

SOUTH AFRICA / JUDGMENT

Els and Another v eMedia Investments (Pty) Ltd (25902/2021) [2024] ZAGPJHC 1164 (19 November 2024)

[2024] ZAGPJHC 1164

COURT

South Gauteng High Court, Johannesburg

BEFORE

N Manoim

CASE / FILE NUMBER

25902/2021

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FLYNOTES: CIVIL PROCEDURE – Interdict – Media broadcast – Right to privacy and prior restraint – Lured into interview on camera without knowledge or consent thereof – Footage will show applicant getting up and walking away to his car – What is likely to be aired is performative not informative – Allegations against applicant are sufficiently grave to warrant claim of public interest – No clear right – Can sue in due course for damages for an invasion of privacy – Application dismissed – Protection of Personal Information Act 4 of 2013.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 25902/2021

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

19/11/2024

In the matter between:

GREGORY JOHN ELS FIRST APPLICANT PRAXLEY CORPORATE SOLUTIONS (PTY) LTD SECOND APPLICANT and eMEDIA INVESTMENTS (PTY) LTD RESPONDENT

REASONS

Manoim J

- [1] This is an urgent interdict where the applicants, Mr Gregory Els, and his company Praxley Corporate Solutions (“Praxley”), seek to interdict the respondent, eMedia Investments (Pty) Ltd, from broadcasting certain visual and audio material concerning them (“the footage”). [1]
- [2] I heard the matter on Friday the 14 November, but the matter was urgent because eMedia’s subsidiary, e.tv (Pty) Ltd (“e.tv.”), intended to broadcast this footage on Sunday night 17 November at 18h30. E.tv. was unwilling to give Els an undertaking that they would not broadcast the footage on Sunday or to postpone the broadcast to a later date. The footage was intended to be broadcast on what is termed the ‘Devi Show’ which is broadcast on two channels, ENCA and e.tv. E.tv. describes the Devi Show as “an investigative, current affairs programme dealing with matters of public interest.” It is hosted by Devi Govender whom I will refer to from now on by her first name as both parties have done.
- [3] I gave my order on 15 November dismissing the interdict. My reasons for doing so now follow.

Background

- [4] Els is a businessman whose company Praxley, the second applicant, provides corporate advisory services, inter alia in in respect of mergers, acquisitions, disposals, and various capital raising and restructuring ventures. He has been in this business for twenty-one years. Praxley has provided these services to more than 430 customers over this period.
- [5] On 24 October he was contacted by someone claiming to be a Mr Hendrik Zowitsky who asked to meet with him to advise him on a sale of a business. They arranged to meet on 29 October at a coffee shop called Tashas located in a shopping mall in Sandton. Zowitsky requested that they meet outside as he was coming with his client who was a smoker.
- [6] Els arrived there at the arranged time only to be confronted not by Zowitsky but by a TV crew from e.tv. led by Devi. Devi called Els by name and then proceeded, with her camera crew following her and filming, to ask Els questions about why he had not refunded a certain Dr Reza his money. Els did not respond and then walked to his car. Devi and the TV crew followed filming him climbing into his car. He heard Devi remark “nice car.” He left and then tried to contact the number on which Zowitsky had called him, only to find that the number was blocked. It is now common cause that e.tv. used the name of Zowitsky and the possibility that he was a potential client, as a ruse to lure Els to Tashas so he could be filmed by e.tv.
- [7] Shortly thereafter, on the same day, Els received an email from Maria Wein on behalf of Devi. Wein had a list of questions with allegations made about his treatment of certain past clients of Praxley. There were 14 questions, and he was given a week to respond. He was told he could either respond in writing or give a camera interview.

- [8] Els consulted his attorney who wrote back to e.tv. requesting that it not broadcast any footage of him alleging that its usage would constitute a violation of the Protection of Personal Information Act 4 of 2013 (“POPIA”). An exchange of correspondence between his attorney and e.tv. and subsequently its attorney followed for several days thereafter. It is not necessary to go into detail of this correspondence, but the upshot was that each side firmed up on its views. Although Els responded in writing to some of the allegations made against him, he insisted that the footage was not screened. E.tv. was prepared to publish his replies, and give him airtime on camera, but it was not willing to give any undertaking that it would not make use of the footage. E.tv. took the view that this was a matter of public interest, and that Els was a public figure, something he denies.
- [9] In its answering affidavit it justifies itself in the following terms:
- “Broadcasting allegations against persons such as Els would empower other members of the public to come forward with their own experiences. This would not only help validate the claims made against the applicants, but also paint a comprehensive picture of the issues, fostering a culture where individuals feel supported and confident in reporting misconduct. There is also a profound public interest in the ventilation of allegations of this nature, because they are relevant to the administration of justice and public confidence in the rule of law.”*
- [10] In its answering affidavit e.tv. first took several points before dealing with the merits. The first point was that the incorrect entity for e.tv. has been cited but it nevertheless did not seek to make anything further of this point. The next point was that Praxley the second applicant was wrongly joined as no relief is sought against it. When I heard oral argument, this point was not persisted with and correctly so in my view. This point need not be considered further.
- [11] The next point taken is one of urgency. E.tv argued that at best for him Els ought to have known by 7 November 2024 that e.tv. was not acceding to any undertaking that it would not broadcast the footage and that he should have acted earlier.
- [12] Although it is correct that on 7 November 2024 e.tv. had indicated that it would go ahead with the broadcast, it was only on the 13 November 2024, that e.tv. ‘s attorneys informed Els’ attorneys that the broadcast would be made on 17 November 2024. I consider that was the trigger event in this matter that created the urgency. If Els had brought the application earlier, he risked the criticism that he had acted prematurely.
- [13] The application was then brought to this court on 14 November 2024 with electronic service on e.tv.’s attorneys at 11h35 that day. The matter was set down for 10h00 on the 15th of November i.e. the following day. Although this time scale had given e.tv. only a day to respond, I am satisfied that Els had no choice in the circumstances and that the delay in bringing the application was not abusive. Nor although it claims it needed more time, was e.tv. prejudiced. It put up a substantial response in its answering affidavit despite the limited time frame, and presumably had much information on hand given that they had investigated Els for the purpose of the program. I accept that given more time e.tv. may have

been able to produce further information. This further information it was argued during the hearing would have further fortified their papers in relation to the issue of public interest which I discuss later in their reasons. On this issue I indicated at the hearing I would give them the benefit of the doubt. Once this was my approach, I considered that e.tv. was not otherwise prejudiced, and I decided that Els had made out a case for urgency.

The merits

- [14] It is common cause that this application is restricted to what I have termed the footage. It does not seek to prevent e.tv. from covering serious allegations of alleged financial misconduct that certain of its informants have made or will be making against Els and Praxley. Thus, whatever sting they entail be it defamatory or not, will be aired despite the interdict, if it was granted.
- [15] This then leaves the issue of privacy as the main right asserted by Els for his relief. Since this is an application for a final interdict, Els had to establish that he has a clear right. Els asserted his right to privacy on two bases. First his general right to privacy and secondly that the conduct infringes on his rights to privacy in terms of POPIA.
- [16] I consider first the facts on which he relies and then the legal basis.
- [17] The first and obvious point is that Els did not consent to being filmed. Second Els argues that he was never approached by e.tv prior to being 'ambushed' to comment on the allegations. Third, he argues that he was lured to the coffee shop by deception. Fourth he contends he is a private businessman who maintains a low profile, does not have an account on any social media, and cannot otherwise be considered a public figure. Finally, he seeks to rebut usage of the footage because he argues it does not fall within the realm of material protected from prior restraint that our courts have typically upheld. This is because the footage contains no information other than him being confronted and walking away to his car. It is also common cause that he remained silent throughout the encounter, so the footage does not constitute an interview.

POPIA

- [18] POPIA protects what it describes as the data subject's personal information. It is an offence for someone to process someone else's personal information. But even if we consider that broadcasting constitutes processing as defined in the Act, it is not clear what personal information Els relies on. The footage will show him getting up and walking away to his car. Although it reveals his name, this identification is part of the broadcast in any event which is not the subject of the interdict. Nor is his appearance an issue as it is already in the public domain on Praxley's website. At best for him the processing of personal information is somehow the difference between his static image and the moving image of him as it appears on the footage as well as his make of car.

[19] I do not consider that this difference is sufficient to distinguish between what may appear in the impugned footage and what might appear in the non-impugned footage.

[20] But even if I am wrong on this POPIA has a provision which provides for inter alia a journalistic exclusion. This is section 7 which states:

"7. Exclusions for journalistic, literary or artistic purposes This Act does not apply to the processing of personal information solely for the purposes of journalistic, literary or artistic expression to the extent that such an exclusion is necessary to reconcile, as a matter of public interest, the right to privacy or the right to freedom of expression."

[21] The test in section 7 is similar to that for considering an ordinary claim for a right to privacy which I will go on to consider. Put differently the balancing exercise required under section 7 of POPIA between the respective rights of privacy and freedom of expression appears to be the same under POPIA as it would for an ordinary claim of a right to privacy.

[22] What a court needs to balance is the claim of the subject asserting the right of privacy with the right of the publisher to freedom of expression.

[23] It might be assumed that these competing rights weigh evenly on the scale. But when it comes to a prior restraint on publication, as in the present case, they do not, and several decisions of our courts make this clear.

[24] It must be borne in mind that the reason courts so assiduously protect freedom of expression from prior restraint, as the Supreme Court of Appeal expressed it in the Miti Television case, is not for the benefit of the media alone:

"To abridge the freedom of the press is to abridge the rights of all citizens and not merely the rights of the press itself. "

[25] In Hix it was held that applications for orders placing prior restraints on publication ought to be approached with caution.[2]

[26] In Print Media South Africa and Another v Minister of Home Affairs and Another the Constitutional Court summed up the case law in this way:[3]

"The case law recognises that an effective ban or restriction on a publication by a court order even before it has "seen the light of day" is something to be approached with circumspection and should be permitted in narrow circumstances only."

[27] A more in-depth treatment of the subject matter was made earlier in the case of Miti Television where the court held:[4]

"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 been infringed, and an anticipatory ban on publication will seldom be necessary for that purpose. Where there is a risk to rights that are not capable of subsequent vindication a narrow ban might be all that is required if any ban is called for at all. It should not be

assumed, in other words, that once an infringement of rights is threatened, a ban should immediately ensue, least of all a ban that goes beyond the minimum that is required to protect the threatened right.

[28] Does the fact that this case is premised on protecting a right to privacy worthy of a greater claim for protection by prior restraint than might the fear of defamation which is what most of these cases were concerned with. For Els it was argued that it does. However, e.tv. argues that the reliance on claims for privacy to interdict the broadcast is a fig leaf for what amounts to prior restraint.

[29] I agree with e.tv on this. This is because the same considerations that may apply to the publication of allegedly defamatory material should apply to an alleged invasion of privacy. Before the footage has in the words of the court in Print Media “seen the light of day” a court should be careful not to ban it.

[30] Having considered the case law on prior restraint I now consider the law on the protection of privacy. Both parties have considered the dicta in Bernstein the leading case in point. The case summarises the degree of protection given to privacy in a continuum.

“Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.” [5]

[31] If the right of privacy is constrained by its distance from the personal outwards, and is thus a relative concept, what is the premise of the competing claim for freedom of expression. This is best formulated In Print Media where the court stated:

“... the right cognises an elemental truth that it is human to communicate, and to that fact the law's support is owed. In considering the comprehensive quality of the right, one also cannot neglect the vital role of a healthy press in the functioning of a democratic society. One might even consider the press to be a public sentinel, and to the extent that laws encroach upon press freedom, so too do they deal a comparable blow to the public's right to a healthy, unimpeded media.”[6]

[32] Council for Els argued that this is not what Els seeks to restrain by the proposed interdict. This is why he has limited his interdict to the footage not whatever else may be said about his dealings in the program. The footage on this argument contains no information that press freedom concerns are premised on. What is likely to be aired is performative not informative. Thus, in weighing up the contesting claims, Els is seeking not to deny the importance of freedom of expression, but to claim that the likely content of the footage does not justify any claim for protection. At least not of they type that freedom of expression is normally premised on.

[33] I accept that this is an interesting argument. Certainly, e.tv wants to secure the dramatic effect of its footage and the typical modus operandi which is the essence of the Devi Show. The feisty host of the program is known for what they term her door stopping technique. The program thrives on Devi being seen on camera confronting an alleged exploiter of the innocent and holding him to account on camera. This it says explains its insistence on

wanting to screen the footage. This does have elements of the performative, but it does not lack the purpose as well of being informative. The two are not always mutually exclusive and must be judged in their context when considering an evaluation of the subject's right to privacy.

- [34] Moreover, this approach when some material is not objected to whilst others is, compels the court to engage in a piecemeal assessment of the facts. The fact that the footage may contain no communication from Els does not detract from its claim to expression. It must be seen in the context of the overall report which because this is prior restraint, is not before me. Even if it appears that by walking away from Devi, Els appears to be unable or unwilling to refute his accusers, this remains a form of non-verbal communication, albeit he considers it very unfair to him. I am not therefore persuaded to consider that the footage dilutes any claim for freedom of expression asserted by e.tv not only for itself but also for its viewers.
- [35] I return then to Els claims for privacy applying the Bernstein continuum. Els also maintains that there is no public interest in his business affairs as he is not a prominent public figure and has no profile on social media. That may be so, but he has a profile on the internet and accusations concerning the propriety of his business dealings have surfaced on the internet including on the website of a private investigator.
- [36] The allegations of impropriety made against Els are not trivial. The allegations against him involve him misappropriating substantial sums of money from erstwhile clients and have been made by a variety of sources over a period of years according to the version of e.tv. As I mentioned earlier when I discussed the urgency issue, e.tv had limited time to indicate all its sources. Nevertheless, it is based on information from at least six people and investigations with third parties such as the IDC, which had allegedly, according to what one of these sources been told by Els, agreed to provide finance for some of the projects. The IDC had allegedly denied any knowledge of this.
- [37] This means that the allegations against him are sufficiently grave to warrant a claim of public interest. On the Bernstein test the footage was taken in a public place, concerned Els' business and hence how he interacts with the public. His business on his own claims is substantial – a claim to having had more than 430 clients over a 20-year existence. He offers his services to the public. If e.tv's allegations are correct or even partially correct, members of the public may be at financial risk in dealing with his firm. This places his affairs in the public realm. Put differently on the continuum his claims for privacy have receded far from the realm of the private affairs of someone in their private home.
- [38] Nor does the fact that he was lured by deceptive means alter the picture in his favour. Courts have not intervened in even more serious cases. In *Tshabalala-Msimang v Makhanya*, the respondent newspaper had unlawfully obtained the private medical records of a cabinet Minister, but notwithstanding this, the court had refused to interdict the future use of the records in media reporting because to do so “may suspend journalism in a manner too dangerous to accept” [7]

- [39] I conclude that Els fails at the first hurdle for a final interdict– he has not made out a case for a clear right. He fails as well in respect of one of the others - whether he lacked a satisfactory alternative remedy. [8]
- [40] He does - he can sue in due course for damages for an invasion of privacy. Thus, I conclude that no case has been made out for a final interdict on either of these two grounds.
- [41] Els may well feel aggrieved at being door stopped in public after a false inducement to attend a meeting. Whatever his feelings in the matter they do not justify a remedy of prior restraint.
- [42] I did indicate at the hearing that Els was concerned that the identification of his car might expose him to risk. E.tv undertook not to reveal the licence plate on his car. I accept this but nevertheless have made the undertaking an order of court and have extended it to include any other feature that might distinguish his car.
- [43] I do not consider that this case warrants an award of attorney client costs. The case was an unusual one and Els was scrupulous about limiting his relief to the footage only. An award of party and party costs will suffice.
- [44] Although I gave my order on 15 November 2024, I set it out again below.

ORDER: -

[45] In the result the following order is made:

1. The forms, service and time periods prescribed by the Uniform Rules of Court are dispensed with and the application is heard as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court.
2. The application is dismissed.
3. The respondent is ordered to take steps to ensure that the first applicant's vehicle is not identifiable by means of its licence plate or any other distinguishing feature in its broadcast concerning the applicants on 17 November 2024.
4. The applicants are ordered to pay the costs of the application on party and party Scale B.

N. MANOIM

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

JOHNANNESBURG

Date of hearing: 15 November 2024

Date of Reasons: 19 November 2024

Appearances:

Counsel for the Applicant: Instructed by: K. Harding-Moerdyk RHK Attorneys Inc Counsel for the Respondent: Instructed by: A. Friedman Rosengarten & Feinberg Attorneys

- [1] The correct entity that should have been cited is e.tv (Pty) Ltd.
- [2] Hix Networking Technologies v System Publishers (Pty) Ltd and Another 1997 (1) SA 391 (A)
- [3] 2012 (6) SA 443 (CC) para 44
- [4] Midi Television (Pty) Ltd t/a e-tv v Director of Public Prosecutions (Western Cape) [2007] ZASCA 56; 2007
- (5) SA 540 (SCA) at paragraph 19,
- [5] Bernstein v Bester [1996] ZACC 2; 1996
- (2) SA 751 (CC) at para 67,
- [6] Print Media, supra, paragraphs 53-54.
- [7]
- [2007] ZAGPHC 161; 2008
- (6) SA 102 (W) at paragraph 56.
- [8] For the requirements see Setlogelo v Setlogelo 1914 AD 221 at 227A.

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Prepared on 10 October 2026 · Esheria