IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Reportable

Case No: 12477/2016

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF CO-OPERATIVE GOVERNANCE & TRADITIONAL AFFAIRS **APPLICANT**

and

JABULANI CROSBY MAPHANGA **RESPONDENT**

JUDGMENT

Delivered on: 7 December 2017

GORVEN J

[1] The applicant seeks the following relief:

'1. Subject to this order, it is ordered that Respondent may not institute legal proceedings, in any high court or inferior court, against the applicant, her Department or any employee or former employee of the Public Service, unless Respondent first obtains, pursuant to an application which must be served on Applicant, leave from such court, which leave:

1.1. shall not be granted unless such court is satisfied that such proceedings are not an abuse of the process of such court and that there is *prima facie* ground for such proceedings.

1.2. may be granted on conditions, including a condition that Respondent may not institute any such proceedings, unless he first pays all moneys owing in respect of all and any costs orders that have been granted in favour of Applicant against Respondent.

2. Respondent may not institute any proceedings in any court without disclosing to such court a copy of this order.

3. It is declared that all and any claims that Respondent may have had arising from his employment, prior to 30 June 2000, in the public service:

3.1. have been finally determined in terms of the applicable labour law; and/or

3.2. have become prescribed in terms of the Prescription Act No. 68 of 1969.

4. Respondent is interdicted from defaming, insulting or harassing Applicant and all employees in her Department in relation to any claims and disputes arising from Respondent's said employment in the public service.

5. In particular, but without derogating from paragraph 4 above, Respondent is interdicted from referring to any forum or institution any complaint relating to his said employment in the public service, unless he first obtains leave from this court.

6. Respondent is ordered to pay the costs of this application on a scale as between attorney and client.'

[2] The application was brought on the basis of s 2(1)*(b)* of the Vexatious Proceedings Act 3 of 1956 (the Act). It was prompted by the receipt of a Notice of intention to institute legal proceedings dated 22 June 2016 delivered by the respondent in terms of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002. After the launch of this application, the respondent launched the application foreshadowed in the Notice under case no. 8345/2016 in the KwaZulu-Natal Local Division, Durban (the Durban application). In this, he in essence sought damages arising from the sale in execution of his immovable property (the property). He also lodged a dispute concerning severance pay with the General Public Service Sectoral Bargaining Council (the Bargaining Council). In response, the applicant launched an urgent

application (the urgent application), interlocutory to this one. In it she sought and obtained interim relief pending the outcome of this application for prayers 1, 2, 4 and 5 above along with further interim relief to the effect that:

'1. The proceedings:

1.1. pending in the Durban High Court in case number 8345/16, and

1.2. pertaining to the dispute that the Respondent has referred to the General Public Services Sectoral Bargaining Council, in its case number GPBC217/2017,

are stayed.'

In addition to the relief set out in paragraph 1 hereof, the applicant requests that this further interim relief be made final.

[3] Section 2(1)*(b)* of the Act 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 person or giving him an opportunity of being heard, order that no legal proceedings shall be instituted by him against any person in any court or any inferior court without the leave of the court, or any judge thereof, or that inferior court, as the case may be, and such leave shall not be granted unless the court or judge or the inferior court, as the case may be, is satisfied that the proceedings are not an abuse of the process of the court and that there is *prima facie* ground for the proceedings.'

This section has been held to pass constitutional muster.[1] Its provisions are slightly wider than the order granted under the common law jurisdiction of the court to regulate its own proceedings in *Corderoy v Union Government (Minister of Finance)*.[2] I shall return to this case later. The jurisdiction of this court to regulate its own proceedings has since been made explicit in s 173 of the Constitution:[3]

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[1] *Beinash & another v Ernst & Young & others* 1999 (2) SA 116 (CC).
[2] *Corderoy v Union Government (Minister of Finance)* 1918 AD 512 at 520.
[3] Constitution of the Republic of South Africa, 1996.

'The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

[4] The essential facts relied upon by the applicant to found the relief she seeks follow. Prior to 1994, the respondent was employed by the Natal Provincial Administration. Due to subsequent rationalisation under the democratic dispensation, the respondent became an employee in the Department of Local Government and Housing. He claimed that he should have been promoted. In addition, he claimed compensation for 'sustained personality infringement' arising from the failure to promote him. He litigated this claim against that Department in the Labour Court. The Labour Court held that it did not have jurisdiction. He then took the same dispute to the Industrial Court. On 16 August 1998, the Industrial Court dismissed his claim on the basis that it ought to have been instituted in the civil courts. Dissatisfied with this outcome, the respondent lodged a complaint with the Public Protector on 10 October 1998. This was dismissed. He approached the South African Human Rights Commission on 16 May 2000 which required further information. During 2001, he complained about the handling of his complaint by the Public Protector to a parliamentarian and to the City Press newspaper respectively. During 2004, he referred these complaints to the Parliamentary Portfolio Committee on Justice. There is no indication on the papers as to the outcome.

[5] On 30 June 2000, the respondent accepted a voluntary severance package, ending his employment in the public service. On 17 May 2013, the respondent referred an unfair labour practice dispute to the Bargaining Council. The dispute seems to have been characterised as 'promotion' in one document and dismissal in another. Due to the time which had passed since he was last employed, he was required to apply for condonation which was refused. He then sought to

review and set aside the refusal of condonation in the Labour Court. The review application was dismissed with costs on 18 November 2014. He applied for leave to appeal this dismissal which was also dismissed with costs by that court, this time on 6 August 2015. The respondent then petitioned the Labour Appeal Court for leave to appeal. This was refused on 5 November 2015. He indicated that he would bring an application for leave to appeal to the Constitutional Court but this was never launched.

[6] In 1999, the applicant taxed costs arising from the litigation. These costs amount to just over R40 000. As I indicated, the Durban application, which prompted the grant of interim relief, claims damages for the wrongful and unlawful sale in execution of the property. The respondent claims that the applicant sold the property in execution to satisfy the costs order.

[7] The appeal procedures and attempts to have extra-curial bodies come to his assistance were quite clearly an attempt by the respondent to exhaust whatever remedies might have been available to him. They do not constitute fresh proceedings. In essence, therefore, the respondent has brought two sets of legal proceedings against the applicant arising from his broad dissatisfaction with the Department and its predecessors. In contrast, the Durban application concerns a delictual action for damages alleged to have been suffered as a result of the sale in execution of the property. The pending complaint to the Bargaining Council concerns severance pay. As far as I can make out from the papers, this is the first time that this complaint has been made.

[8] The applicant submits that, in addition to her express reliance on the provisions of the Act, she has made out a case under the common law for the relief sought. Before dealing specifically with the provisions of the Act, it will be helpful to sketch the common law relating to an application such as this. This

will serve two purposes. First, it will set out what the applicant has to prove under the common law. Secondly, it will shed light on the similarities and differences of the two procedures.

[9] As regards the common law, the applicant sought to rely on the judgments in *Corderoy* and *Bisset v Boland Bank Ltd*.[4] The court in *Corderoy* was confronted with a plea in bar to a declaration. The relief sought included a prayer that the plaintiff be ordered to abstain from further legal proceedings on the same subject matter. There had been six previous legal proceedings based on the same ground, affecting the same subject matter and between essentially the same parties. The plaintiff had been 'uniformly unsuccessful' in all of them. He announced his intention of continuing with such actions until, as he put it, the facts of the case were dealt with by some competent court. Innes CJ referred to an English case where, in a pending action, twenty-nine frivolous interlocutory applications had been brought.[5] The court there made an order that the defendant was not allowed to make any further applications without leave of a judge in Chambers.

[10] In *Corderoy*, the Appellate Division held that our courts had inherent jurisdiction to regulate their procedures. A litigant is entitled to protection against 'long-continued unsuccessful onslaughts in respect of the same dispute'.[6] However, Innes CJ warned:

'This is a power which should be very cautiously exercised, because it affects the elemental right of free access to the courts, with which we should be slow to interfere except in exceptional and necessary instances.'[7]

The test adopted in that matter was that it must be shown that such a person 'habitually and persistently instituted vexatious legal proceedings without

[4] *Bisset & others v Boland Bank Ltd & others*1991 (4) SA 603 (D).
[5] *Kinnaird v Field* 1905 LR 2 ChD 306.
[6] *Corderoy* at 518.
[7] *Corderoy* at 519.

reasonable grounds'.[8] The relief granted in *Cordero*y was that the plaintiff was ordered to 'abstain from any further legal proceedings of any description in this Court against the above defendant in connection with the said subject matter . . . without leave of the Court.'[9]

[11] What is meant in *Cordero*y by 'vexatious legal proceedings' was explained in *African Farms and Townships Ltd v Cape Town Municipality*,[10] where Holmes JA said:

'Our law recognises that the Court has an inherent power to strike out claims which are vexatious; see *Western Assurance Co v Caldwell's Trustee*, 1918 AD 262 at p. 272. An action is vexatious and an abuse of the process of Court *inter alia* if it is obviously unsustainable. This must appear as a certainty, and not merely on a preponderance of probability.'

This latter test was applied in *Bisset*. An action for damages had been brought against attorneys responsible for registration of a bond in contravention of the provisions of certain legislation. The attorneys brought an application for an order striking out the action on the basis that it was unsustainable and clearly vexatious. The court held that it had not been shown that the action was unsustainable as a matter of certainty and, therefore, vexatious.

[12] *In re Anastassiades*[11] dealt with the limitations of the common law. In that matter, Ramsbottom J had issued a rule *nisi* calling on Mr Anastassiades to show cause why he should not grant an order:

'Forbidding . . . Anastassiades from instituting or continuing in any way any legal proceedings of any kind whatsoever, against any person whatsoever, in this Court, unless and until, after application in writing addressed to the Registrar, he shall have obtained permission from a Judge to institute or to continue such proceedings.'[12]

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[8] Loc cit.
[9] At 520.
[10] *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 565D-E.
[11] *In re Anastassiades* 1955 (2) SA 220 (W).
[12] *Anastassiades* at 221A-B.

On the return day of the rule *nisi*, Ramsbottom J declined to confirm the rule, holding that he had no jurisdiction to grant such an order. He relied on *Corderoy* as authority for that proposition, saying:

'I think that it is implicit . . . from the judgment that the learned CHIEF JUSTICE considered that the wide powers conferred by the statute in England exceeded the inherent power exercised by the Courts under the Common Law, and that in the absence of such statutory powers the South African Courts do not possess inherent power to impose a general prohibition of the kind referred to in the English Statute.'[13]

[13] Citing this *dictum* with approval, the Constitutional Court said:

'…Ramsbottom J held that, absent a statutory power, he had no jurisdiction under the common law to make an order that would curtail Mr Anastassiades' power to litigate more than that which would be required by the circumstances and between the parties of the particular case. In direct response to this, the Act was passed the following year. However, this Act did not purport to repeal the common law.'[14]

Commenting on *Anastassiades* and *Beinash* in *ABSA Bank Ltd v Dlamini*,[15] Rabie J said:

'An analysis of the Act and the aforesaid authorities (and the authorities mentioned therein) seems to enforce the view that: *(a)* the court has no inherent jurisdiction at common law to prevent the future institution of vexatious proceedings; and *(b)* the provisions of the Act only aim to protect a person or persons against the institution of future vexatious proceedings in any court or inferior court and do not relate to any proceedings already instituted.'

[14] I was not referred to any decided cases, including that of *Dlamini*, which deal with the requirements of s 2(1)*(b)* of the Act. I consider that Rabie J was correct in his finding that the Act deals only with prospective litigation and not existing litigation. This is because the section provides only for an order 'that no legal proceedings *shall* be instituted by him'.[16] This clearly deals only with an

[13] *Anastassiades* at 225G-226A.
[14] *Beinash* (note 1) para 11. Reference omitted.
[15] *ABSA Bank Ltd v Dlamini* 2008 (2) SA 262 (T) para 24.
[16] My emphasis.

interdict against instituting litigation, not one against continuing it. For existing litigation, a party must make out a case under the common law.

[15] Section 2(1)*(b)* has two requirements before an order may be granted. The first requirement is that legal proceedings have in the past been, or there is reason to believe will in the future be, instituted against the applicant. That requirement is satisfied. It is clear that the legal proceedings which were instituted in the Labour Court and the Industrial Court in 1998 fulfil this criterion, as does the Durban application.

[16] I was referred to no authority that the lodging of a complaint before the Bargaining Council amounted to instituting legal proceedings. Neither could I find any. It is not readily clear that approaching the Labour Court in 2013 to review the refusal of the Bargaining Council to grant condonation meets the requirement. I say this because this was simply an attempt to have the complaint lodged with the Bargaining Council dealt with substantively. However, since the requirement is met by the legal proceedings referred to above, no finding need be made on this issue.

[17] Clearly, lodging complaints with the Public Protector and the Human Rights Commission did not amount to instituting legal proceedings. Neither did sending the letters written to the parliamentarian and City Press newspaper or lodging the complaint with the Parliamentary Portfolio Committee on Justice.

[18] The second requirement is that the court must be satisfied on two counts. First, that the person in question has persistently instituted legal proceedings in a court. Secondly that she or he has done so without any reasonable ground.

[19] Can it be said that the respondent has persistently instituted legal proceedings? The word 'persistent' has a range of meanings. It can simply mean a tendency to persist; in other words, a refusal to give up in the face of adversity.[17] It can also mean continuing or recurring.[18] Taking account of the language, the context and, in particular, the purpose of the legislation and the background to its preparation,[19] the word must mean recurring legal proceedings and not sheer doggedness in seeing a single matter through to finality. Because the legislation limits the right of access to the courts, it must be restrictively interpreted in a way which least intrudes on that right.[20] What is thus required is repeated institution of legal proceedings. He did so in 1998 in the Labour Court. That was dismissed, not on the merits, but on grounds of lack of jurisdiction. His response was to do so in the Industrial Court. That was also dismissed, not on the merits, but on grounds of lack of jurisdiction. His next approach to a court was to the Labour Court to review the refusal of condonation for the late lodging of a complaint with the Bargaining Council. When this was refused, he appealed and when the appeal was dismissed sought leave to appeal. These last two approaches cannot be characterised as instituting legal proceedings. They were exhausting the appeal procedures open to him on the application for review which he had instituted. In my view, the requirement of persistent institution of legal proceedings is not made out in the application.

[20] Were these proceedings instituted without any reasonable ground? As regards the promotion dispute, no substantive judgment has been handed down. It is not possible to find that the respondent had no reasonable grounds to institute those proceedings. The fact that he has always represented himself without legal assistance does not change this. This dispute was, quite simply,

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[17] *Oxford South African Concise Dictionary* 2ed 2010 p878.
[18] Loc cit.
[19] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.
[20] See *Regering van die Republiek van Suid-Afrika v Disotto en andere* 1998 (1) SA 728 (SCA) at 735D-E.

never adjudicated and there is certainly not enough evidential material before me to show that reasonable grounds did not exist at the time. This applies equally to the matter previously referred to the Bargaining Council, if indeed it amounts to the institution of legal proceedings. Likewise, there is insufficient evidence concerning the matter presently referred to the Bargaining Council for this purpose.

[21] This means that the applicant has not made out a case on either of the aspects of the second requirement. In my view, no court can be satisfied that the respondent 'has persistently and without any reasonable ground instituted legal proceedings'. No relief accordingly lies under s 2(1)*(b)* of the Act to interdict the institution of future proceedings.

[22] The question remains whether the applicant is entitled to relief under the common law. As I mentioned, the test set out in *Corderoy* is that it must be shown that the respondent has 'habitually and persistently instituted vexatious legal proceedings without reasonable grounds'.[21] *African Farms* held that the proceedings must be 'obviously unsustainable'.[22] As I have mentioned, it was also there held that this must be shown as a matter of certainty and not merely on a balance of probabilities.[23]

[23] The only existing litigation is the Durban application. In the first place, my comments above concerning the failure of the applicant to show that the respondent has persistently instituted legal proceeding apply equally here. On this score alone, the application must fail.

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[21] At 519.
[22] At 565D-E.
[23] Loc cit.

[24] In case I am wrong in that view, I shall consider whether it is shown that the Durban application is obviously unsustainable. The applicant submits that the Durban application is doomed to failure. The applicant in argument attacks the very foundation of the Durban application. viz. that it was the applicant, or her predecessor in title, who sold the property in execution. The deponent to the applicant's affidavits in this and the urgent application is an official who has only been involved since 2013. He testified that no sale in execution of the respondent's property took place at the instance of the applicant since 2013. He cannot say with certainty that such a sale did not take place at the instance of the applicant before then. The applicant thus perforce can only contend that the respondent has not to date put up proof of any such sale in the Durban application. This is correct. However, the respondent put up two warrants of execution issued in 1999 in respect of the costs order. The first, dated March 1999, required the sheriff to attach and take into execution the movable goods of the respondent. This clearly could not be executed against the property. The second, however, dated November 1999, purports to be a re-issue of the first warrant but does not specify that only movable property can be attached and sold in execution.

[25] It can thus not be said with certainty that the property was not sold in execution at the instance of the applicant. The applicant contends that the respondent is required to go beyond a bare averment that this was done and to put up the Notice of Sale in execution. This would certainly have clarified this point one way or the other. However, it must be borne in mind that, as I said earlier, the respondent acts in person. He does not necessarily have the requisite knowledge and skill to hunt down and obtain a copy of that Notice. In addition, he may apply to supplement his papers in the Durban application with the Notice, if one exists. Finally, the applicant bears the onus to show with certainty that the Durban application is 'obviously unsustainable' on this basis. In order

to do so, the applicant could herself have obtained a copy of the Notice if the property was not sold at her instance, and have put it up. In summary, therefore, it is unclear whether the property was sold at the instance of the applicant.

[26] Of course, this is only one element which the respondent must prove in order to succeed. It must be said that, viewing his averments in the Durban application, I have grave doubts that he will succeed. The averments, both in the Notice foreshadowing the Durban application and in that application itself, are not clearly focussed. It is difficult to see what case for damages is made out. This comment should not be construed as a finding to that effect. However, the respondent would be well advised to obtain proper, qualified, legal advice before taking any further steps in this or any other future course of conduct. However, this is not the test. It must be shown with certainty that the Durban application is unsustainable. I do not consider that this test is satisfied in the circumstances.

[27] I have already dealt with the failure of the applicant to show that the respondent has 'habitually and persistently instituted vexatious legal proceedings'.[24] To that must be added the failure to show that the Durban application has been brought without reasonable grounds. The common law test is accordingly also not satisfied. This means that the applicant is not entitled to paragraphs 1 and 2 of the relief claimed.

[28] Paragraph 3 of the order sought is by way of two declarations of rights. The first that all claims arising from the employment of the respondent in the public service prior to 30 June 2000 have been finally determined. The second that all such claims have prescribed. The complaint presently before the Bargaining Council is for severance pay and arises from that employment.

[24] *Corderoy* at 519.

There is no particularity concerning this claim and I can accordingly not make a finding that it has been finally determined or that it has prescribed. In any event, the position concerning prescription of claims arising from employment relationships is by no means settled as was helpfully drawn to my attention by the applicant in argument. In *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus & others*,[25] three judgments were handed down. The two main judgments, in each of which three other judges concurred, differed on this point. In one of these, Jafta J held that the provisions of s 16 of the Prescription Act[26] do not apply to claims under the Labour Relations Act.[27] I am therefore not persuaded that a case has been made out for any such declarations.

[29] Paragraphs 4 and 5 deal with interdicts sought against the respondent. It should immediately be noted that this relief does not fall within the ambit of s 2(1)*(b)* of the Act or amount to the regulation of court procedure. No relief thus lies on the basis of the legal principles set out above. Accordingly, in order to succeed, the applicant must prove the requirements for a final interdict. These are notorious: 'a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy.'[28]

[30] Paragraph 4 seeks to interdict the respondent from 'defaming, insulting or harassing' the applicant and employees in her Department. When I put to the respondent that his language in some of the correspondence is *prima facie* defamatory, he did not deny this. Dealing only with his Notice that he intended

[25] *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus & others* [2016] ZACC 49; (2017) 38 ILJ 527 (CC).
[26] Prescription Act 68 of 1969.
[27] Labour Relations Act 66 of 1995. In saying this, I am alive to the fact that the Labour Relations Act might not apply to this claim, but no argument to this effect was advance before me.
[28] Per Innes JA in *Setlogelo v Setlogelo* 1914 AD 221 at 227.

to launch the Durban application, he claims that the sale of the property was 'malicious, mysterious, corrupt and barbaric'. He speaks of 'oppressive, repressive victimization' and unlawful discrimination. He claims that the Department subjected him to nuisance and had notorious unsound industrial practice. He accuses the Department of having issued the writ for costs out of 'sheer vengeance and malice', that it became 'jovial at my pleas and became contemptuous, contumacious'. I need go no further. Strong as the respondent's feelings may be, he offers no justification for this language. The applicant and staff in her Department have a clear right not to be defamed. The injury has been committed and, in the light of previous similar defamatory language by the respondent, she has no alternative but to seek an interdict. I shall deal with the issue of harassment when evaluating the relief sought under paragraph 5.

[31] Paragraph 5 seeks to interdict the respondent from referring any complaint relating to his employment in the public service to any forum or institution. No case is made out in the papers for interdictory relief of this nature. The founding papers refer to a complaint recently made to a 'complaints hotline'. It is submitted, without more, that '[s]uch complaints are injurious and damaging to Applicant and her Department.' No reason is given for this assertion. In the replying affidavit, it is said that the complaints amount to 'harassment and defamation' in support of the relief sought in paragraphs 4 and 5. The word 'harass' means to 'torment by subjecting to constant interference or intimidation'.[29] Lodging those complaints by the respondent does not, in my view, meet this definition. The last complaint made to a body other than the Bargaining Council was in 2004, to the Parliamentary Portfolio Committee on Justice. In my view, no relief can be granted under this head.

[29] *Oxford South African Concise Dictionary* op cit p531.

[32] The last substantive issue is that the applicant seeks the final stay of the Durban application and the dispute which has recently been referred to the Bargaining Council. This relief was granted pending the outcome of this application and a rule *nisi* was issued to show cause why the order should not be made final. I have dealt with each of these matters. No case has been made out for this relief.

[33] Finally, I come to the issue of costs. The applicant has not succeeded in the main relief sought. However, the respondent's conduct entitles the applicant to an interdict against his defaming her and employees of her Department. In my view, it is appropriate in the circumstances that there is no order as to costs.

[34] In the result, the following order is granted:

1. Prayers 1, 2, 3 and 5 of the notice of motion are dismissed.
2. The respondent is interdicted from defaming the applicant or any employee in her Department in relation to any claims and disputes arising from the respondent's employment in the public service which terminated on 30 June 2000.
3. Subject to paragraph 2 hereof, the rule *nisi* issued on 17 March 2017 is discharged.

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GORVEN J

Date of Hearing: 20 November 2017

Date of Judgment: 7 December 2017

Appearances

For the Applicant: D Crampton
Instructed by PKX Attorneys

For the Respondent: In person