, a further postponement until 2 September 2024 for the specific purpose of engaging attorneys. This was done to assist the respondent despite the absence of a proper application for postponement, and in the face of the prejudice suffered by the applicant in having to travel back and forth to Italy with no end in sight. The respondent was warned that no further postponements for that purpose would be

entertained, and that she would have to act expeditiously to ensure that the trial could finally get off the ground in September

2024.[34]

Conclusion on contempt and vexatious litigation

88. Against this backdrop, it is clear that the respondent did not comply with either Cloete J's or Sidaki AJ's directives in relation to obtaining legal representation. She also did not use the further opportunity of a one-month postponement granted by this Court on 31 July 2024 (to 2 September 2024) to obtain legal representation. She gave no reason for her inactivity

other than stating that it was for the same reason as before – meaning that she could not pay for legal services. That excuse rings hollow. The respondent cannot cry poverty on the one hand, and on the other refuse to tell the Court what the status is of the proceeds of the sale of the apartment in France.

89. The respondent was wilful in her failure to obtain legal representation. Her oral evidence revealed, moreover, that she did not genuinely try to carry out the Court's directives, in that she persisted in refusing to pay for legal advice despite the fact that she was on the probabilities able to do so, and further in that she refused to appoint any legal representative who

dared to give her objective advice. She was not bona fide in such attempts as she did make to obtain representation. I am therefore of the view that the respondent is in contempt of court for the third time.

90. Despite the admonishments of Cloete J, the respondent seemingly has no intention of desisting from making vexatious and defamatory

allegations directed at the applicant's legal representatives and her own, which have no foundation in truth. She does this in correspondence, on affidavit, and in court. More important, however, is the fact that every application instituted by her has been unsuccessful[35] and had no reasonable prospects of success, as illustrated by four judgments in this Court, and the fact that her application and subsequent petition to the Supreme Court of Appeal for leave to appeal in the issue estoppel matter were refused with costs. Both elements required by the Act for the declaration of the respondent as a vexatious litigant, namely persistence and the absence of reasonable grounds, are present in this matter.

91. The applicant has not only shown that the respondent has in the past instituted proceedings against him persistently and without

reasonable cause, but also that further vexatious litigation might reasonably be expected.[36] The respondent clearly held the view that a successful outcome to her second rescission application would signal an end to the action, which was not the case, because the commencement of the trial was not dependent upon the existence of the anti-dissipation order. Despite having been advised of this on various occasions between 9 February 2024 and 29 July 2024, the respondent persisted with the second rescission application.

92. Whilst the respondent bemoans the fact that the litigation between the parties is dragging on, she is herself to blame for the state of affairs in instituting one interlocutory application after the other on flimsy grounds, and in engaging in obstructive conduct in other respects. She complains, moreover, about a lack of legal representation, but has persisted in the attitude of not wishing to pay for the services of an attorney, and of not trusting any legal representative who offers advice that does not accord with her own beliefs in the merits of her case. She has made offensive allegations of the most serious kind against most of the attorneys and advocates involved in this matter to date, and it is thus small wonder that she now has to claim that none of the law firms which she has approached is prepared to represent her.

93. It must be remembered too that the respondent is continuing to reside in a house in Constantia which is part of the dispute between the parties (each party claiming that it belongs to him or her) and in respect of which she is not paying anything.[37] She has over the past eight years[38] also been in receipt of a monthly cash allowance from the proceeds of the sale of the B[...] property (the ownership of which is also disputed) that are being held in the Bowman Gilfillan trust account, by virtue of the provisions of the anti-dissipation order.

94. This matter has reached the stage where the respondent is abusing the process of this Court. This cannot be allowed to continue. In terms of section 2(1)(c) of the Act, an order under section 2(1)(b) may be given for a specific time period, or indefinitely. I am of the view that, given the history between the parties, the order that I intend to grant should be in place indefinitely, until such time as the order is varied or rescinded on good cause shown.

The costs of the postponement on 13 March 2024

95. On the facts set out above it is clear that the postponement of the trial on 13 March 2024 was caused by the respondent's conduct, in particular her failure to heed Cloete J's advice to obtain legal representation, and the institution of the second rescission application as a mechanism to stall the trial.
96. There is thus no reason why she should not be ordered to pay the wasted costs incurred as a result thereof. The trial was set down on 12 March 2024 and finally postponed on 13 March 2024, and the respondent should pay the costs incurred on both days.

Costs of this application

97. The respondent's failure to comply with the Court's directives constitutes blameworthy conduct that justifies a punitive costs order.
98. Her conduct throughout the course of litigation can furthermore be regarded as objectively vexatious, and warrants an award of costs on the attorney and client scale.[39]

Order

99. In the circumstances, the following orders are granted:
- 99.1 The respondent is to pay the wasted costs incurred on 12 March 2024 and 13 March 2024, occasioned by the postponement of the trial under case number 11709/2017 on 13 March 2024.
- 99.2 The respondent is declared to be in contempt of court for her failure to comply with the directives issued by this Court on 13 March 2024 under case number 11709/2017 that she must appoint legal representation without delay, and the respondent is ordered to pay a fine of R25 000,00.
- 99.3 The respondent is declared a vexatious litigant pursuant to the provisions of section 2(1)(b) of the Vexatious Proceedings Act 3 of 1956 ("the Act").
- 99.4 The respondent is not allowed to institute any legal proceedings against the applicant in any Division of the High Court of South Africa or in any inferior court without the leave of the inferior court or of the High Court or any judge of the High Court, as the case may be, as contemplated in section 2(1)(b) of the Act.
- 99.5 The Registrar is directed to cause a copy of this order to be published in the Government Gazette, as contemplated in section 2(3) of the Act.

99.6 The respondent is to pay the costs of this application on the scale as between attorney and client.

P. S. VAN ZYL

Acting judge of the High Court

Appearances:

For the applicant: J. C. Heunis SC, instructed by Webber Wentzel Attorneys

The respondent in person

[1] The order granting the postponement directed that the costs of the postponement would stand over for later determination.

[2] Consolidated Fish Distributors (Pty) Ltd v Zive 1968

(2) SA 517 (C) at 522B–D.

[3] Culverwell v Beira 1992

(4) SA 490 (W) at 493D–E.

[4] Jayiya v Member of the Executive Council for Welfare, Eastern Cape 2004

(2) SA 611 (SCA) at 621E.

[5] Townsend-Turner v Morrow 2004

(2) SA 32 (C) at 49C–D.

[6] Fakie N.O. v CCII Systems (Pty) Ltd and another 2006 (SCA) at paras [42]-[43].

[7] Matjhabeng Local Municipality v Eskom Holdings Ltd and others; Mkhonto and others v Compensation Solutions (Pty) Ltd 2018 (1) SA 1 (CC) at paras [85]-[88].

[8] HL and another v Cathay Pacific Airways Ltd and another

[2016] 1 All SA 543 (GJ).

[9] Hudson v Hudson 1927 AD 259 at 268.

[10] Corderoy v Union Government (Minister of Finance) 1918 AD 512.

[11] Supra.

[12] 1979

(3) SA 1331 (W) at 1339F.

[13] At 517.

[14] 2008 (3) SA 10 (C) at para [26].

[15] Cohen v Cohen 2003

(1) SA 103 (C) at para [17].

[16]

[2007] ZAGPHC 241; 2008 (2) SA 262 (T) at para [32].

[17] Fitchet v Fitchet 1987 (1) SA 450 (E) at 454B.

[18] 1961 (2) SA 159 (N) at 160H.

[19] 1980 (1) SA 699 (C) at 702H.

[20] 1969

(1) SA 251 (N) at 255C-H.

[21] 1999

(2) SA 116 (CC) at paras [17]-[18].

[22] The matter is a contractual one; the parties do not owe each other any maintenance obligation.

[23] Under Rule 15(3) of the Uniform Rules of Court.

[24] Both Italian citizens.

[25] As I have mentioned, the respondent failed to deliver an answering affidavit but wished to oppose the application.

[26] Similar allegations were made before the Taxing Master at the taxation in 2024 of various costs orders that had been granted against the respondent over the preceding years.

[27] Unreported judgement under case number 23724/2016, delivered on 8 September 2017.

[28] At para [16].

[29] At paras [49]-[50].

[30] Unreported judgment under case number 23724/2016, delivered on 25 May 2018.

[31] Written reasons were given on 11 September 2024.

[32] Unreported judgment under case numbers 23724/2016 and 11709/2017, delivered on 22 February 2024.

[33] The applicant points out that the respondent's message could hardly be taken seriously since the record reflects that the

respondent had by that stage rejected numerous settlement proposals made over the years, and reneged even on her own settlement

proposals.

[34] The circumstances surrounding this postponement is set out in more detail in this Court's reasons for the order granted on the merits of the action.

[35] Save for the amendment to her plea, but which amendment was subsequently successfully excepted to.

[36] See *Member of the Executive Council of the Department of Co-operative Governance and Traditional Affairs v Maphanqa*

[2020] 1 All SA 52 (SCA).

[37] The respondent complains that the house is falling apart, which indicates that she has not been attending to necessary repairs and maintenance thereof.

[38] At least until 2 September 2024, when judgment was granted again her in the trial.

[39] *Johannesburg City Council v Television and Electrical Distributors (Pty) Ltd and another* 1997 (1) SA 157 (A) at 177D: "...in appropriate circumstances the conduct of a litigant may be adjudged 'vexatious' within the extended meaning that has been placed upon this terms in a number of decisions, that is, when such conduct has resulted in 'unnecessary trouble and expense which the other side ought not to bear (*In re Alluvial Creek* 1929 CPD 532 at 535)."

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