

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 24131/2012

- (1) REPORTABLE: ~~YES~~ / NO  
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO  
(3) REVISED. *YES*

**SALEEM MASIH**

Applicant

and

**JAVED MASIH**

First Respondent

**MUNEER MASIH**

Second Respondent

**DEPARTMENT OF HOME AFFAIRS – SPRINGS**

Third Respondent

**DEPARTMENT OF HOME AFFAIRS – GERMISTON**

Fourth Respondent

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**JUDGMENT**

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**GRAVES AJ**

1. By notice of motion dated 25 June 2012 the applicant informed the respondents that he would apply to this court on 3 July 2012, as a matter of urgency, for an order (Part A) as follows:-
  - 1.1 interdicting the first and second respondents from intimidating, threatening, harassing, assaulting or committing any act of violence upon the applicant and members of his family, and further interdicting the first and second respondents from securing assistance for this from any other persons;
  - 1.2 interdicting the third and fourth respondents from arresting or detaining the applicant and members of his family contrary to the provisions of the Immigration Act;
  - 1.3 interdicting the third and fourth respondents from assisting the first and second respondents in carrying out acts of intimidation and/or harassment of the applicant and his family;
  - 1.4 ordering that the relief in paragraphs 1.1 to 1.3 above operate as an interim order pending the outcome of proceedings in Part B of the notice of motion.
2. In Part B the applicant sought an order confirming the interim relief granted in Part A, declaring the arrest and detention of the applicant's

wife, Zahida Masia, on 20 June 2012 to be unlawful and unconstitutional and ordering the first and second respondents to pay the applicant's costs, and the third and fourth respondents to pay the costs in the event of opposition.

3. On 2 July 2012 the first respondent delivered an answering affidavit (supported by the second respondent). No papers were at any time served by the third and fourth respondents.
4. On 3 July 2012 an order was granted by Kgomo J in accordance with the relief sought in Part A of the notice of motion.
5. The essence of the case made out in the founding papers is as follows:-
  - 5.1 The applicant hails from Pakistan, as does the first respondent. The first respondent conducts business as an immigration consultant for reward together with the second respondent.
  - 5.2 When the applicant arrived in South Africa (on a date he does not specify) he approached the first respondent to obtain assistance for acquiring rights of residency in the Republic. He secured this for himself and for his wife and children. The applicant says that the first respondent insisted on thereafter being involved in all matters of importance concerning the applicant and his family.

- 5.3 When the applicant's sister-in-law passed away in February 2012 the applicant attempted to contact the first respondent to arrange the burial, but without success. Because of customary practices which demanded that the deceased be buried in a reasonable haste, the applicant and his family approached a third party to assist with the burial. The applicant says that the first respondent took this as a personal insult and that he was very angry. The applicant says that this in turn led to a personal campaign conducted against him and his family by the first respondent, assisted by the second respondent.
- 5.4 The applicant narrates a series of incidents involving persons (claiming to be from the Department of Home Affairs) in which the applicant and members of his family were visited at home with requests about valid residence papers. On some of these occasions the applicant claims that the individuals disclosed that the first respondent had laid a complaint against the applicant and his family. The applicant also says that he received numerous phone calls from callers claiming to be from the Department of Home Affairs, which he claims were orchestrated by the first respondent.
- 5.5 Matters came to a head on 20 June 2012 when two men arrived at the applicant's home when he (the applicant) was at work and

only his wife was at home. The applicant was telephoned by his wife and he advised her to make contact with two friends, and that she should co-operate with the gentlemen.

- 5.6 The applicant's wife, the friends and the officials then left for the Department of Home Affairs in Germiston, but en route a stop was made at the Germiston Police Station, where the applicant's wife was detained for approximately six hours before being released without explanation.
6. The applicant finishes his narrative with allegations that the first and second respondents are known in the community to be members of the Pakistani Mafia who demand utmost subservience from members of the community. He says that members of the community (who he does not name) have been harmed by or at the behest of the first and second respondents and that he has a reasonable apprehension of himself and his family being harmed. He also says that the officials of the third and fourth respondents are being used to carry out the threats of the first and second respondents and that this is corrupt. For these reasons he asked for relief.
7. In the answering affidavit the first and second respondents dispute all allegations of wrongdoing on their part. They say the following:-

- 7.1 Both of them conduct business as immigration consultants from the same premises, but separately and for their own account.
- 7.2 The first respondent arrived in South Africa during 1998, approximately one year after the applicant's arrival in 1997. The applicant approached the first respondent during May 2011 (at which time he already had a permanent residency permit issued during 2004), in an attempt to acquire South African citizenship. This application was declined because the applicant had a criminal record for contravening the Corruption Act for which he was sentenced to a fine of R5 000,00 or two hundred days imprisonment, which sentence was suspended. (The applicant admits the offence but says that his application for citizenship is still pending).
- 7.3 The first respondent is the founder and chairman of Jesus Fellowship International Society, of which the applicant was previously a member. The first respondent says that the applicant was excommunicated from this society during March 2012, to which event he attributes the applicant's motive in levelling false accusations against him.

- 7.4 The first respondent says that he was disappointed that the applicant did not utilise his services for the burial of his sister-in-law, but accepts that the applicant had a free choice in this regard.
- 7.5 The first respondent says that he is from a different town in Pakistan to that from which the applicant hails, and that the towns are separated by a distance of approximately 400 kilometers. He denies having met the applicant in Pakistan or that he has any ties with him from Pakistan.
- 7.6 The first respondent denies all allegations of criminal, wrongful and unlawful conduct against him (which allegations are also denied by the second respondent).
8. The applicant seeks a final interdict in motion proceedings. A final order can only be granted if the facts as stated by the respondents, together with the facts alleged by the applicant that are admitted by the respondents, justify such an order.<sup>1</sup> The applicant falls far short of the onus resting upon him in these motion proceedings. First, the applicant fails to apprehend that the requirements for a final interdict (a clear right,

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<sup>1</sup> *Plascon-Evans Paints Ltd. v Van Riebeeck Paints (Pty) Ltd.* 1984 (3) SA 623 (A) at 634, *Thint (Pty) Ltd. v national Director of Public Prosecutions*; *Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) at 19A.

an injury actually committed or reasonably apprehended and the absence of any other suitable remedy<sup>2</sup>) must all be established, and that these are inter-related. Accordingly, although the applicant is, in common with all other persons, entitled not to be subjected to unlawful conduct, the mere allegation that this has – on his version – occurred does not justify a final interdict. He must discharge the onus of showing that he has a clear right against the respondents, for which he must show that the harm caused or reasonably apprehended is caused or threatened by the respondents. This he must establish on a balance of probabilities; if this is not shown, he cannot succeed.<sup>3</sup>

9. It was correctly accepted during argument that the applicant could not succeed against the first and second respondents on the basis of the test in **Plascon-Evans** (*supra*). During argument it was suggested on behalf of the applicant that the matter should be postponed for the hearing of oral evidence on the disputed allegations. However, a request for the hearing of oral evidence must, as a rule, be made *in limine* and not only once it becomes clear that the applicant is failing to convince the court on the papers. The circumstances must be exceptional before a court will permit an applicant to apply in the alternative for the matter to be referred to

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<sup>2</sup> **Setlogelo v Setlogelo** 1914 AD 221

<sup>3</sup> **Prest: The Law and Practice of Interdicts** at 37,43



evidence should the main argument fail.<sup>4</sup> In this case the applicant took no steps to enroll the application for final relief, and enrolment occurred at the instance of the first respondent. There are no circumstances which persuade me that I should refer the matter for the hearing of evidence and I decline the request.

10. The notice of motion and founding papers was served upon the fourth respondent on 27 June 2012 according to the return of the sheriff. An affidavit of service by the applicant's attorney reflects that the notice of motion, founding affidavit and annexures were telefaxed to the offices of the third respondent on 28 June 2012, and that the documents were received by one Sonia, who confirmed receipt and who undertook to hand same over to the official responsible. Given that this was an urgent application this form of service was arguably permissible. Both the third and fourth respondents thus received notice of the application enrolled for 3 July 2014. The notice of set down for the hearing before me on 29 July 2014 was duly served on the third and fourth respondents by the sheriff.
11. As I have indicated an order was granted by Kgomo J on 3 July 2012 for the relief set out in Part A of the notice of motion. There is however no record or indication in the papers before me that this order was served

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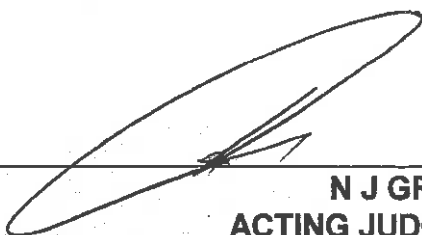
<sup>4</sup> **Law Society, Northern Provinces v Mogami & Others** 2010 (1) SA 186 (SCA) at para 23.

upon the third and fourth respondents, who did not appear before me when the matter was heard, and who neither filed any notice of their intention to oppose the application, nor delivered any answering papers. Mr Wildenboer for the first respondent referred me to letters written by his attorney on 6 May 2014 to the third and fourth respondents attaching a copy of the papers exchanged in this application, and pointing out that interim relief in terms of Part A had been granted and that the first respondent had proceeded to enroll the matter for the dismissal of the interim relief on 28 July 2014. The letter went on to point out that the respective departments had a potential interest in the final relief sought in the notice of motion. These letters were served by the sheriff on the third and fourth respondents respectively. An earlier letter from the first respondent's attorneys dated 27 August 2013 is in the file, in which the applicant's attorney is asked whether the court order dated 3 July 2012 was served on the third and fourth respondents. There was no answer to this letter in the court file, and counsel for the applicant was unable to assist as to whether there had been service of the interim order on the third and fourth respondents. I must thus accept that the interim order was not served on the third and fourth respondents.

12. In these circumstances, and notwithstanding the notice given to the third and fourth respondents by the first respondent's attorney on 6 May 2014, the third and fourth respondents would have been entitled to adopt the

attitude that until an order had been served on them, they were not bound by any interim interdict granted against them, and that they accordingly were not required to oppose the grant of final relief. There is no indication that the third and fourth respondents were present or represented in court when the interim order was granted. This obviates the need for any consideration of the merits of the applicant's case against the third and fourth respondents.

13. Mr Wildenboer made it clear that he appeared only on behalf of the first respondent. This means that, despite having filed an affidavit confirming the answering affidavit of the first respondent, the second respondent against who interim relief was granted made no submissions on whether final relief should be granted against him. Nevertheless, the case against the second respondent must be considered on the papers. The applicant says that the complaint which caused the officials of the third and fourth respondents to initiate contact with the applicant was on behalf of the first and second respondents, and that the arrest by the SAPS was at the instance of the first respondent, the second respondent and two unnamed officials from the Department of Home Affairs. These allegations were denied by the first respondent, which denial I take to be supported by the confirmatory affidavit filed by second respondent. Accordingly, on the test to be adopted in motion proceedings, the applicant similarly cannot succeed in obtaining final relief against the second respondent.



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**N J GRAVES**  
**ACTING JUDGE OF**  
**THE HIGH COURT OF SOUTH AFRICA,**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**Date of Hearing: 29 JULY 2014**  
**Date of Judgment: 31 JULY 2014**

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