

SOUTH AFRICA / JUDGMENT

Omar v Amod (7087/2020) [2021] ZAGPJHC 610 (6 September 2021)

[2021] ZAGPJHC 610

COURT

South Gauteng High Court, Johannesburg

BEFORE

K E Matojane

CASE / FILE NUMBER

7087/2020

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

CASE

NO: 7087/2020

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED.
06
SEPTEMBER 2021
In

the matter between:

Omar,
Humaira
Adam
Applicant
Versus
Amod,
Faizaan Ahmed
Mahomed
Respondent

JUDGMENT

MATOJANE J

- [1] The applicant, Ms Hamaria Amod, brings this application seeking a declaration that the respondent, her former husband, is a vexatious litigant
- [2] The respondent and the applicant were married on 23 March 2013, in terms of Islamic laws. The marriage was dissolved by the Jamiatul Ulama South Africa (Council of MuslimTheologians) on 21 November

2017. One minor child was born from the marriage.

- [3] I digress to observe that there are many allegations and counter-allegations advanced by the parties, some of which, in my opinion, have no cogency, so without deciding them, I will refer to some of them briefly:
- [4] In paragraph 20 of the founding affidavit, the applicant sets out a chronological list of applications the respondent has launched against her to date.

"20.1 January 2016, the respondent set the law into motion by having my father, Mr. Adam Omar, arrested in Randburg for alleged damage to property, which he later withdrew with no explanation;

20.2 During June 2017 and at Randburg Police Station, the respondent laid criminal charges against me, my father and mother, Mrs Halima Omar ("Halima") incidental to alleged crimen injuria and intimidation. When we attended the police station in order to file our affidavits, the charge was for the lack of a better word "gone".

20.3 A criminal charge was laid against me for contravention of a court order in April 2017. On the Sunday he had to pick up our minor child in terms of the court order. He came to my parents' house with police officials. They ordered me to go to the police station, which I did. There, I was put in the cells for 10 minutes. An officer by the name of ZWANE then told me I must mediate the issues with the respondent and I was released without being given any documentation.

20.4 In May 2017 he laid a charge of contravention of a protection order, the case was not enrolled and nolle prosequid in Randburg court.

20.5 Interim protection order granted against my sister, Miss. Maaza Omar out of Carolina Magistrate's Court under application number 92/2018 on 13 July 2018. The interim order was confirmed in her absence;

20.6 Interim protection order granted against the respondent out of Vereeniging Magistrate's Court under application number 865/2017. The interim order was confirmed;

20.7 Investigation in terms of section 155(2) of the Children's Act 38 of 2005 out of Vereeniging Magistrate's Court under file number: 14/1/4/2 – 62/16. This matter was referred to the office of the Family Advocate who compiled a report. Primary care was awarded to me;

20.8 Interim Protection order granted against me out of Randburg Magistrate's Court under application number 373/2017. The interim order was confirmed together with a cost order. I confirm that I was represented during the proceedings, but due to circumstances beyond my control, I had to appoint a new legal representative who was not allowed a postponement to appraise himself with the status of the matter;

20.9 Interim protection order granted against my mother, Hamila out of Randburg Magistrate's Court under application number 770/2017. The interim order was confirmed together with a cost order;

20.10 A section 29 notice against my sister, in terms of the Small Claims Court Act out of the Carolina Small Claims Court incidental to taxed legal fees;

20.11 During July 2018 he laid criminal charges against my sister for alleged assault of the minor child. The matter was referred to the Vereeniging Magistrate's Court where I was ordered to attend the Child Welfare Office to see a court-appointed social worker. The social worker submitted a report and the prosecution issued a nolle prosequi certificate; and

20.12 During 12 April 2019 the respondent launched a Review Application to this Honourable Court incidental to an order obtained against him in the maintenance court. The parties settled the dispute (maintenance and all High Court applications) in terms of which the respondent pays an amount of R1850.00 for maintenance and the respondent will not proceed with his High Court applications.

20.13 I was lastly informed that he indeed removed the Rule 43 application from the court roll, but that he obtained a cost order against me, contrary to our settlement arrangement."

[5] On the other hand, the respondent alleges that he applied for protection orders when the applicant and her family intimidated him when he came to collect the minor child from the applicant. He states further that he applied for a protection order from harassment by the applicant's mother and laid criminal charges against the applicant's father for malicious property damage when he entered his premises. He alleges that he has received anonymous calls threatening to kill him if he goes to court for a protection order against the applicant's mother. He also asserts that the applicant's uncle has threatened

him, saying that he must "watch his steps" and that something untoward will be done to his legs.

[6] He maintains that he brought the applications on good cause, and the applicant has not sought to review or appeal any of the court orders he obtained against her or her family.

Analysis

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

"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."

[8] In *Fisheries Development Corp v Jorgensen*[1] 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 an ulterior motive..."

[9] It bears mentioning that the right of access to courts is protected under s34 of the Constitution[2]. 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 of access to 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. 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".

[10] In order to succeed, the applicant is required to show that she has a bona fide claim and that her claim is meritorious[3]. 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.

[11] The evidence in this application confirms that the respondent has resorted to abusing the legal process to harass, oppress and embarrass the applicant and her family[4].

[12] The respondent brings all these applications at no costs to himself as he represents himself when he files these applications as such he is not burdened by the costly litigation expenses. He does not have to pay attorneys and the services are for free. The applicant, on the other must address these claims and spend limited resources defending herself and staying away from work to attend the various courts.

- [13] During all these proceedings, the applicant, a candidate attorney, was an unemployed UNISA student residing with her parents in Vereeniging. Despite this knowledge and to make it as difficult as possible for the applicant to attend every application and oppose them, the respondent issued some of the applications in Randburg, Johannesburg and Carolina magisterial districts. This has had the desired effect as adverse orders have been made against the applicant and her sister, who could not attend various courts in different jurisdictions for lack of financial means.
- [14] The applicant explains that she is a small woman that could never defend herself against physical attacks directed at her by the respondent during their short marriage. It is difficult to understand how the applicant could have intimidated the respondent to an extent that he had to have her arrested on two occasions for an alleged breach of the protection order. The conclusion is inescapable that laying criminal charges against the applicant's mother and father and later withdrawing those charges confirms the applicant's allegation that the respondent has embarked on a campaign of vilification and abuse against her.
- [15] Vexatious actions include those brought for an improper purpose, including harassment and oppression of another person by multifarious proceedings brought for purposes other than the assertion of legitimate rights.
- [16] The applicant asserts that the only reason the respondent is constantly approaching the various courts for "relief" is that he is attempting to force her into signing a settlement agreement wherein she agrees to primary care of their minor child be awarded to him. There is merit in this contention. Presently there is a pending Children's court hearing where the respondent is seeking full primary care of the minor child.
- [17] The Family advocate has already compiled a report wherein she recommended that the applicant remain a primary caregiver of the minor child, and provision has been made for visitation rights for the respondent. The conduct of the respondent indicates that these various applications are brought for an improper purpose, namely, to obtain full primary care of the minor child and, in the process, to ruin the applicant financially and psychologically.
- [18] There is every indication that the respondent is likely to persist with this strategy on an indefinite basis until he is stopped. It is time for this to come to an end, as this also places a disproportionate burden on the limited resources of the courts and judicial system.
- [19] I consider that the applicant has been put to unnecessary trouble of having to bring this application to bring to an end to the financial and emotional burden the respondent has visited on her by the various applications he launched against her. She ought not to be put out of pocket for seeking respite from this court. A punitive costs order is appropriate in the circumstances of this case.

Order

An order shall issue as follows:

1. It is declared that Amod, Faizan Ahmed Mahomed;
 - a. may not institute any legal proceedings against the applicant or her immediate family members in any court or any inferior court without the leave of this court.
 - b. is ordered to pay the costs on an attorney and client scale.

K E MATOJANE

JUDGE OF THE HIGH COURT,

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for Applicant:

Advocate WJ Prinsloo

Attorney for Applicant: BMH Attorneys

Counsel for Respondent: Advocate L Msomi

Attorney for Respondent: Dankuru Attorneys

Date of Hearing:

02 August 2021

Date of

Judgment:

06 September 2021

[1] 1979

(3) SA 1331 (W) at 1339E-F

[2] No 108 of 1996

[3] Beinash and Another v Ernst & Young and Others (CCT12/98) [1998] ZACC 19; 1999 (2) SA 116 (CC); 1999 (2) BCLR 125 (CC) (2 December 1998) at para 13

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