

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

CASE NO: 19591/2022

DATE: 2023.05.29

In the matter between

GARY WALTER VAN DER MERWE

Applicant

and

THE SOUTH AFRICAN LEGAL PRACTICE
COUNCIL

Respondent

10 THE COMMISSIONER FOR THE SOUTH
AFRICAN REVENUE SERVICE

Intervening Party

JUDGMENT

THE COURT (SALDANHA, J, GAMBLE, J, BREMRIDGE, AJ):

This is an application in which the applicant, Mr Gary Walter Van der Merwe, seeks relief in the form of declaratory
20 orders as to the representation of parties and the rendering of legal services listed in Section 33(1)(a) and (b) of the Legal Practice Act 28/2014 by persons other than legal practitioners admitted and enrolled under the Act, and in particular his right to represent his daughter in proceedings before the Tax Court.

Given the order the Court intends to make, the further specifics of the order sought are not relevant for current purposes. The papers were issued and served on the respondent, the South African Legal Practice Council on 18 November 2022.

Thereafter and on 3 February, 2023 the Commissioner of the South African Revenue Services delivered an application to
10 intervene in and oppose the main application. The notice of motion indicated that this application was to be made at the hearing of the main application and thus remains for determination.

The applicant fails to disclose in his founding papers, as he was dutybound to do, the fact that on 21 September 2021 and in the matter of Commissioner for the South African Revenue Services v Gary Walter Van der Merwe and Others
20 (case number 7255/2019) Savage J gave a judgment in this division which included an order under the provisions of Sections 2(1)(b) of the Vexatious Proceedings Act 3/1956 (the VPA) in the following terms in paragraph 3:

"The first respondent, Mr Gary Walter
Van der Merwe, in his personal capacity, or

his capacity as a director, member or trustee of any company, close cooperation or trust, and the second, third, and fourth respondents, being Gary Walter Van der Merwe, N.O., Fern Jean Cameron, N.O. and Dave Dedeo Nkomo, N.O. in their capacities as trustees of the Eagles Trust, IT3019/95, may not in terms of Section 2(1) (B) of the Vexations Proceedings Act 3/1956 institute any legal proceedings against any person in any court in the Republic of South Africa without leave of the Court, to be granted only if the Court is satisfied that the proceedings are not an abuse of process of the court and that there are *prima facie* grounds for such proceedings."

The respondent alerted the Court to the existence of this judgment in paragraphs 16 to 22 of its answering affidavit with a copy of the judgement attached as annexure A11 thereto and averred that absent evidence that the requisite leave to institute the current application had been sought and granted, the application should be dismissed.

In reply the applicant admitted the existence of Savage J's order as set out above but averred that the operation of that order had been suspended under Section 18(1) of the Superior Courts Act, given that an application to the Constitutional Court for leave to appeal the order had been lodged on 25 April 2022 under case number CCT109/22 and no decision on that application had been received at the time the current application was launched on 18 November 2023.

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In the answering affidavit in the application for intervention, the applicant informed this Court that the application for leave to appeal was refused by the Constitutional Court on 13 February 2023. The applicant further argued that, given the suspension of the order of Savage J while his application was to the Constitutional Court was pending:

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"That order has no bearing on the current matter, which was launched before the leave to appeal was dismissed and was suspended in terms of Sections 18(1) of the Superior Courts Act."

In other words, the applicant maintains that he is properly before this Court, because he did not need to apply for

permission to launch this application. As a matter of fact, and following upon the order of the Constitutional Court, it is now indisputable that the applicant is a vexatious litigant as contemplated under the VPA.

Given that the respondent and the intervening party dispute the applicant's entitlement to proceed before this Court, as we heard in argument today, without him having obtained the requisite leave as contemplated by the order of
10 Savage J, we are unable to proceed to hear this matter until that issue is resolved.

Given that the applicant may consider applying for leave to proceed with this application, we consider it inappropriate to pronounce upon the merits of the matter before us at this stage. The correct approach is to strike the matter from the roll. Naturally, such an order attracts an award for wasted costs.

20 In argument before us today Mr Van der Merwe made the submission that since the granting of the order by Savage J, he had instituted what he referred to as a number of applications and actions against other parties in which the very issue raised before us today was also raised. He also indicated that rulings were made. When asked for details by

the Court, he was unable to furnish any of such actions, save for an action which he recalled which he instituted against SARS for damages.

He also recalled that there was an action which he instituted on behalf of a company against a homeowner's association. No details are given of those actions and it was clear that no details were at hand to Mr Van der Merwe in court today with regards to the other applications which had instituted
10 since the order of Savage J. If anything, that indicates the importance of this Court's order that Mr Van der Merwe is required to obtain leave from a Judge in compliance with the order of Savage J.

In respect of costs, Mr Van der Merwe was given the opportunity of addressing the Court with regard to the issue. He indicated that save for the respondent, the Legal Practice Council, who had raised the issue in their papers, SARS had not done so. SARS had nonetheless argued that
20 very position before the Court today, that this Court may not deal with the merits of the matter until Mr Van der Merwe has obtained leave from a Court with regard to the further prosecution of this application.

It is also our view that for Mr Van der Merwe to prosecute or

to proceed with these proceedings he should bring the necessary application before a single Judge. It cannot be heard by us as the full court, for obvious reasons. This court is seized with the merits of the matter. Mr Van der Merwe and all of the other parties should deal with the issue as to whether he may proceed with this application before a single judge. There he would be able to motivate why the application is:

- 10 a) not an abuse of process; and secondly
- b) whether he has made out a *prima facie* case.

Needless to say, the respondents and any other party which has an interest in such proceedings would be entitled to oppose such an application.

In the circumstances the following order is made:

- 20 • THE APPLICATION IS STRUCK FROM THE ROLL.
- THE APPLICANT IS ORDERED TO PAY:
- o THE WASTED COSTS OF THE HEARING OF TODAY; AND
 - o SUCH COSTS TO INCLUDE WHERE TWO COUNSEL HAVE BEEN EMPLOYED IN RESPECT

OF SARS.

SALDANHA, J

JUDGE OF THE HIGH COURT

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GAMBLE, J

JUDGE OF THE HIGH COURT

BREMIDGE, AJ

ACTING JUDGE OF THE HIGH COURT

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