

SOUTH AFRICA / JUDGMENT

Diamond v O'Sullivan and Another (45270/12) [2013] ZAGPJHC 403 (18 July 2013) [2013] ZAGPJHC 403

COURT

South Gauteng High Court, Johannesburg

BEFORE

CE Watt-Pringle

CASE / FILE NUMBER

45270/12

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG
REPUBLIC OF SOUTH
AFRICA
CASE NO: 45270/12
DATE: 18 JULY 2013

In the matter between:

NEIL
DIAMOND
Applicant
and
PAUL
O'SULLIVAN
First Respondent
ANNELIEN
VAN DER WALT
Second
Respondent

JUDGMENT

WATT-PRtNGLE. AJ

1, On 30 November 2012, the applicant made application to this court ex parte, and as a matter of urgency, for a rule nisi interdicting and restraining the respondents from further threatening, harassing, intimidating or abusing, verbally or otherwise, the applicant; interdicting and restraining respondents from inciting any other person or entity to harass, threaten, intimidate or abuse, verbally or otherwise, the applicant: and interdicting and restraining respondents from extorting (from) the applicant or from stalking at or entering into the business premises of the applicant at a given address.

2. Mokgoatheng J granted such an order returnable on 4 December 2012, with interim relief in the terms of the rule nisi. The matter came before me on the extended return date.
3. I shall refer to the applicant as Diamond and to the first respondent as O'Sullivan,
4. The facts of this matter are relatively simple and are, despite O'Sullivan's best efforts to avoid admission of the best evidence of what transpired at the relevant time, essentially common cause. (I shall refer to the conduct of O'Sullivan

and his legal representatives below, which forms the basis of the punitive costs order appearing at the end of this judgment.)

5. Diamond was, in February 2012, appointed as the executor of the Estate of the late Mr Jannie van der Walt ("Van der Walt), They had been close friends prior to Van der Walt's death on 31 January 2012. Diamond states that he performed his functions as executor with some assistance from an attorney, Mr Bouwer, and the second respondent who is Van der Walt's widow, until 25 June 2012, when the second respondent requested him to resign, which he did. He advised the Master of his resignation as executor of Van der Walt's estate but this notwithstanding, the second respondent brought an urgent application against him on 20 July 2012 in which she sought an order that he be replaced as executor and that a statement and debatement of the liquidation and

distribution account be given. That application was still pending as at the date of this application. The second respondent was appointed executrix on 30 July 2012.

Diamond alleges that by the time he resigned as executor, the estate was all but wrapped up. He says that he was a creditor of Van der Walt's estate in the sum of R851 250 (plus interest) and another amount of R125 000 (plus interest) in respect of monies lent and advanced to Van der Walt during his life-time. In addition, he advanced the sum of R1 067 361 to cover urgently needed and immediate expenses of the second respondent and of the estate. During the course of his administration of the estate, Diamond, as he was "legally advised to be entitled to do", caused the estate to repay the loans due to him. He did the same in respect of numerous other creditors.

6. He further states that on 21 August 2012 he met with an attorney, Mr Coetzer, who the second respondent in her capacity as executrix had appointed as her agent to administer the estate.
7. He says that at this meeting no demand was made by Coetzer in respect of the payments which he made to himself, nor was there any

allegation that he had acted improperly. Moreover, as at date of this application, he had not received any demand on behalf of the estate, either from Coetzer or any other person.

8. None of these allegations is disputed by O'Sullivan save that he disputes Diamond's averment that the latter never received

demand for repayment to the estate; this on the basis that a letter was hand delivered to Diamond's offices for payment of an amount of R3 190 968.91, at 08h00 on 30 November 2012 which is the same day on which this urgent ex parte application was launched. There is, however, no evidence to dispute Diamond's version that the letter had not come to his attention before he deposed to the founding affidavit, in any event, nothing turns on this for purposes of the relief sought.

9. What is common cause, and significant in my view, is that no letter of demand preceded O'Sullivan's visits to Diamond's business premises, which constitutes the reason and basis for this application.
10. The events of 27 and 28 November 2012 occasioned the present application. On 27 November, O'Sullivan and an associate of his

visited Diamond's office in Alberton and requested to see him. This visit was unannounced and it is probable that it was only because Diamond was not at his office at that time that no meeting took place that day. Diamond's assistant, Ms Schmidt, explained to O'Sullivan that he ought to schedule an appointment with Diamond. On Schmidt's version O'Sullivan refused to schedule a meeting and said that he would be back the next day. According to O'Sullivan, he was not advised to schedule a meeting but was told that he should not come back before 09h00 the following day as Diamond would be in a meeting with senior traffic officials before that time. Either way, O'Sullivan neither made an appointment to see Diamond, nor did he notify Diamond in advance of the meeting which ensued on 28 November, of the nature of his business.

11. Diamond alleges that on 28 November 2012, he arrived at his office at around 07h30. He says that from about 08h00 he noticed O'Sullivan and his associate sitting at the entrance to his building in a white Mazda with a given registration number but that they did not announce themselves at the door of his office. He left the office at 09h15 with his wife, whereupon O'Sullivan and his associate approached him as he exited the door.
12. O'Sullivan denies this version, stating that he arrived at the premises at 09h05 and after completing a telephone call, he was in

the process of exiting his vehicle when he saw Diamond and his wife leave the office. He and his associate, Naidu, approached Diamond and he introduced himself.

13. Diamond says that he was startled by this sudden approach and that O'Sullivan had immediately addressed him in an aggressive tone.

O'Sullivan told him that he had been investigating Diamond for some time. According to Diamond, O'Sullivan, in a threatening

and intimidating tone, said that Diamond could either co-operate with him in which event he could make Diamond's "problems go away" or O'Sullivan could have him arrested for criminal activities. O'Sullivan asked when Diamond was going overseas and before Diamond could answer, O'Sullivan responded by saying that he would have Diamond arrested on Sunday 2 December 2012 at the airport when he and his family were to leave for the United States of America. Diamond pointed out that this information

was not widely known and that O'Sullivan must have been investigating his affairs and become privy to private information.

14. According to Diamond, O'Sullivan continued in this threatening and intimidating tone, stating that if Diamond co-operated with him he could avoid his "imminent arrest for [his] criminal activities. Diamond said that it was not clear on what basis O'Sullivan had become involved in investigating him but he was aware from reports in the media of O'Sullivan's conduct as a self-appointed quasi police officer and with his highhanded tactics of intimidating and threatening people and causing their arrest as if he was a policeman.

Diamond stated that he felt threatened by O'Sullivan's demeanour and statements. He further alleged that according to O'Sullivan the latter could "keep this out of the press" and make the entire unpleasant business go away if money exchanged hands." He alleged that O'Sullivan was well aware of the fact that he, Diamond, is a politician who holds public office and O'Sullivan would know that if he was arrested legitimately or otherwise, it would cause him and his family great embarrassment. At that stage, O'Sullivan provided no detail of his allegations or what he believed to be criminal activities on the part of Diamond which he was investigating.

15. Diamond told O'Sullivan that he and his wife were late for a meeting but that he could meet that afternoon. The parties agreed to meet at Diamond's office at 14h30.
16. O'Sullivan disputed much of this version of that first meeting. Apart from alleging that he arrived somewhat later than on Diamond's version, he alleges that he gave Diamond his business card and advised Diamond that he was acting on behalf of the estate of the late J M Van der Walt on the instructions of the executrix of the estate. He said that he needed to discuss with Diamond the repayment to the estate of certain funds that Diamond had stolen. He denies having used "an aggressive tone". He admits having told Diamond that it would be "better to co-operate" but denies having said that he could make Diamond's problems go away. O'Sullivan admitted having said to Diamond that he believed that Diamond was travelling overseas but on O'Sullivan's version, he did not know when Diamond was due to go

overseas and had received this information from the second respondent “who was worried that [Diamond] might be leaving the country with the money he had taken from the estate, with the intention of not returning to the country.”

17. For her part, the second respondent was content to file a confirmatory affidavit which merely confirms O’Sullivan’s version insofar as it pertains to her, but does not elaborate on her role, if any, in the matter. The court therefore has no way of ascertaining what she knew about the overseas trip, how she knew about it, or whether she had a basis to suspect that Diamond would leave the country without returning, having allegedly stolen money from the estate. It is telling that at a later stage and clearly in an attempt to shield the second respondent from any order in this application, O’Sullivan said the following:

"In particular; I deny that the second respondent either instructed me or gave me a mandate to speak to the applicant in the way I did. / took it upon myself to speak to the applicant as I was hoping there was a possibility that the matter could be settled on the basis that the money that he had unlawfully paid himself from the estate would be repaid to the estate and that his claims to be paid would be dealt with as normal claims in the winding up of the estate. My approach to the applicant was based on what I believed to be a common sense, fair and logical approach to the problem and not on

instructions from the second respondent”

18. That statement appears in answer not only to the first meeting in the car park adjacent to Diamond’s office premises on 27

November 2012, but also the second meeting on 28 November 2012.

19. With reference to Diamond’s allegations that O’Sullivan was well-known for his self-appointed “crime busting” activities, O’Sullivan stated that he did not know what Diamond read in the media but that any such allegations are hearsay and should be ignored. I do not agree. The allegations concerning O’Sullivan’s reputation are not merely gratuitous. They go to the question of whether Diamond felt threatened and whether he reasonably contemplated that in the absence of the final interdict sought in this application, O’Sullivan might be tempted to repeat the conduct complained of. O’Sullivan cannot avoid the fact that he is a public figure who is not only frequently reported on and quoted in the media but has on several occasions conducted radio interviews in the course of which he has dealt with his investigations of, and the laying of charges against, various accused persons, some of whom have been high-profile individuals. I am entitled to take judicial cognisance of this as a fact well known by reasonably well-informed people living in the Johannesburg area. (*S v Mosala* 1968 (3) SA 523 (T); *Schwikkard and van der Merwe*, *Principles of Evidence*, 3rd edition at p 482) and I do so, although Diamond has said as much in his affidavit O’Sullivan’s reference to his profile in the media as “hearsay” is, in keeping with his general approach to the merits of this matter, both disingenuous and

unhelpful.

20. O'Sullivan and his associate duly attended at Diamond's office at 14h30 that afternoon.
21. Unbeknown to O'Sullivan, Diamond recorded the entire meeting which took place in his office over a period of some 25 minutes. In his founding affidavit Diamond quoted the following portion of the transcript of the meeting. In what follows "Paul" is O'Sullivan and 'Neil' is Diamond:

'Paul: It's not about emotion; it's about facts, alright One thing I don't like doing is dancing around the bushes, ok, Neil, I can tell you right now, we have substantial evidence and the evidence is overwhelming. Now I am not in the business, i'm not a dancer that takes her clothes off in a club and you get to see a little bit more and a little bit more and a little bit more. The bottom line is very simple, very simple. We believe, and you may believe otherwise, and you are entitled to believe otherwise, you got constitutional

rights, we believe, that our case is rock solid. Now, I said to our client, she wants you locked up

Neil: I would imagine that's why ... (Paul interrupts)

Paul: And I said to our client, let's try and resolve this without resorting to people getting locked up and all the publicity that gonna go with it, you know. I mean, we know probably as much about you by now as you do, you would be surprised about how much we know and at the end of the day ...

Neil: My humble apologies would you mind if I give this to my personal assistant?

Paul: Sure, at the end of the day, Neil, you know, the quickest solution is to put the money back where it belongs and I said to you that if you believe you have got a claim as a creditor as against the Estate, you can file your claim and i guarantee you that claim will be properly handled. But you don't, nobody has the right to say I am claiming and I am paying, I am claiming and I am paying, I am claiming and I am paying, and that is what you have done. That is theft; alright

Neil: Obviously, just a follow up question, so the mandate is then from Annelien Van der Walt as executrix of the Estate?

Paul: You know, I have made it clear to you that we act for the Estate.

Neil: I am just trying to understand, so are you saying....(Paul interrupts)

Paul: I have not come here to be interrogated by you, Neil, alright. I didn't

Neil: I thought it ivas a discussion.

Paul: It Is a discussion but know what I am not In the business of being interrogated. If you want to interrogate me, get me in court and you can interrogate, you can cross-examine me after I given evidence cause I can tell you know if this matter goes to the full nine yards, you will need to get yourself a lawyer alright. I am hoping I can

convince our client, not to go that route. Now, at this point in time, I got her swaying like that I can assure you, if I go back to her and say to her, listen, you know what, I think we have resolved this now, calm down, blah blah blah. You are gonna come out of this a lot better than you currently, potentially can come out of it.

Neil: Look, I am just trying to get on board; obviously I am not on board yet. My last discussion was with your clients representative, her attorney of record. ..(Paul interrupts)"

22. Diamond stated that O'Sullivan abruptly ended the conversation, said that he was not there to be interrogated by Diamond and that he was simply there to agree principles of repayment. O'Sullivan opened Diamond's office door to leave the meeting but did not leave the meeting and instead continued the discussion in the doorway, loudly so that Diamond's staff in the next office could hear him. Diamond said that O'Sullivan's conduct was designed to embarrass him. He further repeated that

Diamond had stolen R921 000 and that he would be arrested soon. These statements were made in the presence of Diamond's bookkeeper

and one of his senior employees, whose confirmatory affidavits were tendered in evidence.

23. Diamond concluded that O'Sullivan had come to his office with the premeditated intention of extorting money from him and had

done so on the instructions and mandate of the second respondent.

24. The above-mentioned extract, which was recited in Diamond's founding affidavit,[1] forms part of the longer transcript of the meeting in Diamond's office. That transcript shows that the general thrust of what was said in the extract was repeated several times during the entire course of the meeting.

25. From the transcript, it is apparent that:

25.1 O'Sullivan claimed to have made a thorough investigation of Diamond and he alleged that he had a "rock solid" case demonstrating that Diamond had committed theft from the estate;

25.2 he, O'Sullivan, was the "good cop" to the second respondent's "bad cop" in that the latter clearly wished to see Diamond in jail whereas O'Sullivan believed that if only Diamond would admit to having intentionally misappropriated funds from the estate (that is having committed theft from the estate, in the legal sense

of the word) and undertaken to repay these monies, he would be in a position to persuade the second respondent not to pursue a criminal prosecution; and

25.3 that the general approach adopted by O'Sullivan was one of bullying.

26. A typical example of O'Sullivan's bullying and overbearing manner in dealing with Diamond is exemplified by the exchange which followed shortly after the exchange quoted above, which took place in the following context: Diamond pointed out that he had last discussed

the matter with the second respondent's attorney of record in the High Court litigation between Diamond and the second respondent, Mr Coetzer. Diamond was clearly puzzled at O'Sullivan's approach given that, despite the pending litigation and despite having met with Coetzer, he had never received any demand based on unlawful misappropriation from the estate and yet O'Sullivan was there threatening him with arrest for what O'Sullivan described in no uncertain terms as criminal conduct: theft. It is not alleged that the disputed debt is the subject of that litigation.

27. O'Sullivan pointed out that Coetzer was no longer second respondent's attorney and thereafter the following exchange

occurred:

"Neil:

- okay, but, you know, obviously I haven't been informed The first... (Paul interrupts)

Paul: you don't need to be informed, we forensic consultants, I even can give you my card. Monty Coetzer was handling the difficulties relating to the, your position as executor of the estate, alright. Monty Coetzer is no longer briefed in this matter. Okay, you know, / have made it clear to you, we have done our work, it is completed, we are ready to take the next step and before taking the next step, I am giving you an opportunity to say whether you want us to take the next step or not.

Neil: Where does this leave us with regard to our current litigation in the Gauteng South High Court?

Paul: Which litigation? Which matters are you referring to?

Neil: You know, your client need to brief you on this. I cannot brief you on your client's ... (Paul interrupts)

Paul: Have you taken the matter further?

Neil: In the Gauteng South High Court? Yes

Paul: Okay, well, she is not aware of that.

Neil: Once again, the attorney of record did not communicate to us they are no longer the attorneys of record.

Paul: Whatever civil matters is going on, did you appeal the decision?

Neil: There are no decisions,

Paul: There was a decision in removing you as executor;

Neil: No, no, no. Maybe let me make a suggestion, and obviously you are my intellectual superior as far as these matters are concerned, maybe you should get that information because there was no ruling as far as ... (Paul interrupts).

Paul: That does not change the fact that you have stolen money from the Estate. Now, if we going to play cat and mouse, we will just go.

Neil: That statement is a significant problem for me because you approach me in my office not on a fact finding mission ... (Paul interrupts)

Paul: No, we got the facts already.

Neil: But that is a little bit difficult if you have not engaged me. So you may have a set of facts ... (Paul interrupts)

Paul: Let me explain something to you, taking money out of the account of the estate and paying it to yourself, is theft. Short and simple. And if we are going to go, if you have a defence, great, we are not interested in hearing it. We are going to leave now.

Neil: I don't intend in providing you with a defence either. Could i get in indication just from you whether I am the only person you approached for a repayment. Have you approached ABSA as well for repayment?[2]

Paul: We are not going to discuss the matter further. Let's go.

Neil: Are you sure you want to leave Mr O'Sullivan?

Paul: Absolutely, because you are not interested in settling this matter.

Neil: No, I am absolutely ... (Paul interrupts)

Paul: No, no, no. if you are going to start cross examining me, there is no discussion. The question I want answered, are you or are you not prepared to put the money back?

Neil: Well, you need to give me an indication of what money you referring to. What amount is of that money, so that I have an idea ... (Paul interrupts)

Paul: i am taiking about ail the money you paid out of the Estate, okay, you know. No, I am not going to go into detail

28. In short, therefore, I find that O'Sullivan sought to convey the impression that he had uncovered information which showed not merely that Diamond had paid money to himself out of the estate, possibly in the mistaken belief that he could do so before the submission of a liquidation and distribution account to the Master,[3] but that he had done so intentionally and with knowledge that it was unlawful and that he had therefore committed the common law crime of theft, which requires the wrongful intention to commit a crime.

29. O'Sullivan was clearly not interested in anything that Diamond had to say. Indeed, on several occasions, when Diamond attempted either to ascertain further facts or even to convey his own knowledge of the facts, O'Sullivan threatened to walk out of the meeting. The evident implication of that threat was that Diamond would shortly thereafter be arrested, based on information (the precise import of which O'Sullivan refused to share with Diamond) which O'Sullivan would convey to the police. That, in my view, is a substantial threat and one which Diamond could not guard against short of giving in to O'Sullivan's demand that he admits to misappropriation and pays back, or agrees to pay back an unspecified amount.
30. it is clear that what was required of Diamond to avoid his arrest was an unequivocal undertaking to pay back whatever it was that O'Sullivan or the second respondent contended to be due to the estate, the precise quantum of which O'Sullivan refused to disclose. O'Sullivan only mentioned the figure of R922 000 as "an example" and not as the total amount of Indebtedness. After further repeated threats from O'Sullivan, the following exchange took place:

"Neil: I am just trying to understand... (Paul interrupts)"

Paul: No, no, no, you don't want to understand anything. You have crooked the books and stolen from the Estate and you are now going to face the music.

Neil: But Sir; you can't make those claims. You don't have (Paul interrupts)

Paul: I am telling you, I am telling you, I have got the proof, I have got the proof.

Neil: But then show ... have the courtesy of sharing ... (Paul interrupts)

Paul: if you want to see the evidence, you are going to see it in court, and i have told you that You don't want to settle this matter, let's go.

Neil: Sir, if I walk into your office and ask you to fork out R920 000, would you do that?

Paul: I don't want R921 000, I want a lot more than that.

Neil: But then tell me what's the rest, so I know what you talking about because ... (Paul interrupts)

Paul: We are not going into detail. I said to you, right at the beginning, we are going to establish principles first, if the principle is that you agree to refund the money then we can sit and debate and you agree yes. Must pay that; we put it to one side, if you agreeing that..."

31, The insidious part of O'Sullivan's conduct lies in his unsubstantiated claim that he was in a position to convey information to the police which would at the very least result in Diamond's arrest. O'Sullivan's attempts to characterise his conduct as that of a reasonable person attempting to persuade Diamond to do "the right thing" to avoid the unpleasantness of his imminent arrest and criminal prosecution is belied by O'Sullivan's refusal firstly to share the nature and ambit of the information at his disposal (so that Diamond could respond to it) or indeed to hear Diamond's side of the story at all. In Diamond's mind, the possibility that O'Sullivan would present a one-

sided and self-serving version to the police sufficient to ensure his arrest at least, must have loomed large and in my view, justifiably so.

32. I now turn to deal with the manner in which O'Sullivan sought to exclude the transcript from the admissible evidence before

the court.

33. The transcript of the meeting in Diamond's office was typed by Diamond's assistant, Ms Schmidt. This appears from a

confirmatory affidavit handed up to me by counsel for Diamond on the day of the hearing. Schmidt had in fact signed a confirmatory

affidavit to the founding affidavit but she did not therein confirm that she had listened to the recording of the meeting and typed the transcript. Although Diamond's founding affidavit referred to the transcript, it did not state who had typed the transcript.

Nevertheless, Diamond was present throughout the meeting and he deposed to the fact that the transcript was a transcript of the

meeting. In my view, therefore, the transcript did not constitute hearsay evidence in the absence of an affidavit from the person who transcribed it. In any event, in my discretion, I allowed the late filing of the confirmatory affidavit.[4]

34. Mr Roos SC who appeared for O'Sullivan sought to deal with an application to strike out certain portions of and annexures to Diamond's founding affidavit as a matter in limine. The application sought to strike out annexure ND3, which was the transcript of the recording of the meeting on the grounds, firstly, that it was unlawfully made and secondly, that there was (at that stage) no affidavit from the scribe that the transcript is a true and correct transcription of the recording. Secondly, he sought to strike out paragraph 22 of the founding affidavit which contains the quotation from the transcript first appearing in this judgment, on the basis that it is not admissible for the same reasons as the transcript is supposedly not admissible. Thirdly, he sought to strike out paragraphs 27 and 28 and annexures ND6 and ND7 on the grounds that the allegations therein are irrelevant and inadmissible as they refer to similar but unrelated

facts.

Those paragraphs and annexures relate to an earlier incident in which Diamond's attorney of record had brought an application in

similar terms to the present application because O'Sullivan had allegedly threatened the attorney and accused him of criminal conduct and in which O'Sullivan had, in terms of a settlement agreement, accepted that his conduct was unlawful and warranted an interdict. (I will deal with this in more detail below.) Lastly, the respondents sought the striking out of paragraphs 29 and 30 of the founding affidavit on the basis that they constituted either hearsay or opinion evidence of a person not qualified to give an opinion. The relevant paragraphs read as follows:

"29 From the tone and content of the first respondents threats and his past conduct and 'name' that he has made for himself in the media, it is clear that he is a self-appointed vigilante who has taken it upon himself the self-appointed right and duty to root out crime wherever, in his subjective opinion, crime manifests itself. He does not claim any appointment under the law to have this task. He does not claim any rationale beyond the reason for his picking the various persons that he chooses to target for his alleged crime fighting activities. Indeed, bereft, for the most part, of any admissible evidence, he chooses to threaten and intimidate his targets to achieve his own end. He also, quite evidently, enjoys publicity in the press for his self-appointed "white knight" activities.

30 It will be submitted that it is evident that the first respondent is emotionally unstable and believes himself to hold some special place in society where the ordinary rules of societal conduct do not apply to him. Persons such as Mr O'Sullivan are quite evidently dangerous in society if left unchecked"

35. Curiously, however, the respondents did not seek the striking out of paragraph 31 in which O'Sullivan is referred to as a megalomaniac or psychopath on the basis of the immediately preceding paragraphs.
36. I declined to deal in limine with the application to strike out. Instead I elected to hear Diamond's counsel first and to deal with the application to strike out as part of the respondents' case.
37. In addition to the formal application to strike out, counsel for the respondents contended that Diamond's replying affidavit

fell to be disregarded in toto because of non-compliance with Uniform Rule 63(2) relating to the formalities applicable to affidavits attested to outside of the Republic. The replying affidavit was signed in Orlando, Florida, USA before a police service officer whose official stamp denotes that he is a commissioner. Counsel furthermore attempted to exclude the confirmatory affidavit of Schmidt on the basis that (in addition to being out of time) it purported to be a confirmatory affidavit of the replying affidavit and because, so it was contended, the replying affidavit was not properly attested for purposes of admission in a South African court, her affidavit fell to be disregarded altogether. This despite the fact that Schmidt's

confirmatory affidavit also states in a self-contained sentence that she confirmed having made the transcript referred to in the founding affidavit and annexed as annexure ND3 thereto and confirmed that it was a true transcript of the recording of the meeting between Diamond and O'Sullivan. This argument is a non sequitur and I thus admitted the confirmatory affidavit.

38. On the view I take of the matter, it is not necessary to decide this issue. The case against the respondents is made out in the founding affidavit read with the answering affidavit. The contents of the replying affidavit takes the matter no further.
39. As to the application to strike out the transcript, apart from the fact that any deficiency in its proof was cured by the confirmatory affidavit of Schmidt, even without that I do not regard it as hearsay evidence by reason of the fact that Diamond himself was a party to the conversation reflected in the transcript and he described the transcript as a transcript of that meeting. Although I accept that without listening to the recording he would not be able to state with certainty that the transcript had captured, word for word, what was said at the meeting, it is not hearsay in the sense that the deponent has no personal knowledge as to its accuracy. By analogy, witnesses are frequently called to confirm that the minutes of a meeting constitutes an accurate record of what transpired at the meeting, even when the witness in question did not keep the minutes.
40. The application to strike out reference to the similar, earlier application to this court brought against O'Sullivan by a third party under case number 12486/2011, to interdict O'Sullivan, as well as the settlement agreement in that matter, is in my view equally unfounded. That evidence was relevant and thus admissible for at least two reasons.
41. The first is the one tendered expressly in the founding affidavit, namely that it demonstrated a proclivity on the part of O'Sullivan. This, inter alia, goes to Diamond's reasonable apprehension that absent an interdict, there is a likelihood that O'Sullivan will continue to threaten and harass Diamond.
42. The second is that Diamond seeks a punitive costs order in this application. O'Sullivan appears not to have learnt anything from

the fact that he has been taken to court for similar conduct in the past and on that occasion had accepted that his conduct was unlawful and warranted an interdict. It also provides a window into what he is capable of. That application was precipitated by an email from O'Sullivan dated 29 March 2011 and despatched to Diamond's attorney, in which he states the following:

"Subject: You have crossed the line.

THIS MAIL IS DIRECTED TO

* * *

ID NO ****[5]

THIS IS A 24 HOUR WARNING NOTICE

IF YOU DO NOT GIVE A SUITABLE RESPONSE WITHIN 24 HOURS, ROLLING ACTION WILL BE TAKEN AGAINST YOU.

Hello scum,

Do not see this as a threat - Rather see it as a promise.

As a result of the lies you have procured the publishing of, I did call your office, but I see that your operator does not speak English too well so here it is in a fashion you will easily understand:

When you chose to receive blood money (proceeds of crime - in contravention of Prevention of Organised Crime Acts) from *** that was one thing. Then you have chosen to lie for him, is a totally other matter. That you have chosen to lie to the media against me, and persuade your gangster friends to open false dockets against me, makes you move very quickly into my radar screen, something I am willing to bet, you will wish you had not done.¹

43. The email continues in similar vein and then refers to a number of individuals, including some high profile persons convicted of crime, impliedly as a result of O'Sullivan's efforts. The email concludes in melodramatic fashion as follows:

*"*** found out the hard way, you have the chance to avoid the big fall.*

Read Hosea VIII7

For they have sown the wind and they shall reap the whirlwind"

44. In the settlement agreement which followed upon an ex parte order obtained against O'Sullivan on 29 March 2011, the interim order was made final and in relation to the aforementioned email, O'Sullivan unreservedly tendered his apology to the applicant, the members of his family mentioned in the email and the directors of his firm and further records that it was never his intention that the said email should constitute a threat but conceded that it was reasonably so interpreted. He further declared his understanding for the constitutional right of any person charged with any offence to legal representation and the importance of a protection of this basic right and the maintenance of the rule of law and democracy. There is, furthermore, a concession by all parties to the settlement agreement "including attorneys involved in the criminal law process, [that they] should abide by the legal principles governing their conduct and any specific legislation such as the Prevention of Organised Crime Act and the Financial Intelligence Centred Act which may be applicable to the relationship between attorney and client." It was expressly agreed that the agreement would constitute a mutual press release which would be made available to the press upon the order being confirmed and made final.
45. The present application was necessary, despite O'Sullivan's previous experience of having to tender his unreserved apology and having to seek to characterise a communication which quite clearly constituted a threat or, in the comic-book caricature of a bully, "a promise" rather than a threat, as not having been intended that way.

46. It is now necessary to deal with various aspects of the manner in which the hearing before me was conducted. I first heard Diamond's

counsel. Diamond's counsel stated at the outset that he had been taken by surprise in relation to the objection to the manner in which the replying affidavit had been attested, since no mention was made of it in the short heads sent to Diamond's counsel (or in fact, his predecessor in the matter) in advance of the hearing. It transpired that different versions of these heads had been sent to Diamond's counsel and to me, respectively. I accept that this was done in error, but must emphasise that it is an obligation of the legal representatives in any motion proceedings in this Court to ensure that a copy of the. practice note and short heads are provided to opposing counsel.

47. I then heard counsel for the respondents. I made it clear that I was not convinced by the arguments advanced in support of the formal striking out application but that I would deal with it together with the merits in the main judgment dealing with the merits.

48. Respondents' counsel argued in essence that O'Sullivan had done no more than advise Diamond that he had evidence of criminal

conduct on his part which, if referred to the proper authorities, could result in his arrest and indictment before a criminal court if and only if the prosecuting authorities decided to prosecute. There were no unlawful threats and no extortion on his part. I will deal with this argument later on in this judgment.

49. After the lunch and adjournment (by which time I had heard Diamond's counsel and a considerable amount of argument by respondent's counsel), the latter informed me that he had been instructed to seek a postponement of the hearing, on the basis that the transcript of the meeting annexed to the founding affidavit was inaccurate in material respects and that the respondents sought an opportunity to produce an accurate transcript. He submitted (again based on his instructions) that an accurate transcript would alter entirely the supposedly false impression created by the transcript and cast new light on Diamond's case, to the benefit of O'Sullivan.

50. I was not satisfied as to the bona fides of the application. Firstly I agreed with Diamond's counsel that the timing of the application was suggestive of the respondents' seeking to delay the matter and to seek their fortune before another judge, because the proverbial shoe was starting to pinch. Secondly, and more to the point, although O'Sullivan in his answering affidavit had sought to exclude the transcript on the grounds that it was inadmissible, he purported to deal with what had happened at the meeting in general terms and nowhere did he allege that the transcript was the product of a fertile imagination or that it was in any material respect inaccurate or incomplete. The existence of a recording was known by the respondents from late November, some two months before the hearing, and there was no suggestion that a copy thereof had ever been sought. The respondents had, moreover, been in possession of the recording for a day or two prior to the hearing, so I was informed. No explanation was tendered as to why, if the transcript was Inaccurate to a degree that it

misrepresented the general thrust and import of O'Sullivan's alleged conduct, the recording had not been procured earlier. Instead, respondent's legal representatives did their best to keep the facts of the matter from the Court by means of the application to strike out. As to Diamond's version of the meeting, O'Sullivan had been content in general terms to deny that he had threatened Diamond, that his conduct constituted extortion or that he had in any manner acted unlawfully.

51. I refused the application for postponement, a decision which was vindicated by what followed.
52. Respondents' counsel thereupon sought a brief adjournment whereafter he sought my recusal on three grounds. These grounds were firstly that I had in the course of Diamond's counsel's address referred to O'Sullivan as a "cowboy*"; secondly, that I had suggested to Diamond's counsel an argument which tended to favour his case and thirdly, that I appeared to be more disposed towards Diamond's than the respondents' case.
53. i dismissed the application for recusal and briefly gave my reasons for doing so. The reference to O'Sullivan or to his conduct as that of a cowboy was a figure of speech and not unreasonable given the content of the transcript. As to the second ground, there is nothing improper nor indicative of bias for a judge to suggest a point in one party's favour, particularly when counsel for the other party has yet to address the court and will have an opportunity to deal with it. As to the third ground, I had prior to the hearing read the papers and the heads of argument filed by both counsel and formed a prima facie view in favour of Diamond, at least on the facts of the matter. I consider the grounds of recusal advanced by counsel particularly

flimsy and mendacious. Indeed the application for postponement appears to have been a disguised application for recusal and the

application for recusal, a disguised application for postponement. Both were baseless and both were advanced for purposes of avoiding

the completion of the matter before me.

54. Argument ensued and I enquired of both counsel as to who had a copy of the recording. I was informed that there was a copy available

in court and that neither party objected to my listening to the recording in court together with counsel. (Respondents' counsel

had informed me that he personally had not listened to the recording.) This was done and I was able to follow the transcript whilst listening to the recording and able to determine that give or take an insignificant word here or there, the transcript was entirely

accurate and certainly presented a fair picture of what had transpired at the meeting. The first part of the recording during which banalities were exchanged prior to the business of the meeting commencing had not been included in the transcript, but this had no impact on the

merits of the case. It had been suggested in the course of the argument in favour of the application for postponement that Diamond and his companions could be heard laughing after O'Sullivan had departed and this supposedly demonstrated that Diamond was not fearful of O'Sullivan and that he therefore had no genuine or reasonable "apprehension" that O'Sullivan would infringe his rights. There was nothing in the recording which vindicated such a conclusion.

55. By this time it was abundantly clear that respondents' counsel's "instructions" which had given rise to the application for postponement, were misleading, to put it politely. Had I given respondents the

opportunity to procure an accurate transcription of the meeting it would not to the slightest degree have altered the impression created by the transcript already before court. I enquired of respondents' counsel at that point from whom his instructions had emanated and he referred to an associate of Mr O'Sullivan as being that person.

56. I must say that I find this explanation most unsatisfactory. Whilst I have no reason to doubt counsel's word that he had not

had the benefit of listening to the recording and that he was acting on instructions, I question whether he could properly have made sufficiently searching enquiries as to what the import of the differences would be in the transcript before court as opposed to the "accurate" transcript sought to be obtained by O'Sullivan, such as to warrant a postponement and supplementation of the papers. Whatever else might have been said at the meeting which may not have been included in the transcript, the transcript itself is clear and the conduct complained of occurs repeatedly in the course of the meeting. In my view, the application for postponement was not bona fide or based on any substantial grounds.

57. When counsel makes application for a postponement from the bar, both the opposing party and the court are placed in the invidious position of having to assess the reasons advanced for the postponement on the basis of the facts, usually advanced by counsel from the bar, based on counsel's instructions. In these circumstances there is a duty on counsel to have obtained sufficiently detailed instructions to justify the submissions made in support of such an application. In this case, counsel would have to have been satisfied that a postponement would result in O'Sullivan being able to cast an entirely different light on the meeting of 28 November, given the opportunity to obtain an accurate transcript. In my view O'Sullivan's counsel ought to have been more circumspect in advancing his "instructions" as grounds for a postponement.

58. I have already concluded that O'Sullivan's conduct, properly construed amounted to this: O'Sullivan was not interested in anything that Diamond had to say. Whenever Diamond attempted either to ascertain further facts or to convey his own knowledge of the facts, O'Sullivan threatened to walk out of the meeting. The clear implication of that threat was that Diamond would shortly thereafter be arrested, based on information (the precise import of which O'Sullivan refused to share with Diamond) which he would convey to the

police. That in my view is a substantial threat and one which Diamond could not guard against short of giving

in to O'Sullivan's demand that he admits to misappropriation and pays back an as yet unspecified amount.

59. I find that O'Sullivan's conduct is unlawful and amounts to attempted extortion, The common law crime of extortion is

committed when a person unlawfully and intentionally obtains some advantage, which may be either of a patrimonial or a non-patrimonial

nature, from another by subjecting the latter to pressure which induces him or her to hand over the advantage (Snyman, Criminal Law 5th edition page 426).

60. It matters not whether the advantage is due or not by the victim (Snyman, Strafreg 6th edition page 445; Milton, South African Criminal Law and Procedure Vol II 2nd edition page 699), nor whether the advantage sought is to the perpetrator (Milton, South African Criminal Law and Procedure Vol. II 2nd edition page 695). it is also of no consequence whether an accusation made against a victim is true or false, where the threat made is to expose the victim (Milton, South Afn'can Criminal Law and Procedure Vol II 2nd edition page 699; R v G 1959 (4) SA 39 T at 41; R v Lutge 1947 (2) SA 490 (N)).

61. In enquiring into the lawfulness of the conduct of the perpetrator, the enquiry should not be restricted to whether or not the threat was to do something which the perpetrator lawfully and legitimately was entitled to do, including reporting a suspected offence to the police. The threat should not be seen in isolation. Unlawfulness lies in the combination of the threat, the purpose for which it was made, and the manner in which the perpetrator exercised his authority or entitlement to do something (MA Hunt: South African Criminal Law and Procedure (formerly Gardiner and Lansdown Vol. H Common-Law Crimes 2 ed by RL Milton page 699; R v N 1955 (2) SA 647 (T); R v Lepheana 1956 (1) SA 337 (A); Snyman, Strafreg 6th edition, page 445). In addition, the conduct is considered wrongful if the use of pressure causes some harm to the victim (Milton, South African Criminal Law and Procedure Vol. II, 3fd edition, page 683).

62. On the facts disclosed in this application, the advantage sought by O'Sullivan was the resolution of his investigation for the second respondent on his terms without the inconvenience of seeking redress through legitimate avenues. He may have achieved this advantage had Diamond succumbed to his threats to place allegations before the police and undertaken to pay whatever O'Sullivan

wanted. His conduct went well beyond that of a reasonable demand for something he believed was owed: it was accompanied by bullying and aggressive behaviour and a refusal to engage Diamond on the specific allegations against him in order to place him in a position to evaluate them and possibly to provide an answer thereto. The question of whether or not Diamond was obliged to repay the estate had not been adjudicated on by anyone other than O'Sullivan and the

second respondent; the question of whether Diamond, even if he acted unlawfully, did so with criminal intent had also not been adjudicated on by anyone other than O'Sullivan and the second respondent; legitimate processes were available to the respondents to recover the estate's money if indeed there had been misappropriation and indeed were already underway. Under the circumstances, it is clear to me that O'Sullivan acted with the requisite mens rea.

63. The failure of Diamond to be intimidated or succumb to the threats or the achievement of the advantage does not in any way detract from the unlawfulness of O'Sullivan's conduct. All this means is that O'Sullivan's conduct amounts to attempted extortion rather than extortion (Milton, South African Criminal Law and Procedure Vol. II 2nd edition page 694).
64. The advantage sought by second respondent was similarly a resolution of the matter on her terms and the return to the estate of monies that had been paid out. She had used O'Sullivan as her instrument to achieve this. While the extent of the second respondent's Knowledge of O'Sullivan's tactics it is not clear on the facts before me, this is because of her failure to take the court into her confidence in circumstances in which she ought to have done so. It is not disputed that O'Sullivan was purporting to discharge his mandate from the second respondent. The conduct of the second respondent, through the use of O'Sullivan

as her agent, was similarly wrongful and an infringement of the clear right of Diamond not to be the victim of unlawful conduct.

65. Even if I am wrong in the finding that O'Sullivan's conduct amounts to the criminal offence of attempted extortion, I am satisfied that it amounts to unlawful harassment of Diamond. It is lawful for any person to assert rights or alleged rights by confronting the person said to owe satisfaction of those rights, but there is a point at which the manner in which this is done would constitute unlawful harassment. The courts are there for the resolution of such disputes and a right once asserted, must be vindicated in accordance with the rule of law and the rights to due process enjoyed by all in our constitutional democracy. To apply the sort of illegitimate pressure on Diamond to make concessions in response to the threats issued in the manner described above, amounts in my view to O'Sullivan taking the law into his own hands. My findings above relating to the role of the second respondent apply equally in this context.
66. In *Deneys Reitz v South African Commercial, Catering and Allied Workers Union* 1991 (2) SA 685 (W) the applicant, a law firm, sought inter alia an interdict against the respondent trade union's planned campaign against what it perceived to be "union bashing" conduct on the part of the applicant, arising from its representation of employers in labour disputes and submissions made by the applicant to the legislature in respect of proposed labour legislation amendments. This Court, per Flemming DJP, referred to the public policy considerations applicable to the question of when the law curtails the ostensible exercise of rights in a manner which may exceed reasonable bounds, to a degree that it is deemed unlawful. The learned judge held, at 693H to 694A:

“When apparently permissible conduct impacts upon others, the assessment of unlawfulness is guided by the sense of fairness of the judiciary (in the wide sense) as the criterion-formulating arm of society. The judiciary responds to the general sense of justice of the community, frequently displayed by expressions of public opinion, to which vent is given in accordance with sound public policy and good morals in the relevant sphere. I emphasise the words 'sound' and 'good' See Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others 1981 (2) SA 173 (T) at 188H - 189G; Schultz v Butt 1986

- (3) SA 667 (A) at 678, 679; Hawker v Life Offices Association of South Africa and Another 1987
- (3) SA 777 (C) at 7810 - I; Elida Gibbs (Pty) Ltd v Colgate Palmolive (Pty) Ltd
- (1) 1988 (2) SA 350 (W) at 356F - 357F. I agree with respondents' counsel that that approach applies in the field of law which is relevant in this case.

In respect of a right of which the existence can be unhesitatingly admitted, a particular exercise thereof or a specific type of exercise thereof may constitute an unlawful impingement on another's right."

- 67. Accordingly, I find that Diamond has demonstrated all the requirements for the granting of a final interdict in the terms sought in the notice of motion.
- 68. It also follows from what I have stated above about the conduct of the respondents in the manner in which they have conducted their opposition to this application that a punitive costs order is warranted.
- 69. The following order is made:
 - (a) the first and second respondents are interdicted and restrained from further threatening, harassing, intimidating or abusing, verbally or otherwise, the applicant;
 - (b) the first and second respondents are interdicted and restrained from inciting any other person or entity to harass, threaten, intimidate or abuse, verbally or otherwise, the applicant;
 - (c) the first and second respondents are interdicted and restrained from stalking at or entering into the business premises of the applicant;
 - (d) the first and second respondents are ordered, jointly and severally, to pay the costs of the application on an attorney and client scale.

CE WATT-PRINGLE, AJ

Acting Judge of the High Court

Date Argued: 1 February 2013

Date of Judgment: 18 July 2013

For the Applicant: Adv D Vetten

Attorneys: Botha du Plessis and Kruger Attorneys

For the Respondents: Adv J Roos SC Attorneys: Gary G. Mazahan Attorneys

- [1] I have corrected certain minor patent errors in the transcript which have no bearing on its accuracy as to the substance of what was said and by whom.
- [2] Elsewhere Diamond pointed out that he had made payment to other creditors of the estate, such as ABSA, in the same way as he had paid himself as a creditor of the estate.
- [3] I make no finding in this regard.
- [4] See the judgment of Wepener J in Pangboume Properties Ltd v Pulse Moving CC 2010 JDR 1414 (GSJ) at paragraph 17 on the court's discretion to allow additional affidavits in motion proceedings.
- [5] I do not repeat and thus republish the names of the persons referred to in this email.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPJHC/2013/403.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/diamond-v-osullivan-and-others-unknown-topic-agpjhc-2013--6a3ea5173b1caa912980e370>

Prepared on 10 October 2026 · Esheria