

SOUTH AFRICA / JUDGMENT

Govender v Panday (15672/22P) [2023] ZAKZPHC 141 (23 November 2023)

[2023] ZAKZPHC 141**COURT**

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Mlotshwa AJ

CASE / FILE NUMBER

15672/22P

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****KWAZULU-NATAL****DIVISION, PIETERMARITZBURG****CASE****No: 15672/22P****In****the matter between:****BENEN-LEE
WALLACE GOVENDER
APPLICANT
and
VISHAM
PANDAY
RESPONDENT****Heard:****10 November 2023****Delivered:****23 November 2023****ORDER****The****application is dismissed with costs, including the costs occasioned
by the appearance in court on 18 January 2023.**

JUDGMENT

Mlotshwa AJ

[1] The applicant sought interim relief on 18 January 2023 in the following terms:

‘1. That a Rule is issued calling on the Respondent to show cause before this court sitting at Pietermaritzburg on day of 2022 at 09h00 or soon thereafter as the matter may be heard why an order in the following terms should not be granted:-

(a) That the Respondent is declared to be a vexatious litigant in terms of Section 2(1)(b) of the Vexatious Proceedings Act 1956.

(b) That the Respondent is interdicted and restrained from instituting any proceedings (whether civil or criminal) against the Applicant and any person in any Court without the leave of a judge of the High Court.

(c) That the Respondent pay the costs of this application.

2. That subparagraphs (a) and (b) of paragraph 1 of this order are to operate as interim orders with immediate effect pending the confirmation or discharge of the rule.

3. That the Applicant be granted further or alternative relief.’

[2] Bezuidenhout J, on that day, granted an order by consent of the parties, containing the following:

(a) Adjourning the application sine die.

(b) The applicant to file the replying affidavit by not later than 1 February 2023.

(c) The costs occasioned by the appearance in court for the 18th of January 2023 were reserved.

[3] The application was on the opposed roll on 10 November 2023. The matter was argued and an amended draft order was handed up in court, which read as follows:

‘1. That the Respondent is declared to be a vexatious litigant in terms of Section 2(1)(b) of the Vexatious Proceedings Act 1956.

2. That the Respondent is interdicted and restrained from instituting any proceedings (whether civil or criminal) against the Applicant and any person in any Court without the leave of a judge of the High Court.

3. That the Registrar is directed to cause a copy of this order to be published in the Government Gazette in terms of section 2(3) of the said Act.

4. That the Respondent pay the costs of this application including the costs of the proceedings on 18 January 2023 which were reserved and all other reserved costs.’

[4] Significant to this application is section 2(1)(b) of the Vexatious Proceedings Act 3 of 1956 (the Act) that states that:

‘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.’

[5] In order to determine whether or not the respondent institutes legal proceedings persistently and without reasonable grounds, consideration must be given to annexure “BG2” attached to the applicant’s founding affidavit.

[6] The applicant averred that annexure “BG2” is a summary of various proceedings brought by the respondent against various persons, including the applicant. The purpose of annexure “BG2” is to set forth particulars of the cases brought by the respondent of which the applicant is aware but did not propose to traverse the details in such cases to any extent in this application.[1] Apparent in annexure “BG2” for context of this application is the following:

- (a) The applicant refers to two cases in item 1, case number D4530/2022, an application brought by the respondent against Lockhat Mayat Attorneys and the applicant as first and second respondents, respectively. The respondent duly complied as directed to institute an action against Lockhat Mayat Attorneys and the applicant under case number D5240/2022. However, the application under D4530/2022 is still pending. The applicant did not wish to traverse the merits of the claim as that would be dealt with by the trial court in due course.
[2]
- (b) Item 3 reflects case number 7882/18P, an application that was initiated by the respondent in the KwaZulu-Natal Division of the High Court, Pietermaritzburg against Dr Dayanand and the Health Professions Council of South Africa. The court dismissed the respondent’s application with the remark that the respondent was abusing the court’s process. The courts, including the Supreme Court of Appeal and the Constitutional Court refused the respondent’s leave to appeal.

- (c) Item 4 sets out case number 5448/18P that is still a pending action in KwaZulu-Natal Division of the High Court, Pietermaritzburg. It involves the respondent in his capacity as executor of the estate of late Luan Trevlin Panday against Dr Dayanand and Mrs Dayanand for payment of R3 475 000.00 for payment of the balance of 205 Kruger Rands allegedly sold by the late Mr Panday to Dr Dayanand and his wife.
- (d) Item 5 reflects that case number 6974/18P is a pending application brought by the respondent against Dr Dayanand, his wife and Brigadier Bantam as first, second and third respondents.
- (e) Item 6 states that in case number 7374/18P, is a R1 000 000.00 pending damages action instituted by the respondent against the magistrate, Mr Ashin Kumar Singh. A plea and counterclaim are filed in court but no plea to counterclaim has been filed.
- (f) Item 7 details case number D5830/2021, which is an unsuccessful urgent interdict application brought by the respondent in the KwaZulu-Natal Local Division of the High Court, Durban against Ms Aarti Malthoo.
- (g) Item 8 reflects case number D6687/2021, a R402 245.75 action instituted by the respondent on 6 August 2021 in the KwaZulu-Natal Local Division of the High Court, Durban against Ms Malthoo but that action was either abandoned or dismissed.
- (h) Item 9 sets out case number D7380/2021, which is a pending action instituted by the respondent for payment of monies allegedly loaned to Ms Malthoo.
- (i) Item 10 details case number D8122/2021 which is a R1 457 579.08 action by the respondent against Ms Malthoo for payment of Dell computers allegedly purchased from Ms Malthoo.
- (j) Item 11 describes that case number 2677/22 is an application that was dismissed with costs but was brought by the respondent against Mr Kawlasir and Ms Malthoo.
- (k) Item 12 reflects that case number D3833/2022 is a defamation action pending in KwaZulu-Natal Local Division of the High Court, Durban, instituted by the respondent against Ms Malthoo.
- (l) Item 13 details case number 5674/2022 which is a pending damages action in the Durban Magistrates' Court instituted by the respondent against Ms Malthoo.
- (m) Item 14 sets out case number D7312/2012 a pending application in the KwaZulu-Natal Local Division of the High Court, Durban brought by the respondent against Ms Malthoo.
- (n) Item 15 is case number 8318/18P a pending interdict application brought by the respondent in the KwaZulu-Natal Division of the High Court, Pietermaritzburg against Dr Reshal Dayanand.

- [7] The applicant averred that there is a criminal case in which the respondent is the complainant and the applicant is the suspect. The matter is currently being investigated by Specialised Commercial Unit of South African Police Service. In this regard, Captain Chetty has obtained a signed warning statement from the applicant.[3] The applicant also laid a fraud criminal charge against the respondent and that matter is also currently under investigation.
- [8] The respondent opposed this application to be declared vexatious litigant and stated that the applicant left out in the list of cases brought by the respondent a matter where the respondent successfully applied against the University of KwaZulu-Natal (UKZN), before Chetty J with an order compelling UKZN to furnish certain information to respondent.[4] The respondent admitted that there was another application against UKZN in 2022 that was dismissed on the basis of non-joinder of parties.
- [9] It was submitted by Mr De Beer SC, on behalf of the applicant, that:
- (a) Annexure “BG2” attached to the applicant’s affidavit provided a succinct summary of the proceedings instituted by the respondent against the applicant and other persons. The respondent has persistently and over a long period of time instituted proceedings against the applicant and other persons as set out in annexure “BG2”
 - (b) The Constitutional Court confirmed in *Beinash and another v Ernst and Young and others*[5] that the limitation against vexatious litigation provided for in terms of section 2(1)(b) of the Act is constitutionally justifiable.
 - (c) Mr De Beer SC submitted further that the order sought was for an indefinite period and if for instance the respondent were to be a victim of a crime, would have to first obtain leave of the court by persuading court that he is rehabilitated from persistently instituting proceedings that are without reasonable grounds.
- [10] Mr Chetty submitted, on behalf of the respondent, that:
- (a) There is only one application brought by the respondent in which the applicant is cited as the respondent, but no relief is sought against the applicant as an interested party. The applicant has not even opposed the application, presumably on the grounds that no relief is sought against the applicant.
 - (b) Omitted from annexure “BG2” is a second pending action instituted by the respondent against the applicant in the Durban High Court case number: 11147/2022 in relation to a loan agreement but the applicant brought an application for costs.
 - (c) The applicant has also brought three applications against the respondent, including application for security for costs and has also initiated criminal proceedings against the respondent.
- [11] Mokgoro J stated in *Beinash v Ernst & Young*[6] that:

‘The right of access to courts protected under s 34 of the Constitution is of cardinal importance for the adjudication of justiciable disputes. When regard is had to the nature of the right in terms of s 36(1)(a), there can surely be no dispute that the right of access to court is by nature a right that requires active protection. However, a restriction of access in the case of a vexatious litigant is in fact indispensable to protect and secure the right of access for those with meritorious disputes.’

[12] The first requirement to be satisfied by the applicant, is to demonstrate ‘persistence’ on the part of the respondent to institute proceedings. The Oxford South African Concise Dictionary[7] defines ‘persistent’, the parts relevant for this matter, as follows:

‘1. persisting or having tendency to persist. 2. continuing or recurring, prolonged.’

[13] Inherent in annexure “BG2” is that the respondent instituted five legal proceedings in 2018, four of which are still pending in courts (5448/2018P, 6974/2018P, 7374/2018 and 8318/2018P), and one was unsuccessful (7882/18P). In the unsuccessful matter, the respondent’s attempt to be granted leave to appeal was refused by all courts including the Constitutional Court. The parties involved in respect of pending legal proceedings, were not joined in this application and there is no explanation from them with reasons why at least they, the other parties, decided not set these matters

down for hearing so that they can be finalised once and for all.

[14] For two years, 2019 and 2020, the respondent never instituted any legal proceedings either against the applicant or any other persons.

[15] Out of the four matters brought by the respondent in 2021 in annexure “BG2”, one was struck off roll (D5830/2021), there is no indication whether another matter was abandoned or dismissed (D6687/2020), but the other two are still pending (D7380/2021 and D8122/2021). Again, there is no explanation with reasons why these pending matters have not been set down for hearing either by the respondent or other parties involved.

[16] There is one case (D2677/2022) that was dismissed with costs among the six instituted by the respondent in the year 2022 according to annexure “BG2”, but the other five are still pending (D4530/2022, D5240/2022, D3833/2022, 5674/2022 and D7312/2022). Regrettably, there is no explanation with reasons why any of the parties have not set the matters down for hearing in order to have them finalised.

[17] Other than stating that the manner in which the legal proceedings are instituted by the respondent against the applicant and vice versa raises concern, it cannot be said that it constitutes persistence if regard is had to the lapse between these legal proceedings. Furthermore, these proceedings appear prima facie justifiable for enrolment in a court of law.

- [18] The second requirement to be met by the applicant must at least demonstrate that these legal proceedings are without reasonable grounds. In the absence of an explanation from the parties involved in the pending matters, difficulty arises in concluding that the respondent does not have reasonable grounds, unless one resorts to speculation.
- [19] Mr De Beer SC and Mr Chetty correctly accepted during their arguments that it cannot be denied that all the other parties involved in the pending legal proceedings do have remedies in law such as punitive cost orders.
- [20] The Constitutional Court case of Beinash on which the applicant relies, is clearly distinguishable from the current application. In Beinash the respondents had launched, between 7 May 1992 and 12 January 1998, forty five different proceedings, of which twenty seven had been unsuccessful and only one, an application for leave to appeal, had been successful.
- [21] Notwithstanding, the respondent's right to access the courts, in terms of section 34 of the Constitution of the Republic of South Africa may be limited by a law of general application that is reasonable and justifiable in an open and democratic society based on dignity, freedom and equality in terms of section 36. This application did not make out a case that such a limitation will be justified.
- [22] Accordingly, the application to have the respondent declared a vexatious litigant in terms of section 2(1)(b) of the Act falls to be dismissed.
- [23] In the result, I make the following order:

MLOTSHWA AJ

APPEARANCES

For the applicant: A De Beer SC Instructed by: Siva Chetty Attorneys Block C, Second Floor, Suite 10 460 Town Bush Road Pietermaritzburg Ref: Mr SN Chetty/Shalina/G2351 For the respondent: Mr KJ Chetty Instructed by: Gosai & Company Inc 105 Sixth Avenue Morningside Durban Ref: Vinay/V Gosai/P452 c/o Messenger King c/o N Nhlapo Attorneys 229 Hoosen Haffajee Street Pietermaritzburg Ref: Deepika Rampersad

- [1] The founding affidavit paras 6(a) and 6(c).
- [2] The founding affidavit para 7.
- [3] The founding affidavit para 22.
- [4] The answering affidavit para 14.
- [5] Beinash and another v Ernst & Young and others 1999 (2) SA 116 (CC) (Beinash).
- [6] Beinash para 17.

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- [7] The Dictionary Unit for South African English (ed) Oxford South African Concise Dictionary 2 ed (2010).
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