

SOUTH AFRICA / JUDGMENT

N.K and Another v B.B (30472/21) [2023] ZAGPJHC 1025 (15 August 2023)

[2023] ZAGPJHC 1025**COURT**

South Gauteng High Court, Johannesburg

BEFORE

G.Y. Benson

CASE / FILE NUMBER

30472/21

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Policy**FLYNOTES:**

FAMILY – Divorce – Vexatious
litigant –
Best
interests of children – Former wife conducting herself in a
manner that maximises harm to children – Continuously
instituting fresh litigation or unmeritoriously opposing justified
legal proceedings against her – Disregards settlement
agreements and court orders – Unfounded criminal complaints
of alleged sexual and physical abuse of children –
Every
indication that she will persist in her strategy – Declared
a vexatious litigant – Vexatious Proceedings
Act 3 of 1956,
s 2(1)(b).
REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA,
GAUTENG
LOCAL DIVISION,
JOHANNESBURG
CASE
NO: 30472/21

REPORTABLE
OF
INTEREST TO OTHER JUDGES
13.09.23
IN
THE MATTER BETWEEN
N
K
FIRST APPLICANT
O
K
SECOND APPLICANT
and
B
B (previously K)
RESPONDENT

JUDGMENT

BENSON AJ

Introduction

- [1] This matter has its genesis in extensive litigation history between the parties.
- [2] In this application, which is strenuously opposed by the respondent, the first and second applicants seek the form of an order in the following terms, as against the respondent:
- (i) declaring the respondent a vexatious litigant as contemplated in terms of section 2(1)(b) of the Vexatious Proceedings Act, 3 of 1956;
 - (ii) declaring that no legal proceedings shall be instituted by the respondent against any person in any court or any inferior court without the leave of this Court, or any Judge of this Court, as the case may be, and such leave shall not be granted unless the Court or the Judge, as the case may be, is satisfied that the proceedings the respondent wishes to institute, are not an abuse of the process of the Court and that there is a prima facie ground for the intended proceedings;
 - (iii) costs of the application.
- [3] The respondent is the former wife of the first applicant. The first applicant and the respondent were married on the 18th of December 2004, and the marriage was dissolved in April 2017. Two minor children were born of the marriage, presently 13 and 12 years of age respectively. Whilst initially primary residency was awarded to the respondent, this was subsequently altered as a result of various court applications between the parties, and pursuant to several forensic assessments being conducted, amidst, inter alia, allegations by the respondent of sexual abuse of the minor children. The first applicant now holds primary residence of both the minor children. The second applicant is the current wife of the first

applicant.

- [4] Historically, the parties have been embroiled in a multiplicity of court matters, ranging from April 2018 to date, when the respondent first launched an application against the first and second applicants in the Benoni Children's Court, and subsequent urgent High Court applications. The respondent has also laid numerous criminal charges as against the first and second applicants. Even during the week of this matter being heard before this Court, other proceedings

were being heard in the lower court, between the same parties. The constant barrage of litigation at the hand of the respondent is endless. The minor children have throughout, borne the brunt of the litigation, with serious concerns being raised on the part of the forensic psychologists engaged herein, regarding the respondent's parenting abilities.

- [5] It has become commonplace for certain divorced parties, often encouraged by their legal representatives, to continue the acrimonious conduct experienced during the divorce proceedings, well after the marriage has come to an end. Especially where minor children are concerned, the psychological and financial impact that this has on the former spouse, the children, and their extended family members, is debilitating. Family law practitioners ought to discourage the continued harm that is caused by such conduct, but unfortunately, there are a select few, who do not. I digress to observe – without making a finding in this particular application in this regard - that our courts have been slow in sanctioning the conduct of such legal practitioners. The abuse of the legal process is astounding in certain instances, with the right of access to court being exploited by family law litigants.
- [6] In this particular matter, and in the week that the matter was heard, the respondent had further failed to allow one of the minor children (whom she had unlawfully refused to return to the care of the first applicant), to attend school. It appears that the minor child has still not been returned to the first applicant.
- [7] This precarious situation will in all probability necessitate further legal proceedings by the first applicant to ensure the return of the minor to his care, and to reinstate the minor's school attendance (albeit that it is not clear whether this latter aspect has been attended to subsequent to the hearing of this matter). The respondent continuously conducts herself in a manner that maximises harm to the children and obstructs the primary residence of the first applicant. She does so with impunity, whilst continuously instituting fresh litigation or unmeritoriously opposing justified legal

proceedings against her. The respondent repeatedly disregards settlement agreements and court orders, and accuses all professionals

engaged in attempting to assist the minor children, of bias. Unfounded criminal complaints of alleged sexual and physical abuse of the children, and of kidnapping, are repeatedly laid by the respondent against the first and second applicants. The respondent,

despite affording legal representation in these processes, does not contribute to the expenses of the forensic psychologists or social workers tasked with investigating her repeated allegations made in all of the legal proceedings which follow her criminal complaints. In the result, the first and second applicant have been forced, in order to protect themselves and the minor children, to incur great expense over the past several years for legal and other professional services. Whilst I make no findings on the merits of the numerous court proceedings, it is clear that the respondent continues unabated in her conduct of engaging in continued litigation against the first and second applicants.

Analysis:

- [8] Section 2(1)(b) of the Vexatious Proceedings Act (“the Act”) seeks to provide relief to an applicant who is subjected to continued harassment and resultant costs arising from persistent and unmeritorious litigation. The section reads as follows:

“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 other 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 that 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.”

- [9] As observed by Matojane, J. (as he was then) in *HO v FA*[1]:

“In Fisheries Development Corp v Jorgensen it was held that:

“In its legal sense, vexatious means frivolous, improper: instituted without sufficient ground, to serve solely as an annoyance to the defendant. Vexatious 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 misuse, an improper use, a use mala fide, and a use for ulterior motive...”

It bears mentioning that the right of access to courts is protected under s34 of the Constitution. In *Beinash and Another v Ernst and Young and Others*, the court considered the constitutionality of s2(1)(b) of the Act. The court confirmed that:

“the provision does limit a person’s right of access to court. However, such limitation is reasonable and justifiable. While the right to access of court is important, other equally important purposes justify the limitation created by the Act. These purposes

include the effective functioning of the courts, the administration of justice, and the interests of innocent parties subjected to vexatious litigation.(-own emphasis added) Such purposes are served by ensuring that the courts are neither swamped by matters without any merit, nor abused to victimise other members of society.”

In order to succeed, the applicant is required to show that she has a bona fide claim and that her claim is meritorious. In determining whether the claim is meritorious, the court must, in my view, look at the whole history of the matter and ask whether a reasonable person can reasonably expect to obtain relief under the circumstances”.

[10] Section 34 of Constitution provides that:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

[11] Ordinarily, to deprive a litigant access to justice may occasion injustice and inequity, and offend the aforesaid provision of the Constitution. However, and considering that section 2(1)(b) of the Act passed constitutional muster in the Beinash matter quoted supra, there are limits to the right of access to courts.

[12] The following was further stated in the Beinash matter as paragraphs 19 and 20:

“[19] While such an order may well be far-reaching in relation to that person, it is not immutable. There is escape from the restriction as soon as a prima facie case is made in circumstances where the judge is satisfied that the proceedings so instituted will not constitute an abuse of the process of court. When we measure the way in which this escape-hatch is opened, in relation to the purpose of the restriction...it is clear that it is not as onerous as the applicant’s contend, nor unjustifiable in an open and democratic society...The applicants right of access to courts is regulated and not prohibited. (-own emphasis added)...The procedure which the section contemplates therefore allows for a flexible proportionality balancing to be done, which is in harmony

with the analysis adopted by this Court, and ensures the achievement of the snugest fit to protect the interests of both the applicant

and the public.”

[13] Quoting from *Bisset and Others v Boland Bank and Others* 1991

(4) SA 603 (D), it was held in *Price Waterhouse Coopers Inc v Pienaar and Others*[2] by Nziweni AJ, as follows:

“[36] Clearly, the main purpose of the Act, which governs the process of declaring a person a vexatious litigant, is to prevent a person from instituting or continuance of vexatious proceedings consistently and without reasonable ground[s]...”

- [38] Obviously, this piece of legislation seeks to root out the abuse of the courts...The legislative purpose in enacting this particular statute is to regulate the access of litigants to courts as well as to protect the courts and the public from litigation which is perceived as wasteful...”
- [14] In the present matter, and on numerous occasions, the criminal complaints laid by the respondent have been found to be untrue. Various rulings and findings have been made by the upper and lower courts that the minor children are to remain in the primary care of the first applicant. This has been supported on several occasions by the various experts engaged to conduct the relevant forensic assessments. As stated above, and despite this, the respondent continues in her course of conduct.
- [15] Vexatious litigation includes the launching of various proceedings for improper purposes, which includes the harassment and oppression of other persons by the multifarious proceedings brought for purposes other than the assertion of legitimate rights[3]. The primary residence of the minor children, however, has been resolved. The continued trauma occasioned to the first and second

applicants, and the minor children themselves, must now come to attend. The psychological condition of the minor children as appears

from the reports of the experts engaged thus far, such as Rowland, Truby, Labuschagne, Ramdaw and others, shows a burning and urgent

need for some intervention in these circumstances. This is especially so when it appears that the respondent’s current partner, has himself been implicated in allegations of sexual abuse of the children. Again, I make no finding in this regard, but remain of the view that the respondent has on numerous occasions avoided the investigation of her home environment and her relationship with her partner, by simply initiating further proceedings or disregarding court orders and settlement agreements concluded between the parties.

- [16] It must thus be observed that the purpose of this particular statute extends to cases where the best interests of the children must be served, in preventing the further abuse of court proceedings by utilising minor children as justification therefore. This practice ought to be so regulated, where it is clear that even previous cost orders do not deter a prospective litigant from continuing in such a fashion.
- [17] It further appears from the correspondence received from the respondent’s attorney herein during the course of last week, dated the 7th of August 2023 and transmitted to my registrar to the exclusion of the applicants– and which was directed directly to me in what I consider an inappropriate fashion - that the minor children continue to be separated. I hope that this issue can be resolved as expeditiously as possible. I am unable to vary the existing court order regarding the primary residence or otherwise of the minor children as requested, as I am not seized with such an application. Nor am I able to simply remove the appointed parental coordinator as sought by the respondent in said correspondence. The experts and the courts have spoken in this regard, and further attempts to subject the children to further

litigation or assessments must now be regulated.

[18] There remains every indication in all of the circumstances, that the respondent will persist in her strategy on an indefinite basis, unless some measure is taken to bring this conduct to an end. It is in the best interests of the minor children, at the very least, that this must be done. The purpose of section 2(1)(b) of the Act, in protecting innocent persons, must also serve the minor children's best interests in this matter.

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

- (i) The respondent is declared a vexatious litigant as contemplated in terms of section 2(b) of the Vexatious Proceedings Act, 3 of 1956;
- (ii) No legal proceedings shall be instituted by the respondent against the first or second applicants or any related party to the first and second applicants in any court or any inferior court without the leave of this Court, or any Judge of this Court, as the case may be, and such leave shall not be granted unless the Court or the Judge, as the case may be, is satisfied that the proceedings the respondent wishes to institute, are not an abuse of the process of the Court and that there is a prima facie ground for the intended proceedings;
- (iii) This order is to be brought to the attention of the South African Police Services in the event that the respondent lays further criminal charges against the first and/or second applicants;
- (iv) The respondent is ordered to pay the costs of this application.

G.Y. BENSON

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION,

Appearances:

Date of hearing : 22, 24 and 26 May 2023

Date of Judgment : 13 August 2023

Date Judgment Delivered : 15 August 2023

For the Applicant

: Adv. F. Bezuidenhout

Instructed by

: Malherbe Rigg & Ranwell Inc.

For the Respondent

Adv. Terblanche

Instructed by

: T Victor & Associates

- [1] 2021 JDR 2727 (GJ) (unreported)
- [2] (1845/2021) [2021] ZAWCHC 184 (10 September 2021)
- [3] HO v FA supra at [15]
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