HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 11789/19
REPORTABLE: NO.
OF INTEREST TO OTHER JUDGES: NO
REVISED.
DATE: 6th March 2023

In the matter between:

M T MAKHUBELE ENTERPRISES CC	First Applicant
NATHANIEL TSAKANE MAKHUBELE	Second Applicant
HITEKANI FAST FOODS CC	Third Applicant

and

BUSINESS PARTNERS LIMITED	First Respondent
SHERIFF OF THE HIGH COURT – SOWETO WEST	Second Respondent
SHERIFF OF THE HIGH COURT – ROODEPOORT NORTH	Third Respondent
REGISTRAR OF DEEDS – JOHANNESBURG	Fourth Respondent

TAXING MASTER – PRETORIA HIGH COURT Fifth Respondent

LUCAS MOLOBELE Sixth Respondent

J U D G M E N T

The judgment and order are published and distributed electronically.

VERMEULEN AJ

[1] The First Respondent has set an opposed counter application wherein it requests that the Applicants be declared Vexatious litigants in terms of section 2(1)(b) of the Vexatious Proceedings Act down for hearing. The Applicants have filed a notice in terms of Rule 30(2)(b) in respect of the set down of the counter application. Both applications serve before me. The parties are in agreement that I first dispose of the Rule 30 application and if unsuccessful, that I then proceed with the merits of the counter application.

[2] The Second Applicant, Mr Makhubele, appeared in person, also representing the First - and Third Applicants, of whom I am advised that he is the sole member. First Respondent was represented by Advocate Shephard.

[3] Prior to dealing with the merits of the Rule 30 application I deem it necessary and relevant to provide a comprehensive background of the history of the litigation between the parties. The history of the litigation is, however, relevant in adjudicating upon both the Rule 30 application and the merits of the counter application. I will refer to the parties as they are cited in the main application.

History:

[4] The litigation between the parties is a protracted and tragic one. The history of litigation can be summarised as follows:

[4.1] The First Respondent (as plaintiff) instituted action proceedings against the Applicants in the High Court of South Africa, Gauteng Division under Case no. **48567/2014**. In these proceedings the First Respondent claimed against the Applicants payment of an amount of R314 498.88 together with payment of an amount of R175 983.46.[1]

[4.2] The Applicants defended the matter and as far as back as the 20th of August 2015 the Honourable Makume J. granted summary judgement against the Applicants for payment of the abovementioned amount in case number **48567/2014**. At that time the Applicants were represented by both attorney and counsel[2];

[4.3] The Applicants thereafter brought various applications under the same case number which applications ***inter alia*** include:

[4.3.1] An application for leave to appeal;

[4.3.2] An application to **rescind the judgement** of Makume J. (the first application to rescind);

[4.3.3] An application to have the action under Case no. 48567/2014 transferred from this Division to the Gauteng Local Division;

[4.3.4] An application to stay or postpone the hearing of all matters between the parties.

[4.3.5] Various interlocutory applications.

---

[1] ***Summons on case line page 0001-1***
[2] ***Summary Judgement order on case lines page 001-126***

[4.4] The above applications, save the application for leave to appeal, that were launched under Case no. **48567/2014** came before the Honourable **Tuchten J** on 2nd of June 2017 in the above Honourable Court when he ordered that:

[4.4.1] The application to rescind and/or set aside the summary judgement ordered by Makume J. be dismissed;

[4.4.2] The application to remove proceedings between the parties to the Gauteng Local Division, Johannesburg be dismissed;

[4.4.3] The application to stay or postpone the hearing of all matters between the parties be dismissed.

[4.4.4] The Honourable Tuchten already at this stage remarked that it appeared to him that the Applicants were attempting to string the litigation out as long as possible.[3]

[4.5] The application for leave to appeal the judgement of Makume J under case number **48567/2014** was adjudicated on the 4th of May 2018 before the Honourable Fabricius J. However, in the same application for leave to appeal, the Applicants also brought an urgent application seeking an order that the First Respondent's Managing Director and the First Respondent's attorney, Mr Nolte, be held in contempt of Court, that the matter be referred to the Prosecuting Authorities as well as that the proceedings be stayed in the interim;

[4.6] After hearing argument on all of these issues, his Lordship the Honourable Fabricius J. ordered that the application be dismissed and the Applicants be ordered to pay the costs of the application on an attorney and client scale. Of

[3] Par 50 on page 015-24

importance is that the Honourable Fabricius already at the time made a penalising costs order in view of the Applicants blatant abuse of the rules of court.[4]

[4.7] Pursuant to this order the Applicants on the 2nd of September 2018 filed an application for leave to appeal with the Supreme Court of Appeal in respect of the order Makume J;

[4.8] In the interim, however, the Applicants brought yet another urgent application seeking interim relief pending their application for leave to appeal to the Supreme Court of Appeal. On the 11th of September 2018 the **Honourable Khumalo J**. removed the said urgent application from the roll and again ordered the Applicants to pay the costs of that application on an attorney and client scale[5]. Applicants thereafter never pursued this application and this application is still pending and hanging in the abyss of unresolved litigation instituted by the Applicants.

[4.9] On the 21st of November 2018 the Supreme Court of Appeal refused leave to appeal to the Applicants in respect of the judgement and order of Makume J.

[4.10] Thereafter the Applicants applied to the President of the Supreme Court of Appeal for a reconsideration of the application for leave to appeal in terms of the provisions of Section 17(2)(f) of the Superior Courts Act, 10 of 2013. On the 28th of October 2020 the President of the Supreme Court of Appeal dismissed the Applicants' application for reconsideration with costs[6].

[4.11] Thereafter the Applicants applied to the Constitutional Court for leave to appeal against the order of the Honourable Makume J. On the 10th of March 2021 the Constitutional Court refused the Applicants' leave to appeal;

---

[4] ***Order on case line page 019-112;***
[5] ***Order on case page 019-113;***
[6] ***Court Order on case line page 019-116***

[4.12] In the normal course of litigation one would have expected that with the refusal for the application for leave to appeal to the Constitutional Court, this would be the end of litigation between the parties in respect of the matter under case number **48567/2014** and that the First Respondent would finally, since 2015 be in a position to execute on the judgement in his favour. Alas, this was not to be.

[4.13] After the Constitutional Court refused the Applicants' aforementioned leave to appeal, the Applicants in March 2021 filed yet another application for rescission of the judgement of Makume J under case number 48567/2014 and other interdictory relief against the First Respondent prohibiting him to execute in the interim (the second application to rescind).[7] I wish to reiterate that the Applicants instituted a second application for rescission in respect of the same judgement of Makume J. in respect of which the first application for rescission was instituted and already:

[4.13.1] adjudicated by the Honourable Tuchten J;

[4.13.2] leave to appeal was refused by the Supreme Court of Appeal;

[4.13.3] leave to reconsider was refused by the president of the Supreme Court of Appeal;

[4.13.4] Leave to appeal was refused by the Constitutional Court.

[4.14] In the interim, after the Applicants launched the second application for rescission, the Applicants brought another urgent ***ex parte*** application for the stay of execution, pending the finalisation of the second rescission application under case number 37787/21. This application was heard by the Honourable Bokako AJ. who granted an *ex parte* order in favour of the Applicants, on the 3rd of August 2021.[8] This order was granted in the absence of the First Respondent, interdicting the First Respondent in the

[7] See case line page 004-1
[8] See case line page 010-18

interim from executing against the immovable property, pending the finalisation of the "second rescission" application. The order was styled in the form of a rule ***nisi***, but with no return date. After having received the ***ex parte*** order, the First Respondent filed a Notice in terms of Rule 6(12)(c), requesting the Court to reconsider the ***ex parte*** order granted in the First Respondent's absence.

[4.15] The application for reconsideration was set down for simultaneous hearing with the above second rescission application.

[4.16] The second application for rescission and other relief claimed by the Applicants together with the First Respondent's application for reconsideration were eventually argued before the Honourable Munzhelele J. on the 15th of November 2021. On the 22nd of March 2022 the Honourable Munzhelele J. made the following order:

[4.16.1] Application for condonation is denied;

[4.16.2] Application for rescission of judgement is denied with costs;

[4.16.3] Application for reconsideration is denied with costs;

[4.16.4] Application for contempt of Court is denied with costs;

[4.16.5] Rule ***nisi*** granted on Case no. 37787/21 is discharged and set aside;

[4.16.6] It is ordered that the Applicants may not file any further application for leave to appeal or rescission application under Case no. 48567/2014 or 29708/2018 without first obtaining permission to do so from Judge of this Division in Chambers;[9]

---

[9] ***Court order on case line page 019-137***

[4.16.7] The Applicants were also ordered to pay the costs of the First Respondent.

[4.18] It is necessary to refer to certain remarks by the Honourable Munzhelele J in her Judgement[10]:

[4.18.1] In paragraph 2 the learned Munzhelele stated as follows:

"[2] Before the application for rescission was heard the Applicants again brought an application for reconsideration, which was no different from the application for rescission of judgement. This is a trend which the Applicants have been doing for quite a long time. He would constantly file applications one after the other even when they contained similar averments". [11]

[4.18.2] In paragraph 8 the learned Judge dealt with the first application for rescission that served before the Honourable Judge Tuchten and ***inter alia*** stated as follows:

"*However one thing that is brought to light is that the explanation informs me that Judge Tuchten had already entertained the application for rescission of judgement; and as such, the Applicants want a second bite of the cherry. Judge Tuchten denied rescission for judgement on similar averments*."[12]

[4.18.3] Dealing ***inter alia*** with the merits of the application and the explanation for the delay in bringing that application as such a late time. The Honourable Judge inter alia stated as follows in paragraphs 12, 13 and 14:[13]

"*[12] … the Applicants brought this application for rescission of summary judgement to avoid the execution of his house which has been attached. If it*

---

[10] ***Judgement on case line page 019-127***
[11] ***par 2 of judgement on case line, p. 019 - 128***
[12] ***See: par. 8 of judgement, case line, p. 119 - 130***
[13] ***See paragraphs 12, 13 and 14 of judgement, case line, p. 019 – 131*;**

were not so the Applicants would not have brought this application. Six years have elapsed since the judgement of Judge Makume. Surely it cannot be in the interest of justice for this Court to be entertaining this application for rescission without a reasonable and complete explanation.

[13] The Applicants are expected to have explained the prejudice suffered by the Respondent who has been waiting to execute the judgement since 2015. They again chose to be silent about this prejudice.

[14] The Applicants never entertained the issue of prospects of success of the application for rescission of summary judgement. It is clear that a rescission application could not succeed because Judge Tuchten had already entertained the application on 11 November 2017 …"

[4.18.4] The Honourable Judge then in respect of the Applicants' disregard of the rules proceeds in paragraph 15 of the judgement as follows:

"[15] The Applicants have already brought an application for rescission of the summary judgement before Judge Tuchten, as I have touched on this in paragraphs 6 and 12 above. After careful study of the judgement of Judge Tuchten and the rescission application before me, it is clear that the Applicants intend to deliberately annoy the First Respondent by repetitively bringing the rescission applications on similar issues when they know that this application was already denied on the 11th of November 2017 by Judge Tuchten. The Applicants are abusing the court process by bringing their meritless applications and, in the process, harassing the First Respondent. They are vexatious litigants who should be stopped in their tracks."[14]

[4.18.5] The learned Judge then further proceeded and found that the grounds which were raised before her in the application for rescission were the same grounds which were raised by way of an application for leave to appeal to

[14] ***See: par. 15 of judgement, case line, p. 019 – 132;***

the Supreme Court of Appeal, as well as to the Constitutional Court. Both the Supreme Court of Appeal and the Constitutional Court refused leave to appeal on those grounds that were raised.[15]

[4.18.6] The judge in addition in paragraph 17 of her judgement stated as follows:

> *"[17] A person cannot litigate one thing endlessly. The element of good faith will not permit that adjudication should be done more than once. Surely they should know that a final judgement by a competent court between them and the First Respondent based on the summary judgement of the 20th of August 2015 has already been made. He could appeal the judgement, however, he cannot appeal because the appeal was denied even by the Supreme Court of Appeal. This means that the Applicants should accept their faith in this regard. A long established principle of English Law in the case of Henderson v Henderson (1843) 3 Hare 100 stated that:*
>
> > *"'Parties to litigation are required to bring their whole case at once rather than re-litigating the same subject matter concerning the same parties in serial litigation. There should be finality in litigations. I agree with the Respondents that the Applicants should be interdicted from abusing the court process and harassing the Respondents with an application for rescission of judgement"*. [16]

[4.19] I cannot fault the findings of the Honourable Munzhelele in any way whatsoever. Already at that time the Honourable judge attempted to bring finality to the litigation between the parties.

[4.20] On the 17th November 2021 the Applicants, more than 4 years after the judgement and order of the Honourable Tuchten J, filed an application for leave to

---

[15] ***See: par. 16 of judgement, case line, p. 019 – 132;***
[16] ***par. 17 of judgement, case line, p. 019 – 133;***

appeal his judgement and order.[17] This application has not been dealt with yet and is also pending.

[4.21] On the 8th April 2021 the Applicants filed an application for leave to appeal against the judgement and order of the Honourable Munzhelele J.[18] This application has also not been dealt with.

[4.22] On the 13th April 2022 the Applicants launched an application for the recusal of the Honourable Munzhelele J and that the orders and her judgement aforementioned be declared nullities and that the proceedings that served before her be heard de novo.[19] This application is also pending.

[4.23] As aforementioned the Applicants brought an urgent application requesting a stay of the sale of execution that was scheduled to proceed on the 28th July 2022 on an ex parte basis. This application was launched under Case no. 30109/2022 in June 2022. This urgent application came before the Honourable Janse Van Nieuwenhuizen on the 21st June 2002 who struck it from the roll due to lack of urgency. Applicants re enrolled the same application for the 28th June 2022 before the Honourable the Honourable Nyathi J., again in the urgent court, who on the 27th of July 2022 opted to adjudicate on the merits of the application and who dismissed the application with costs. [20]

[4.24] For purposes of the present application I again find it is necessary and relevant to refer to certain extracts from the judgement of the Honourable Nyathi J:[21]

[4.24.1] In paragraph 3 of the judgement the Judge states that although Counsel for the First Respondent during argument argued that the application

---

[17] ***application for leave to appeal on case line page 015-1 to 5***
[18] ***application on case line page 017-16 to 017-45***
[19] ***application on case line page 016-1 to 016-96***
[20] ***Judgement Nyati on case line page 019-145***
[21] ***See: judgement on p. 019 – 146 to 019 – 152;***

should be struck from the roll due to lack of urgency, the learned Judge exercised his discretion and having had regard of all the circumstances decided to hear the matter on the merits nonetheless;[22]

[4.24.2] In paragraph 13 of his judgement the Honourable Judge referred to the well-known passage in the matter of ***Zuma v The Secretary of the Judicial Commission of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State*** (CCT52/21)(2021) ZACC28 (17 September 2021) the Constitutional Court held as follows:

> "*Like all things in life, like the best of times and the worst of times, litigation must at some point come to an end. The Constitutional Court as the highest court in the Republic, is constitutionally enjoined to act as final arbitrator in litigation. This role must not be misunderstood, mischaracterised, nor taken lightly, for the principles of legal certainty and finality of judgement are the oxygen without which the rule of law languishes, suffocates and perishes*".

[4.25] The Property was sold on auction on 28th July 2022. Needless to state and as no surprise the Applicants filed another application for leave to appeal against the judgement and order by Nyathi J.

[4.26] In addition, on the 4th of August 2022, the Applicants under Case no. 48567/2014 launched the present main application on an urgent basis wherein the Applicants sought the following relief:

> "*2. The purported sale in execution by the Second Respondent at the instruction of the First Respondent on the 28th of July 2022 of the Second Applicant's immovable property situate at Erf [....], N [....] Street, Protea North, Soweto Gauteng, held under Title Deed no. [....] be declared null and void and set aside;*

---

[22] ***See: par. 3 of judgement, Case line, p. 019 -149;***

3. Pending finalisation of:

3.1 The application for leave to appeal against the whole of the judgement and orders delivered by the Honourable Judge Munzhelele on 17 March 2022 under Case no. 48576/2014 and 29708/2018;

*3.2 The application for leave to appeal against the order delivered by the Honourable Judge Munzhelele on the 17th of March 2022 reconsidering and setting aside the rule **nisi** order delivered by the Honourable Acting Judge Bokako under Case no. 38778/2021;*

3.3 The recusal application of the Honourable Judge Munzhelele instituted on the 17th of April 2022 under Case no. 48576/2014 and 29708/2018;

3.4 The application for leave to appeal against the order delivered by the Honourable Judge Tuchten on the 2nd of June 2017 under Case no. 48576/2014 refusing the rescission of the judgement and orders delivered by the Honourable Judge Makume on the 20th of August 2015 under Case no. 48576/2014;

3.5 The application for leave to appeal against the whole of the judgement and orders delivered by the Honourable Judge Nyati on the 27th of July 2022 under Case no. 30109/2022;

3.6 The action proceedings between the Applicants and the First Respondent under Case no. 2220/2017 at the Johannesburg High Court:

(a) The First Respondent be interdicted and restraint from causing the Second Respondent to conduct a sale in execution of the immovable property registered in the name of the Second Applicant, that is, Erf

[....], N [....] Street, Protea North, Soweto (hereinafter referred to as the "immovable property");

(b) The Second Respondent be interdicted and restraint from conducting a sale in execution of the Second Applicant's immovable property;

(c) The Fourth Respondent be interdicted and restraint from:

(i) Lifting the interdict against the First Respondent relating to the Second Respondent's immovable property; and/or

(ii) Transferring the Second Applicant's immovable property into the name of the Sixth Respondent or any third party;

(d) The First Respondent be interdicted and restraint from presenting for taxation to the Fifth Respondent any bills of costs that may have been or be awarded to the First Respondent against the Applicants under case no. 48567/2014, 29708/2018, 37887/2021 and 30109/2022 or any case whatsoever;

(e) The Fifth Respondent be interdicted and restraint from taxing any bills of costs that may have been or be awarded to the First Respondent against the Applicants under case no. 4857/2014, 29708/2018, 37887/2021 and 30109/2022 or any case whatsoever;

4. The First Respondent be declared to be in:

(a) Contempt of the ex parte order delivered by the Honourable Acting Judge Bokako on the 3rd of August 2021 under case no. 48567/2014 and 29708/2018;

(b) Constructed contempt of the pending:

(i) Applications for leave to appeal and recusal proceedings before the Honourable Judges Munzhelele, Tuchten and Nyati under case no. 48576/2014 and 29708/2018 and 30109/2022, respectively;

(ii) Application for the recusal of the Honourable Judge Munzhelele from the proceedings between the Applicants and the First Respondent under case no. 48567/2014 and 29708/2018.

5. Conditionally suspended upon the First Respondent purging its contempt and constructive contempt alluded to ad paragraph 4(a) and (b) above by consenting to the relief sought in the draft order prior to the hearing of this application and not acting in contempt or constructive contempt or any pending or future proceedings between the parties including but not limited to these and the proceedings alluded to ad paragraphs 3.1 to 3.5 above:

(a) The First Respondent be fined an amount of R1 million;

(b) The First Respondent be prevented from bringing or opposing any proceedings or invoking any Court or legal process against the Applicants;

(c) This Honourable Court imposes any further sanctions it may deem fit upon First Respondent."

[4.27] It is clear from the relief requested within the main application of which the counter-application presently serves before me that once again as in the past, the Applicants have adopted a stratagem of filing whatever type of applications they can think of, one after the other. As the Honourable Munzhelele already remarked in her judgement of the 17th of March 2022 this is a trend which the Applicants have been doing for quite a long time.

[4.28] In response to the relief sought in the main application the First Respondent launched the counter-application which has now been set down before me. In the counter-application the First Respondent requests;

(i) That the First to Third Applicants be declared vexatious litigants in terms of Section 2(1)(b) of the Vexatious Proceedings Act, Act 3 of 1956;

(ii) That no legal proceedings may be instituted by the First to Third Applicants against the First Respondent, in any provincial or local division of the High Court of South Africa or any inferior court, without the leave of that court, or any Judge of the High Court, as the case may be;

(iii) Alternatively that the First to Third Applicants be ordered to pay all costs orders granted against them under case no. 48567/2014, Supreme Court of Appeal case no. 1058/18 and case no. CCT285/20 alternatively provides security for payment of same, prior to the issuing of any legal proceedings against the First Respondent.

[4.29] The Applicants' main application and the counter application were initially set down for hearing in the urgent court of this division before the Honourable Mbongwe J. for the 30th of August 2022. During the hearing before me it was common cause between the parties that for purposes of this appearance the application was duly indexed and paginated, both parties files practice notes, both parties filed heads of argument wherein they dealt with both the main and counter application and lists of authorities. The Applicants even filed additional supplementary heads of argument. In the premises both the main and counter application were ripe for hearing.

[4.30] On the 30th August 2023 Mbongwe J. struck the Applicants' main application from the roll for lack of urgency with costs.

[4.31] It came as no surprise to me that subsequent to the order of Mbongwe J., the Applicants filed an application in terms of Rule 42(1)(b).

[4.32] The Applicants thereafter brought a further ***ex parte*** urgent application **(37787/2021**) to stay the transfer of the property together with further interdictory relief. Before this application came before the urgent court the Applicants were directed to serve the application on the First Respondent. This application was opposed by the First Respondent and on the 24th of November 2022 Cohen J., after having heard argument, removed the matter from the urgent roll and ordered the Applicants to pay the costs. Again the Applicants have done nothing since that day to bring this application to fruition and this application is also still pending.

[4.33] For reasons which I respectfully do not understand, the Applicants then brought an application in terms of Rule 42(1)(b) to vary the order by Cohen J. This application is once again opposed by the First Respondent and no steps were taken by the Applicants to enrol this application for hearing. In the premises this application is also still pending. This application which was instituted by the Applicants is once again indicative of their ***modus operandi*** followed by them.

[4.34] It is common cause that:

[4.34.1] in November 2022 the First Respondent applied for a date for the hearing of the counter application;

[4.34.2] a date for hearing was allocated for the 27th February 2023, in respect of which a notice of set down was served on the Applicants on the 9th January 2023

[4.34.3] in respect of the setting down of the counter-application for hearing before me, the Applicants have filed notices in terms of Rule 30.

[5] **Rule 30 Notice (s)**

[5.1] When the matter came before me the Second Applicant in the first instance requested that his Notice in terms of Rule 30(2)(b) be amended in terms of the provisions of Rule 28.

[5.2] This was the third amendment which the Applicants sought in respect of the amendment of their Notice in terms of Rule 30(2)(b). The initial notice was served on the 14th of January 2023. The first amendment was sought on the 2nd of February 2023 and again thereafter on the 17th of February 2023.

[5.3] When I enquired from Mr Sheppard what the First Respondent's attitude is in respect of the application for amendment Mr Sheppard advised me that the First Respondent had no objection as it wanted to ensure that the matter proceed and not be postponed for whatever reason. I appreciate this attitude of the First Respondent. The litigation between the parties needs to come to an end. Under these circumstances I allowed the amendment of the Rule 30(2)(b) notice.

[5.4] The fact that I allowed the amendment does not mean that I am of the opinion that there is any merit in the procedure adopted by the Applicants.

(5.5) In the first instance through all of these amendments the Applicants undermined the whole purpose of Rule 30 procedure. The purpose of Rule 30 procedure is that an opportunity be provided to the First Respondent to remove a cause of complaint and only in the event of such complaint not being removed then an application in respect of Rule 30 should be proceeded with. What the Applicants are doing in the present matter is to amend their notice in terms of Rule 30(2)(b) continuously by adding new grounds of complaints without providing the First Respondent with an opportunity to address such complaint. In addition the Applicants proceede with bringing an application in terms of Rule 30 prior to an initial 10 days having lapsed pursuant to the first Rule 30(2)(b) notice. This behaviour and ***modus operandi*** of the Applicants should be

frowned upon and cannot be condoned by the Court. For this reason alone the Rule 30 procedure is defective and the application should be dismissed.

[5.6] I am in any event of the opinion that there is no merit in the application.

[5.7] For the first ground:

(5.7.1) Mr Makubele argued that with reference to the Practice Manual of this Division and Practice Directives issued by the Deputy Judge President in this Division that the First Respondent could not have applied for a date for hearing of the counter-application in November 2022 in view thereof that no new Practice Note and/or Heads of Argument were filed.

[5.7.2] With respect there is no merits in this ground. Mr Makubele conceded and I respectfully submit correctly so, that on the 30th of August 2022 when the main and counter-application came before Mbongwe J., that both applications were ripe for hearing in all respects and that both parties at that time had filed complete Heads of Argument and Practice Notes. After this matter was struck from the roll due to lack of urgency there was no prohibition on any of the parties to immediately proceed applying for a date for hearing of the matter. All procedural steps were duly complied with at that time.

[5.7.3] I referred Mr Makubele to the provisions of par.13.8.3 of the Gauteng Pretoria: Practice Manual that provides as follows:

> "*If concise heads of argument were filed for a previous hearing of the matter and the issues for determination have not changed, concise heads of argument need not be filed again. The practice note must indicate that reliance will be placed on the concise heads of argument filed previously*. *At the hearing of the matter further Heads of Argument may be handed in.*"

[5.7.4] I am of the opinion that in the present matter the parties could rely on the Heads which were filed before Makume J. for the purpose to apply for a date of hearing, as those Heads addressed both the merits in the counter and main applications.

[5.7.5] I am satisfied that at the time when the First Respondent applied for a date for the hearing of the counter-application it was proper for him to do so. This is in essence borne out by the fact that Mr Makubele advised that on the 4th of November 2022, the Applicants also applied for a date of hearing for both the main application and the counter-application. Mr Makubele conceded that at that time (which time coincides give or take a few days) with the time when the First Respondent applied for a date of hearing of the counter-application, that the Applicants were also under the impression that both applications were ripe for hearing.

[5.7.6] Even if I am incorrect in this finding, I am satisfied that the Court must in the present circumstances act in the interest of justice and to bring finality to litigation condone any non-compliance that there may have been with the set down of the counter-application for hearing. The point raised by the Applicants is, in my view, highly technical and can be condoned. The rules are there for the court and not the court for the rules.

[5.7.7] In ***Pangbourne Properties Ltd v Pulse Moving CC and Another***[23] Wepener J considered a vast array of authorities in support of an approach that does not encourage formalism in the application of the rules. Suffice to refer to the matter of ***Trans-Africa Insurance Co Ltd v Maluleka*** [24] where Schreiner JA remarked:

---

[23] **2013 (3) SA 140 (GSJ)**
[24] **1956 (2) SA 273 (A) at 278F-G**

"*… technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.*" [25]

---

[25] - **In *Federated Trust Ltd v Botha* 1978 (3) SA 645 (A) Van Winsen AJA (as he then was) said at 654C-F as follows:**

"*The Court does not encourage formalism in the application of the rules. The rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the Courts. See, e.g. Hudson v Hudson and Another* 1927 AD 259 *at 267; L F Boshoff Investments (Pty) Ltd v Cape Town Municipality (2)* 1971 (4) SA 532 *(C) at 535 (last paragraph); Viljoen v Federated Trust Ltd* 1971 (1) SA 750 *(O) at 754D-E; Vitorakis v Wolf* 1963 (3) SA 928 *(W) at 932F-G. Where one or other of the parties has failed to comply with requirements of the rules or an order made in terms thereof and prejudice has thereby been caused to the opponent, it should be the Court's endeavour to remedy such prejudice in a manner appropriate to the circumstances, always bearing in mind the objects for which the rules were designed. See in this regard the remarks of Schreiner JA in Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 *(A) at 278F-G.*"

- **In *Khunou and Others v M Fihrer and Son (Pty) Ltd and Others* 1982 (3) SA 353 (W) at 355-356 Slomowitz AJ said:**

"*Of course the Rules of Court, like any set of rules, cannot in their very nature provide for every procedural situation that arises. They are not exhaustive and moreover are sometimes not appropriate to specific cases. Accordingly the Superior Courts retain an inherent power exercisable within certain limits to regulate their own procedure and adapt it, and, if needs be, the Rules of Court, according to the circumstances. This power is enshrined in s 43 of the Supreme Court Act 59 of 1959.*"

- **In *Szedlacsek v Szedlacsek and Others* 2000 (4) SA 147 (E) at 149C-H Leach J (as he then was) stated the following after quoting from the *Khunou* case *supra* with approval at 149G-H:**

"*These observations I wholeheartedly endorse. It is trite that Rules are there for the Court, not the Court for the Rules and this Court must zealously guard against its rules being abused, particularly by the making of unnecessary procedurally related applications which are not truly required in order for justice to be done or for the speedy resolution of litigation, but which appear to be designed merely to inflate costs to the advantage of the practitioner's pocket.*"

- **In *Hart and Another v Nelson* 2000 (4) SA 368 (ECD) Horn AJ (as he then was) stated as follows at 374G-375F:**

**"*Where strict adherence to a Rule of court would give rise to a substantial injustice the court will grant relief which will prevent such an injustice. The court has an inherent power to grant relief where an insistence upon the exact compliance with a Rule of court would result in substantial injustice to one of the parties. (Moluele and Others v Deschatelets NO* 1950 (2) SA 670 *(T) at 676; also Matyeka v Kaaber* 1960 (4) SA 900 *(T).) It is inconceivable that a court would give effect to the Rule where the implication of such a Rule would clearly cause undue hardship to one party and present an unfair advantage to the other. In Ncoweni v Bezuidenhout* 1927 CPD 130 *Gardener JP remarked as follows at 130:*

'*The Rules of procedure of this Court are devised for the purpose of administering justice and not of hampering it, and where the Rules are deficient, I shall go so far as I can in granting orders which would help to further the administration of justice.*'**

[5.7.8] I am mindful that the Courts derived their power from the Constitution itself. In procedural matters Section 171 of the Constitution explains that "*all courts who function in terms of National Legislation and their rules and procedure must be provided for in National Legislation*". On the other hand, Section 173 of the Constitution preserves the inherent power of the Courts to protect and regulate their own process in the interest of justice. [26] I am also mindful as was held in ***S v Pennington & Another by the Constitutional Court***[27] that the power of Court to protect and regulate their own process in the interest of justice is a power which has to be exercised with caution. The power must be exercised sparingly having taken into

---

Similarly, where it is evident that use is being made of a procedure for ulterior purposes it amounts to an abuse of the process and the court has an inherent power to prevent such an abuse (Hudson v Hudson and Another 1927 AD 259 at 267; Basson v Bester 1952 (3) SA 578(C) at 583D). In Beinash v Wixley [1997] ZASCA 32; 1997 (3) SA 721 (SCA) at 734D, Mahomed CJ said the following:

'*There can be no doubt that every court is entitled to protect itself and others against an abuse of its process.'*

At para–F on the same page of the judgment, the learned Chief Justice continues as follows:

'*What does constitute an abuse of the process of Court is a matter which needs to be determined by the circumstances of each case. There can be no all encompassing definition of the concept of "abuse of process". It can be said in general terms, however, that an abusive process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective.*

***The Rules of Court are after all designed to facilitate the expeditious ventilation and hearing of disputes as little cost as possible (SOS Kinderhof International v Effie Lentin Architects 1993 (2) SA 481 (Nm) at 491E; Wolf v Zenex Oil (Pty) Ltd 1999 (1) SA 652 (W) at 654F). The Rules exist for the court, not the court for the Rules (Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972 (1) SA 773 (A) at 783). Fairness and transparency come into play, even in the most intense litigation, and no man should be allowed to manipulate the procedures of the Court in a way which would cause a palpable injustice to another, which, I believe would be the case should the appellants be permitted to rely on the payment procedure in terms of Rule 18(1).*"**

[26] ***Phillips & Others v National Director of Public Prosecutions (2005) ZACC15 2006 (1) SA505(CC) at para. 47 – 51*;**

[27] ***1997(4) SA1076 (CC);***

account the interest of justice in the manner consistent with the Constitution.[28]

[5.8] Secondly:

[5.8.1] Mr Makubele argued that the fact that the First Respondent only applied for the set down of the counter-application (and not the counter and main applications) constitutes an irregular step *per se*.

[5.8.2] Although I agree with Mr Makubele that as a general rule, an application and counter-application should be adjudicated ***pari passu*** I do not agree with Mr Makubele that the mere fact that the First Respondent applied only for a date of hearing of the counter-application that same constitutes an irregular step. The fact of the matter is that at the hearing of such a counter-application on its own, an argument may be addressed by the party who sets such a counter-application down, that it is in the interest of justice that such counter-application be heard on its own and that the Court has a discretion to allow the hearing of the counter-application on its own.[29] '

[5.8.3] This is exactly what the First Respondent did in answer to this ground raised by the Applicants. Mr Sheppard on behalf of the First Respondent requested that the Court exercise its discretion having regard to the aforementioned history of litigation between the parties. I am inclined to accede to the First Respondent's request. This is supported by the following:

(i) Mr Makubele conceded on behalf of the Applicants that on the 4th of November 2022 when the Applicants allegedly applied for a date for hearing of both the main application and counter-application the

---

[28] ***Parbhoo & Others v Getz NO & Others 1997 (4) SA 1095 (CC)*;**
[29] ***Truter v Degenaar 1990 (1) SA 206 (T) on p. 211 E – F*;**

Applicants were of the opinion that both were ripe for hearing. As I have already alluded to above at that time Heads of Argument and Practice Notes had been filed on behalf of both parties. When I enquired from Mr Makubele whether we should not utilise the opportunity to hear argument in respect of the main application as well, for which purpose the Court was prepared to let the matter stand down for hearing later the week, Mr Makubele advised the Court that the main application is not ripe for hearing at this stage as in the interim various other developments occurred which caused that the main application could not be argued at this stage. In this respect Mr Makubele referred me to an application to compel the First Respondent to discover documentation etc.. I am not surprised by the attitude adopted by Mr Makubele as the Applicants are masters in the filing of new applications and/or relying on new procedures as duly indicated above;

(ii) It is apparent that already since March 2015 the First Respondent had obtained a valid judgement in this Court which he can still not execute upon (8 years later). Notwithstanding the fact that leave to appeal was refused by the Constitutional Court in respect of that judgement and that the Applicants had already launched two applications for rescission of that judgement, the First Respondent is still prevented by the actions of the Applicants to participate in continuous litigation from executing on that order. If Mr Makhubele could advise the Court that the main application was ripe for hearing and could proceed with hearing in a week or two to follow, it may have had an influence of my decision. As I have already indicated that is not the position.

(iii) I am also having regard to the comments that were made by my brothers and sisters who adjudicated in matters between the parties in

the past as referred to above in respect of the Applicants modus operandi in litigating in the past.

[5.8.4] In the premises the Court agrees with Mr Sheppard that this is the ideal situation where the Court, in the interest of justice and to ensure finality of litigation, needs exercise the discretion in favour of the First Respondent and to allow the hearing of the counter-application separately from the main application.

[5.9] Thirdly :

[5.9.1]Mr Makhubele argued that the relief requested in the counter-application is the same as which was granted by the Honourable Judge Munzhelele and hence on a proper interpretation the relief is ***lis pendens*** and that he is being severely prejudiced because the relief now requested is also the subject of the relief that is subject to the application for leave to appeal against the order of the Honourable Munzhelele J.

[5.9.2] There is with respect also no merit in this grounds. On the contrary if one has a look at the relief which was granted by the Honourable Munzhelele it appears that such relief were restricted to the proceedings under specific case numbers. No reliance was placed before her on the provisions of the Vexatious Proceedings Act. The relief requested by the First Respondent in the present counter-application is much wider and is relief of a general nature. The relief before the Honourable Munzhelele was also requested and granted in terms of section 173 of the Constitution. The present application is premised upon the provisions of section 2(1)(b) of the Vexatious Proceedings Act, 3 of 1956.

[5.9.3] In any event, Rule 30 applies only to irregularities of form and not to matters of substance. [30]

[5.10] Proof of prejudice is a prerequisite to succeed in an application in terms of rule 30(1). [31] I am not persuaded that the Applicants have shown that they have suffered prejudice in the present matter.

[5.10.1] It appears that the Notice of Set down of the counter-application was duly served by way of email on the 9th of January 2023 on the Applicants' representative which proof of service was uploaded onto case line on p. 023 – 3.

[5.10.2] At the time comprehensive Heads of Argument were filed by both parties as well as comprehensive Practice Notes.

[5.10.3] The Applicants received notice of the hearing of set down more than one and a half months prior to the hearing thereof. They had more than sufficient time to properly prepare to continue in their opposition of the counter-application.

[5.10.4] There is further no substance in any of the other grounds of prejudice raised. I am inclined to agree with Mr Shepheard that the noting

---

[30] ***Singh v Vorkel*** **1947 (3) SA 400 (C) at 406; *Odendaal v De Jager* 1961 (4) SA 307 (O) at 310F–G; *Nyaniso v Head of the Department of Sports, Recreation, Arts and Culture, Eastern Cape Province* (unreported, ECB case no 643/2014 dated 27 September 2016) at paragraph [11]. In *Deputy Minister of Tribal Authorities v Kekana* 1983 (3) SA 492 (B)**

[31] ***SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw NO*** **1981 (4) SA 329 (O) at 333G–334G; *De Klerk v De Klerk* 1986 (4) SA 424 (W) at 426I; *Consani Engineering (Pty) Ltd v Anton Steinecker Maschinenfabrik GmbH* 1991 (1) SA 823 (T) at 824G–H; *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen* 1992 (4) SA 466 (W) at 469G; *Gardiner v Survey Engineering (Pty) Ltd* 1993 (3) SA 549 (SE) at 551C; *Malebye Business Enterprises CC v Bela-Bela Local Municipality* (unreported, LP case no 4134/2018 dated 18 June 2020) at paragraph [6]; *Hill NO v Brown* (unreported, WCC case no 3069/20 dated 3 July 2020) at paragraphs [12]–[13]; *Doornhoek Equestrian Estate Home Owners Association v Community Schemes Ombud Service* (unreported, GP case no 32190/21 dated 8 March 2022) at paragraph 14; *Van den Heever NO v Potgieter NO* 2022 (6) SA 315 (FB) at paragraphs [23]–[26].**

of an irregular step in terms of Rule 30 is just another step in the stratagem adopted by the Applicants to get the matter postponed again.[32] In similar circumstance before my brother Tuchten the Applicants also proceeded with a meritless Rule 30 application. Tuchten J already in [33]June 2017 held the opinion that one of the Applicants' motives were to string the litigation out as long as possible.

[5.11] In the premises the court is satisfied that the application in terms of Rule 30 be dismissed with costs.

[6] **Merits of Counter Application:**

[6.1] Section 2(1)(b) of the **Vexatious Proceedings Act 3 OF 1956 provides as follows:**

"(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

---

[32] KMATT Properties (Pty) Ltd v Sandton Square Portion 8 (Pty) Ltd and ANOTHER 2007 (5) SA 475 (W) at par 51

[33] par 50 of Tuchten Judgement on case line 015-24

abuse of the process of the court and that there is prima facie ground for the proceedings.

(c) An order under paragraph (a) or (b) may be issued for an indefinite period or for such period as the court may determine, and the court may at any time, on good cause shown, rescind or vary any order so issued.

(own emphasis)

[6.2] The relevant section was interpreted by the Supreme Court of Appeal in ***MEC Department of Co-Operative Governance and Traditional Affairs v Maphanga*** [34].

"[12] It is clear from the ordinary wording of this provision that it brings within its purview actual or prospective litigation brought or threatened by a person who has persistently, and without any reasonable ground, instituted legal proceedings in any court or inferior court, whether against the same or any other person or persons. The purpose of the provision is 'to put a stop to persistent and ungrounded institution of legal proceedings . . . in the Courts', i.e. to 'put a stop to the making of unjustified claims against another or others, to be judged or decided by the Courts'. So, an applicant who seeks the protection of the provisions must establish, first, that the respondent has in the past instituted legal proceedings in a court against her, or any other person or persons persistently and without reasonable cause. Secondly, she must prove that further litigation has been brought against her or is reasonably contemplated.

[6.3] As was held in the MEC case supra the Act is 63 years old and has not kept abreast with the developments and still defines 'court' as the 'Supreme Court of South Africa' which no longer exists. This anomaly requires the definitions of 'court' in the Act and the Superior Courts Act, which are *in pari*

[34] 2021 (4) SA 131 (SCA) par 12 and further.

materia in this regard, to be construed in a manner so as to be consonant. Court as referred to in the Act thus refers to the High Court, Supreme Court and Constitutional court as well.[35]

[6.4] Although both parties' estimation for the hearing of the matter was 2 to 2 ½ hours, the matter proceeded before me for a period of at least 4 hours. Although the roll is severely congested I allowed it in order to provide Mr Makhubele who appeared in person a fair opportunity to present his arguments to me. Mr Makhubele occupied most of this time in presenting his arguments on the Rule 30 application. Once his submissions on this application were concluded, his submissions on the merits of the counter Application of the First Respondent were limited and need not be considered seperately. In the heads of argument filed in August 2022 I noticed, however, that the Applicants took a constitutional challenge that was not argued in court. Notwithstanding I will address same below.

[6.5] In applying the requirements of section 2(1)(b) of the Act, it is evident from the history of the litigation between the parties above, the Applicants:

[6.5.1] have persistently;

[6.5.2] instituted ;

[6.5.3] a multiplicity of litigation proceedings;

[6.5.4] without any reasonable ground;

[6.5.5] in this court, and the Supreme Court of Appeal; and

[6.5.6] against the First Respondent.

---

[35] Par 14-16 MEC judgement supra

[6.6] On the contrary the stratagem adopted by the Applicants is apparent. Once a judgement and order are given against them they bring an application for leave to appeal, bring an application for recusal and bring an application for rescission, all on substantially the same grounds. These applications will usually follow with an application in the urgent court to suspend the order in the interim.

[6.7] The meritless litigation without any reasonable grounds have been recognised by many of my brothers and sisters in this court.[36] Notwithstanding the Applicants were not deterred and their actions persist.

[6.8] I am fully aware that the right of access to courts is protected under s 34 of the Constitution and is of cardinal importance for the adjudication of justiciable disputes. However, as was held by the Constitutional Court in ***Beinash and Another v Ernst & Young and Others***[37] 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. Indeed, as the respondents argued, in that matter the Court is under a constitutional duty to protect bona fide litigants, the processes of the Courts and the administration of justice against vexatious proceedings.

> *"The vexatious litigant is one who manipulates the functioning of the courts so as to achieve a purpose other than that for which the courts are designed. This limitation serves an important purpose relevant to s 36(1)(b). It would surely be difficult to anticipate the litigious strategies upon which a determined and inventive litigator might embark. Thus there is a requirement for special authorisation for any proposed litigation."*

[6.8] These remarks are appropriate to the actions of the Applicants in the present matter.

---

[36] ***remarks in judgement of Fabricius J (case line page 004-200), Tuchten J (par 50 case line page 015-24), Munzhelele J (par 15 case line page 019-132) and Nyathi J.(par 12 and 13 case line 019-150).***

[37] ***1999(2) SA 116 CC at paragraph 17***

[6.9] I am satisfied that the First Respondent has made out a proper case for the relief that it seeks. Insofar as s 2(1)*(b)* of the Act confers a discretion upon the Court whether to make an order, I am satisfied that in all the circumstances of this case I ought to make an order. I have indicated above the multitude of proceedings instituted by the Applicants. There is every reason to believe that the institution of further legal proceedings is contemplated by the Applicants. The Applicants appear to be impervious to their abysmal failures and adverse judicial comments. They remain undeterred. I am satisfied that the facts of this matter demonstrate aptly that the Applicants have persistently and without any reasonable ground instituted the various legal proceedings referred to herein. I am satisfied that the requested relief should be granted against the Applicants. I again refer to the remarks of the Constitutional Court as was quoted by my brother Nyathi in his judgement above that litigation must come to an end.[38]

[6.10] The only remaining question is to grant relief to meet only the immediate requirements of the particular case.[39]

[6.11] From the history between the parties above it is apparent that there are various pending litigation proceedings between the parties that are unresolved. The relief requested in the present application will not affect the pending proceedings already instituted. The relief will only pertain to new proceedings to be instituted by the Applicants, whether under new case numbers or under the existing case numbers in pending litigation. The purpose of this order is to prohibit the Applicants from proceeding with meritless litigation and to bring to finality the pending litigation.

---

[38] In paragraph 13 of his judgement the Honourable Judge referred to the well-known passage in the matter of *Zuma v The Secretary of the Judicial Commission of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State* (CCT52/21)(2021) ZACC28 (17 September 2021) the Constitutional Court held as follows:

"*Like all things in life, like the best of times and the worst of times, litigation must at some point come to an end. The Constitutional Court as the highest court in the Republic, is constitutionally enjoined to act as final arbitrator in litigation. This role must not be misunderstood, mischaracterised, nor taken lightly, for the principles of legal certainty and finality of judgement are the oxygen without which the rule of law languishes, suffocates and perishes*".

[39] Par 26 MEC judgement supra

[6.11] In the ***Beinash*** matter the Constitutional Court left open the question whether in terms of the Vexatious Proceedings Act a court has the power to make a narrower order than provided for in the Act i.e., power to make a more limited order prohibiting some proceedings against some parties in some courts.[40]

[6.12] Unfortunately this issue was not raised nor argued before me and I am not requested to decide this issue.

[6.13] I wish to emphasize that in making an order against the Applicants, the Applicants will not be remediless. They will have the right to approach this Court or any Judge thereof, by way of application, to obtain leave to institute proceedings against the First Respondent if it can satisfy the court or Judge that the proceedings are not an abuse of the process of the court and that there is *prima facie* ground for the proceedings.

[6.14] It is in this respect which the Applicants have attacked the constitutionality of section 2(1)(b) of the Act. They argue that:

[6.14.1] where a party is expected to choose a Judge in circumstances where it is axiomatic that a litigant cannot chose a judge, it would open door to judicial bias;

[6.14.2] by default a designation of vexatiousness pre-supposes a tendency by such a litigant to push boundaries to the limits which may create the perception of bias even before considering the litigants case;

[6.14.3] litigants who are declined permission to institute proceedings may push back against such orders by unnecessarily approaching higher courts for direct access, particularly in circumstances where the act does not provide a sanction for such unsuccessful litigants.

---

[40] Paragraphs 8 and 9 of Beinash judgement supra

[6.15] In the ***Beinash*** matter supra similar arguments relating to bias as contained in 6.14.1 and 6.14.2 above were raised before the Constitutional Court. There it was argued that it is inescapable that the Judge, confronted by an application to proceed by a person bearing the mark of a vexatious litigant, would have regard to the prior history of the applicant and would be influenced by the propensity that he or she had demonstrated in the past to litigate vexatiously or with some extraneous purpose. It was argued that this would load the dice, so to speak, against the applicant. In essence it was expected that a litigant would first need to establish his bona fides. This kind of propensity-based reasoning, it was submitted, is what our law tries to avoid.

[6.16] In ***Beinash*** the Constitutional Court inter alia:

[6.16.1] determined that in order to evaluate the constitutionality of the impugned section , it needed to consider the purpose of the Act and held that the purpose is 'to put a stop to persistent and ungrounded institution of legal proceedings. The Act does so by allowing a court to screen (as opposed to absolutely bar) a 'person (who) has persistently and without any reasonable ground instituted legal proceedings in any Court or inferior court'. This screening mechanism is necessary to protect at least two important interests. These are the interests of the victims of the vexatious litigant who have repeatedly been subjected to the costs, harassment and embarrassment of unmeritorious litigation, and the public interest that the functioning of the courts and the administration of justice proceed unimpeded by the clog of groundless proceedings.[41]

[6.16.2] held that insofar the effect of s 2(1)*(b)* of the Act is to limit the right of access to such litigants to court protected in s 34 of the Constitution, such a limitation is reasonable and justifiable. [42] A restriction of access in the case of a vexatious litigant is in fact indispensable to protect and secure the right

[41] ***Par 15 of Beinash judgement***
[42] ***Par 16 of Beinash judgement***

of access for those with meritorious disputes. The Court held that it is under a constitutional duty to protect bona fide litigants, the processes of the Courts and the administration of justice against vexatious proceedings. The vexatious litigant is the one who manipulates the functioning of the courts so as to achieve a purpose other than that for which the courts are designed. It would surely be difficult to anticipate the litigious strategies upon which a determined and inventive litigator might embark. Thus there is a requirement for special authorisation for any proposed litigation.[43]

[6.16.3] held that 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 the court. When we measure the way in which this escape-hatch is opened in relation to the purpose of the restriction, for the purposes of s 36(1)*(d)*, it is clear that it is not as onerous as the applicants contend, nor unjustifiable in an open and democratic society which is committed to human dignity, equality and freedom. The applicant's right of access to courts is regulated and not prohibited. The more remote the proposed litigation is from the causes of action giving rise to the order or the persons or institutions in whose favour it was granted, the easier it will be to prove bona fides and the less chance there is of the public interest being harmed. The closer the proposed litigation is to the abovementioned causes of action or persons, the more difficult it will be to prove bona fides, and rightly so, because the greater will be the possibility that the public interest may be harmed. 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

[43] ***Par 17 of Beinash judgement***

Court, and ensures the achievement of the snuggest fit to protect the interests of both applicant and the public.[44]

[6.16.4] held that requiring the potential litigant under these circumstances to discharge this evidentiary burden is not unreasonable. It is justifiable when confronted by a person who has used 'the procedures (ordinarily) permitted by the Rules of the Court to facilitate the pursuit of the truth . . . for a purpose extraneous to that objective'. Having demonstrated a propensity to abuse the process of the Courts, it hardly lies in the mouth of a vexatious litigant to complain that he or she is required first to demonstrate his or her bona fides. In this respect, the restriction is precisely tailored to meet its legitimate purpose.[45]

[6.17] The reasoning cannot be faulted. It is idle for the Applicants who have abused the system until now to complain that there would a perception of bias and a severe burden to establish their bona fides. They have only themselves to blame for the position they find themselves in.

[6.18] There is however, another flaw in the Applicants 'reasoning. Section 2(1)(b) provides that leave be granted by *"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"*. Nowhere does the said section state that the vexatious litigants have the right to choose the judge to hear the request. On the contrary as with normal litigation a court or judge would be allocated by the court with no input by the said litigant.

[6.19] Lastly, if a Judge or court does not make the order in a judicially permissible manner, then there is always the right to appeal. The Applicants

[44] ***Par 18 of Beinash judgement***
[45] ***Par 18 of Beinash judgement***

cannot be deprived of this right. Each case will have to be decided on its own merits and it is not for this court at this stage to speculate in this respect.

[6.20] In the premises I am satisfied that there is no merit in the Applicants' constitutional challenges.

[6.21] Having regard to inter alia the conduct of the Applicants to date and the multitude of pending unfinished litigation between the parties as a result of proceedings instituted by the Applicants, I am of the opinion that it would be in the interest of justice if the order against the Applicants will stand for a period of 10 years from date of this order. This does not detract from the Applicants' right in terms of section 2(1)(c) to approach this court at any time, on good cause shown, to rescind or vary any order so issued.

[7] **Costs:**

[7.1] In general it can be stated that the court does not order a litigant to pay the costs of another litigant on the basis of attorney and client unless some special grounds are present, such as, for example, that his motives have been vexatious, reckless and malicious, or frivolous,[46] or that he has acted unreasonably in his conduct of the litigation[47] or that his conduct is in some way reprehensible.

[7.2] I am satisfied that the actions and conduct of the Applicants justifying the relief sought in the present counter application were at the very least reckless and frivolous

---

[46] ***Real Estate and Trust Corporation Ltd v Central India Estates Ltd*** **1923 WLD 121; *In re Alluvial Creek Ltd* 1929 CPD 532; *Ebrahim v Excelsior Shopfitters and Furnishers (Pty) Ltd (2)*1946 TPD 226; *Van Dyk v Conradie* 1963 (2) SA 413 (C); *Ward v Sulzer* 1973 (3) SA 701 (A); *Waar v Louw* 1977 (3) SA 297 (O) at 304; *Zodin Investments (Pty) Ltd v Kemp* 1983 (4) SA 483 (C) at 486; *Friederich Kling GmbH v Continental Jewellery Manufacturers; Speidel GmbH v Continental Jewellery Manufacturers* 1995 (4) SA 966 (C) at 974G–975H; *Page v ABSA Bank Ltd t/a Volkskas Bank* 2000 (2) SA 661 (E) at 667C–D; *Wraypex (Pty) Ltd v Barnes* 2011 (3) SA 205 (GNP) at 205I–207G; *Wingate-Pearse v Commissioner, South African Revenue Service* 2019 (6) SA 196 (GJ) at 229A–230J; *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at 318D; *Gordhan v The Public Protector* [2021] 1 All SA 428 (GP) (a decision of the full court) at paragraph [304].**

[47] ***De Sousa v Technology Corporate Management (Pty) Ltd*** **2017 (5) SA 577 (GJ) at 655C–655J; *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at 318D.**

and that they have acted unreasonable in their conduct of the litigation. In the premises I am satisfied that the Applicants be ordered to pay the costs on a scale as between attorney and client.

[8] **Order:**

I make the following order:

1. Leave is granted to the First Respondent to proceed with the hearing of the counter application separate from the main application;

2. The First-, Second- and Third Applicants are declared Vexatious Litigants in terms of section 2(1)(b) of the Vexatious Proceedings Act 3 of 1956.

3. The Applicants are prohibited from instituting any legal proceedings against the First Respondent in any Provincial or Local Division of the High Court of South Africa or any inferior Court , unless the Applicants first obtain leave from such Court or from a Judge sitting in such Court, which leave the Applicants need to obtain by filing a substantive application and which application must be served upon the First Respondent with reasonable notice, prior to filing such application with the Court;

4. The Court or Judge hearing such application:

4.1 shall not grant leave to the Applicants unless it is satisfied that such proceedings are not an abuse of the process of such Court and that there is prima facie grounds for such proceedings;

4.2 may impose conditions which it deems necessary in the circumstances, which conditions may include an order that the Applicants first pay all monies owing to the First Respondent in respect of all taxed bills of costs that have been granted in favour of the First Respondent.

5. The Applicants are compelled to disclose this order to any Court or Judge requested to grant leave, as well as to the court in which such proceedings are instituted if leave is granted.

6. The orders in prayers 2 to 5 above will stand for a period of 10 years from date of this order.

P J VERMEULEN
Acting Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 1st and 2nd March 2023
Judgment delivered: 6th March 2023

For the Applicants: Mr Makhubele in person
For the First Respondent: Adv M Shepherd