IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	~~YES~~/NO
Of Interest to other Judges:	~~YES~~/NO
Circulate to Magistrates:	~~YES~~/NO

Case number: 2683/2022

In the matter between:

CARMEN HAYES	First Applicant
FRANCOIS HAYES	Second Applicant

and

WYNAND CORNé DU PLESSIS	First Respondent
RENé DU PLESSIS	Second Respondent
JAN HARM DU PLESSIS	Third Respondent

CORAM: AFRICA, AJ

HEARD ON: 18 AUGUST 2022

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to have been at 11h00 on 7 September 2022.

JUDGMENT

INTRODUCTION

[1] There can be no dispute that in this matter the first applicant and her brother have fallen prey to the plaque of sibling conflict.[1] The applicants correctly agrees with the assertion made that the prevalence of sibling rivalry and conflict has plagued humanity since the dawn of time.[2]

The applicants are seeking an order that the first, second and third respondents be interdicted and restrained from:

[1.1] threatening and/or intimidating and/or harassing the applicants and Benyahmin Hayes, Samuel Hayes and James Hayes ("the children") in any way or form;

[1.2] demanding in any way or form that the applicants and the children should vacate the farm Klipfontein, district Tromsburg, Free State Province;

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[1] Paragraph 2 of first and second respondent's heads of argument.
[2] Paragraph 1 of first and second respondent's heads of argument.

[1.3] entering the residential property of the applicants situated on the Farm Klipfontein, district Trompsburg, Free State Province;

[1.4] directly or indirectly making contact with the applicants and the children; and

[1.5] employing and/or obtaining the assistance of any third parties to threaten, intimidate or harass the applicants and children or to take any of the actions mentioned on paragraph 1.3 of this order.

[1.6] that the first, second and third respondents be ordered, jointly and severally the one paying the other to be absolved, to pay the costs of the application on a scale as between attorney and client.

[2] At the onset of the hearing of the notice of motion, prayers 1.2 and 1.3 were abandoned.

BACKGROUND

[3] The applicants argue that in as much as the issues in this matter revolves around family, the court is enjoined to look at the objective facts giving rise to the matter at hand.

[4] It is common cause that the first applicant (daughter) and the first respondent (son) are the biological children of the third respondent. The second applicant is the third respondent's son in law and the second respondent is his daughter in law. The third respondent has six (6) grandchildren in total.

[5] From the outset, the third respondent contents that he shall not be lured into taking sides between his children as he wants no part of any personal quarrels between the applicants and the first and second respondents.[3]

[6] It is common cause that the applicants reside on the farm Klipfontein in the Tromsburg district, together with the third respondent and his wife, albeit in separate dwellings. The first and second respondents reside on the farm Blaauwfontein in the Tromsburg district which is directly adjacent to Klipfontein Farm.[4] Commercial farming activities are conducted on both farms, by the first and third respondents.

[7] During 2011, the applicants had discussions with the third respondent to permanently relocate to Klipfontein farm. This decision to move was motivated by the fact that the applicants wanted to be closer to their parents, who at that stage were alone on the farm and that the farm life and exposure to farming activities would be advantageous to their children who are home schooled. Also, their oldest son Benyahmin suffers from cerebral palsy and in their view the farm life would have been beneficial to his health.[5]

[8] The third respondent agreed that the applicants and their children could move to Klipfontein without any hesitation, as he was excited to have his daughter, son in law and grandchildren close to him.[6]

[9] Permission was granted for a portion of Klipfontein, which encompasses six (6) hectares for the construction of a family home for the applicants and their children. Applicants contend that they

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[3] Paragraph 11 of third respondent's answering affidavit.
[4] Paragraph 16 of third respondent's answering affidavit.
[5] Paragraphs 20-21 of the founding affidavit.
[6] Paragraph 30 of third respondent's answering affidavit.

have also constructed other buildings on Klipfontein farm, with their own funds.

[10] The third respondent submits that the applicants relocated to Klipfontein knowing that the farm was one on which farming activities would be conducted. Further, that the very nature of activities on the farm necessitates that the first respondent and/or their workers drive past the applicants' residence from time to time. This submission was noted by the applicants.

[11] Applicants however contend that their occupation of the property on Klipfontein has caused great dissatisfaction to the first and second respondents, which led to various accusations and threats being made towards the applicants and their children.[7]

[12] In respect of the third respondent it is argued that from a reading of the papers there are no factual reference where the third respondent intimidated, threatened or harassed the applicants or their children. Further, that there is no evidence to support that the third respondent demanded them to vacate the farm.

[13] It is argued that the only case against the third respondent is referenced in paragraphs 27 and 51 of the founding affidavit, namely:

> "the third respondent's conduct in the circumstances are placing us in a situation that allows that the first and second respondents' feel free to threaten and/or intimidate and/or harass us in that-The third respondent incites the first and second respondents' behaviour and has made it clear to myself and the

[7] Record, page 15, paragraphs 24-26.

second applicant that he considers the actions of the first and second respondents justified"[8] (my emphasis)

[14] It is argued that there is no evidence of what this 'conduct' consists of and it boils down to sweeping generalisations. Further, that there is not a shred of evidence to show how the third respondent incited or engaged with the first and second respondents to provoke them to do anything unlawful against the applicants or their children. In fact, it is argued that 'where and how' the incitement took place is inconspicuous from the papers.

[15] Paragraph 51 reads: "the threatening, intimidating and harassing actions of the first and/or second respondents with the assistance, alternatively incitement of the third respondent are simply unlawful, and it cannot be accepted." Again, it is argued that the statement is unqualified as nowhere in the papers does it state what assistance or what incitement was made.

[16] It is not in dispute that applicants case is premised on 2 incidents dated 17 December 2021 and 28 March 2022 respectively and that the third respondent was not present when these incidents played out. This appears from paragraphs 37 to 38 of third respondent's answering affidavit.

[17] Further, the third respondent submits that the true factual position with regard to the gunshots heard by the applicants on 28 March 2022 is that he (third respondent) noticed porcupines in the cultivated fields on Klipfontein farm, in the days preceding 28 March 2022. As a result, good farming practice is to keep porcupine numbers under control and to engage in the culling of porcupines from time to time. This has been done on Klipfontein farm at least

[8] Paragraph 27 of the founding affidavit.

on a biannual basis. It is submitted that the first applicant is completely opposed to hunting and has an issue with the culling of porcupines and will not allow her sons to take part in it.

[18] In reply, the applicants submit that for eight (8) years prior to 28 March 2022 there has been no gunshots fired and/or hunting activities conducted in close proximity of their residence by the first respondent and/or his sons, on Klipfontein farm.[9]

[19] The third respondent submits that there is clearly a dispute of fact regarding the aspect that the culling is done biannually. To this end, the confirmatory affidavit of Hein Van Rensburg is attached. More specifically, the third respondent submits that the children of the first respondent as well as Hein van Rensburg know that when using a firearm for hunting purposes, such firearm is never to be discharged in the direction of the homes situated on Klipfontein farm.

[20] This court was referred to the case of *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd*[10] where the approach to factual disputes where a party moves for final relief in motion proceedings was authoritatively stated that; if the material facts are in dispute and there is no request for the hearing of oral evidence, a final order will only be granted on notice of motion if the facts as stated by the respondent together with the facts as alleged by the applicant that are admitted by the respondent, justify such an order.

[21] The contention is that the applicants have not disclosed any evidence whatsoever to establish a link between the alleged

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[9] Record, page 312 paragraph 49.
[10] 1957 (4) SA 234 (C) at 235.

offending conduct of the first and/or second respondents and failed *in toto* to:

1. Establish that the third respondent has made himself guilty of conduct which constitutes a breach of applicants rights;

2. Place any facts before court which would objectively ground an apprehension that the third respondent will, if the interdict is not granted, make himself guilty of conduct which constitutes a breach of applicants rights.

[22] Further that there exists no basis upon which the third respondent's evidence can be stated to be far-fetched, untenable or demonstrably unworthy of credence.

[23] Applicant's case is premised on two (2) incidents as stated above. It is common cause that on the 17th of December 2021 a verbal altercation erupted initially between the first applicant, her son, the first and second respondent and later, the second applicant. The version that the first respondent threatened them with physical harm and that the actions of the first and second respondent was unlawful, quarrelsome and aggressive, is denied by the first and second respondent.

[24] As a result of the aforementioned incident and threat to life, the applicants instructed Attorneys to address a demand, dated 15 March 2022, to the first and second respondent seeking them to desist with their unlawful actions and seeking an undertaking that they will not in any way treat and/or intimidate and/or harass the applicants and their children.[11]

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[11] Paragraph 46 of the founding affidavit.

[25] It is contended by the applicants that in response to the aforesaid letter, the first and second respondents gave an undertaking not to threaten and/or harass and/or intimidate and/or defame applicants or their children in any way manner or form.

[26] The first and second respondents argue that this court must have regard to the circumstances under which the 'undertaking' was given, namely: Paragraph 2 reads: "From the onset we wish to confirm that we have noted the averments as contained in paragraphs 2.1 and 2.10 of your letter under reply. We do not intend to deal with each and every averment and our failure to do so should not be construed as an admittance of any averment not dealt with but rather a denial".

Paragraph 4 reads: "Due to the fact that the parties herein are family members residing in close proximity to each other and out of a desperate attempt to avoid any unnecessary litigation...we hold instruction to convey to your clients, as we hereby do, that our clients will not threaten and/or harass and/or intimidate and/or defame your clients or their children in any way, manner or form"

Paragraph 5 reads: "That being said, we wish to inform that our instructions regarding the purported incidents is in direct contradiction to what has been stated in your letter under reply. It is our instructions that your clients and children were the instigators and aggressors during the incident of December 2021. Therefore, we accept that the aforesaid "undertaking" will also be afforded to our clients in writing". (my emphasis)

[27] It is argued that paragraph 4 is not an admission to what happened on 17 December 2021, instead it was simply an attempt to calm the

situation which has arisen. Further, that in paragraph 5, the 'undertaking' is qualified when stated that "therefore we accept that the aforementioned undertaking will also be afforded to our clients in writing".

[28] Hence, it is argued that prior to the launching of this application on the 12th of August 2022, the applicants knew that it was the version of the first and second respondents that it was in fact the applicants who were the instigators and the aggressors during the December incident.

[29] In this regard, the court must examine an alleged dispute of fact and see whether there is a real dispute of fact which cannot be satisfactorily determined without the aid of oral evidence.[12]

[30] This court was referred to the case of *Fakie NO v CCII Systems (Pty) Ltd*[13] where it was stated:

> "Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease to function. But the limits remain, and however robust a court may be inclined to be, a respondent's version can be rejected in motion proceedings only if it is 'fictitious' or so far-fetched and clearly untenable that it can confidently be said on the papers- alone, that it is demonstrably and clearly unworthy of credence."

[31] It is argued that the applicant's version in relation to the alleged infringement of the applicant's rights and their alleged apprehension of further harm, is directly at odds with the incontestable evidence of the first and second respondents and also in particular, material contradictions arise between the evidence proffered by the

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[12] National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at 290 D-G.
[13] 2006 (4) SA 326 (SCA) at paragraph 56.

applicants in their founding papers and their evidence in reply. It is therefore submitted that the court ought to find that the applicants version is fictitious and so far-fetched and clearly untenable that it can confidently be said on the papers alone, that it is demonstrably and clearly unworthy of credence.[14]

[32] The applicants are of the view that the incident of 17 December 2021 was not an isolated incident. And, notwithstanding the undertaking given by the first and second respondent, they have continued with their intimidating and/or threatening and/or harassing actions and have found alternative ways to instil fear upon the applicants in order to have the applicants vacate the property upon which they reside on Klipfontein, in particular:[15]

1. On 28 March 2022 around 22:00 the first respondent and his sons were hunting in close proximity to the property where the applicants and the children reside and fired live ammunition in near proximity to the property;

2. The first respondent and his sons drove their bakkie close to the applicants' home and for no discernible reason shone hunting spotlights on the gate of the property and the house; and;

3. On 30 March 2022 around 23:22 the first respondent again visited Klipfontein and again drove past the applicants' house and shone the spotlight on the property.

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[14] Paragraph 11 of first and second respondents' heads of argument.
[15] Paragraph 18 of applicants'' heads of argument.

[33] There are 3 requisites[16] for the grant of a final interdict, all of which must be present:

1. A clear right on the part of the applicant.
2. An injury actually committed or reasonably apprehended.
3. The absence of any other satisfactory remedy available to the applicant.

[34] It has long been settled in our law that the granting of an interdict is discretionary.[17] The remedy of the interdict itself has been described as unusual.[18] This remedy is termed discretionary in the sense that a court may not grant an interdict in circumstances where there is an alternative remedy available to an applicant for an interdict and which may satisfactorily safeguard the right sought to be protected. Put differently the discretion of the court is bound up with the question whether the rights of the party complaining can be protected by an alternative and ordinary remedy.

[35] The applicants submit that the appropriate relief in the circumstances includes an interdict to prohibit the infringement of a personal right, in that every person has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources, and that if such a right is threatened or infringed a court can be approached for appropriate relief.[19]

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[16] Setlogelo v Setlogelo 1914 AD 221.
[17] United Technical Equipment Co (Pty) Ltd v Johannesburg City Council 1987 (4) SA 343 (T); Burger v Rautenbach 1980 (4) SA 650 (C) and Grundling v Beyers 1967 (2) SA 131 (W).
[18] Transvaal Property Investment Co v SA Townships Mining and Finance Corp 1938 TPD 521.
[19] Paragraph 19 of applicants' heads of argument.

[36] The applicants referred this court to the case of *Minister of Law and Order and Others v Nordien and Another*[20] where it was stated that an applicant seeking an interdict is not required to establish on a balance of probabilities that flowing from the undisputed facts, injury will flow. All he has to show is that it is reasonable to apprehend that injury will result. The test for apprehension is an objective one. The court must decide on the facts presented whether there is any basis for the entertainment of a reasonable apprehension by the applicant.

[37] A reasonable apprehension of injury is one which a reasonable man might entertain on being faced with certain facts.[21]

[38] It is argued that what the applicants seek to do is to utilize the undertaking, in showing that the incident of 28 March, where applicants knew the activities amounted to hunting, constitute a breach of the undertaking, which now entitles them to the interdict. It is argued that any apprehension on the part of the applicants are not reasonable and the allegation of a continual or pattern of harassment, is without merit. Further that the applicants still have a remedy in the form of a claim for damages in respect of the December incident, which according to the first and second respondent, will constitute nothing more than a past invasion of rights.

[39] The first and second respondent contend that it is not in dispute that they have not set foot on applicants' property since 2012 and that the applicants have not placed a scintilla of evidence before court that any threats were made towards them, or that they had

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[20] 1987 (2) SA 894 (A).

[21] See Setlogelo and Minister of Law and Order above.

harassed or intimidated them until the incident of 17 December 2021.

[40] The phrase "clear right" connotes a legal right that has been sufficiently established on a balance of probabilities and in the leading case of *Setlogelo*, Innes CJ said:

> "The requisites for the right to claim an interdict are well-known; a clear right, injury actually committed or reasonably apprehended and the absence of similar protection by any other ordinary remedy. Now the right of the applicant is perfectly clear. He is a possessor, he is in actual possession of the land and holds it for himself. And he is entitled to be protected against any person who against his will forcibly ousts him from such possession." [22]

[41] I pause to mention that apart from asserting the right to freedom and security of person, specifically not to be exposed to threats of violence, the applicants argue that they have also established a right to remain in occupation of the property in which they reside on Klipfontein farm. This right not only flows from the permission given by the third respondent, which is common cause between the parties but also from the fact that the applicants have constructed the dwelling and other buildings on Klipfontein farm, from their own funds.

[42] Notwithstanding the protracted argument that the decision by the third respondent to grant applicants permission to occupy a portion of the farm, is void by operation of law, I have no difficulty in recognising the applicants' right as worthy of protection in law. And

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[22] At p227.

also accepting that the right had been adequately proved in evidence. This plainly suggests that the source and the nature of the right are not material to the enquiry. What is important, instead, is whether the applicant has a right recognised in law and has established its existence by way of acceptable evidence.

[43] This court accords with the submission made by the applicants that this court is not called upon to adjudicate the lawfulness or validity of applicants' occupation. All that is required in these proceedings is whether the applicants have established a right which warrants protection from infringement, on a balance of probabilities.

[44] Notwithstanding this existence of a clear right, the question remains whether the applicants have placed before this court facts which would objectively ground an apprehension that the respondents will, if not interdicted, make themselves guilty of conduct which constitutes a breach of applicants' rights.[23]

[45] It is an irrefutable fact that pursuant to the incident of 17 December 2021, the applicants waited three months before addressing a letter of demand and six months before lodging this application. Questionably, applicants have failed to take any steps to protect itself from the infringement of their rights, promptly.

> "A reasonable apprehension of injury has been held to be one which a reasonable person might entertain on being faced with certain facts. The applicant for an interdict is not required to establish that, on a balance of probabilities flowing from the undisputed facts, injury will flow: he only has to show that it is reasonable to apprehend that injury will result. However, the test for apprehension is an objective one. This means that, on the basis of the facts presented to him, the Judge must decide

[23] Paragraph 9.2 of third respondents' heads of argument.

whether there is any basis for the entertainment of a reasonable apprehension by the applicant."[24]

[46] Further, the assertion that the first and second respondent gave an undertaking not to threaten and/or harass and/or intimidate and/or defame the applicants or their children, must be understood in context of the statement that: "Therefore, we accept that the aforementioned "undertaking" will also be afforded to our clients in writing."

[47] Further the first applicant conceded that she knew that the gunshot which was heard, pertained to hunting on the farm.[25]Further, it is the version of the first applicant that whilst the incident occurred, she managed to investigate from her balcony what transpired. I agree with the submission that this flies in the face of the allegation that the applicants feared for their lives.[26]

[48] Further the submission that on 30 March 2022, the first respondent again drove past the house and shone a spotlight on it, must also be seen in context of the fact that when the applicants relocated to Klipfontein farm, they knew very well that farming activities were conducted on the farm, which in the nature of things will necessitate the first respondent and or the workers to drive past applicants' residence from time to time[27]or even walk to a nearby water pump, more so in light of the proximity of the dwellings of the applicants and the third respondent.

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[24] See Minister of Law and order v Nordien above at 896G-I.
[25] Record page 22, Paragraph 49.2 of the founding affidavit.
[26] Paragraph 36.3 of first and second respondents' heads of argument.
[27] Paragraph 36 of third respondents' heads of argument.

[49] In the present matter, this court has no difficulty in holding that the applicants have proved a clear right for purposes of an interdict, however, if the evidence is insufficient to establish any link between the respondents and the actual or threatened injury, the apprehension of injury cannot be reasonable, more so in light of the third respondent. Further that there was no application for the matter to be referred for oral evidence or trial, when it is evident that a factual dispute exists regarding the events which transpired on 17 December 2021 and 28 March 2022. In conclusion it cannot be said that the version of the respondents is so far-fetched, untenable or demonstrably unworthy of credence. The objective facts presented simply do not lay any basis for the entertainment of a reasonable apprehension by the applicants.

[50] This court being persuaded that in the absence of a well-grounded apprehension of future harm, the words complained of by the applicants could found a claim for damages, still to be determined.

[51] In this regards this court was referred to the case of *Midi Television (Pty)Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)*[28] where it was stated that; where it is alleged, for example that a publication is defamatory, but it has yet to be established that the defamation is unlawful, an award of damages is usually capable of vindicating the right to reputation if it is later found to have infringed, and an anticipatory ban on publication will seldom be necessary for that purpose.

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[28] 2007 (5) SA 540 (SCA) at paragraph 20.

[52] It is the considered view of this court that the balance of convenience favour the respondents and that applicants have failed to make out a case for the relief sought.

[53] In the result, applicants case stands to be dismissed with costs.

AFRICA, AJ

APPEARANCES:

COUNSEL FOR APPLICANTS:	Adv. Sonder Instructed by: Peyper Attorneys
COUNSEL FOR RESPONDENTS:	Adv. Van der Merwe Instructed by: Stander and Associates