

SOUTH AFRICA / JUDGMENT

ENX Group Limited v Spilkin (2296/2022)

[2022] ZAECQBHC 42 (8 November 2022)

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COURT

Eastern Cape High Court, Gqeberha

BEFORE

Lowe

CASE / FILE NUMBER

2296/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION,

GQEBERHA

CASE NO: 2296/2022

In the matter between:

ENX GROUP
LIMITED
Applicant
and
BRIAN LEONARD
SPILKIN
Respondent

JUDGMENT

LOWE J

INTRODUCTION

1. Applicant issued an urgent application seeking that a Rule Nisi issue calling upon Respondent to show cause why a final order should not be granted in the following terms:

“2. That the Respondent be interdicted forthwith from harassing the Directors, staff and shareholders of the Applicant, and in particular the CEO of the Applicant – Mr. Andrew James Hannington (“Hannington”) – by committing, inter alia, the following acts of harassment in respect of “the aforementioned persons”:

2.1.1 Repeatedly making telephone calls or inducing another person to make telephone calls to the aforementioned persons, whether or not conversation ensues;

2.1.2 Repeatedly sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail, WhatsApp messages and or any other electronic text messages to the aforementioned persons;

2.1.3 Repeatedly making telephone calls to persons known to the aforementioned with a view of indirectly issuing threats of harm and otherwise against the aforementioned persons.

3. That the Respondent be interdicted from defaming the Applicant and Hannington and or otherwise attempting to spread false narratives which would bring the Applicant and Hannington into disrepute;

4. That the Respondent be interdicted from publishing any false narratives in respect of the Applicant and Hannington.”

2. It should be said immediately that in argument Applicant conceded that a good deal of what was asked for could not be granted on the papers as not being substantiated and at the end of the day Applicant in essence seeks an order that the Respondent be interdicted from harassing the directors and CEO of Applicant, Mr. Hannington (“Hannington”), by way of electronic mail, WhatsApp messages and any other electronic text messages, and that Respondent be interdicted from defaming Applicant and Hannington and/or otherwise attempting to spread “narratives” which would bring Applicant and Hannington into disrepute.

3. It should also be pointed out that the Mr. Hannington referred to is not an Applicant, which having regard to the entire matter and the nature of the relief sought is difficult to understand.

4. It should be said immediately that it is also difficult to understand why the much broader original relief referred to was sought in the context of what was set out in the papers which simply at a glance disclosed that there was no basis herefor.

5. The matter originally came before Hartle J who granted an order by agreement between the parties (as interim relief) restraining Respondent in much the same terms as the notice of motion, this to serve as an interim interdict pending the finalisation of the matter which came before me.

6. The matter is hotly contested by Respondent, it being alleged that the truth “is distorted to portray a particular narrative”. In short it is suggested that the Applicant’s case does not meet the test for defamation, extortion, compounding or harassment and that in essence what is sought is to restrict Respondent from “both enforcing his rights and telling the truth”. Respondent, in addition, complains about the “severe prejudice” that he has suffered and which is occasioned by the manner in which the proceedings have been brought. It is alleged that Applicant has failed to place the entire set of facts and the full background

before the court and is “cherry picking.” In the result Respondent contends that Applicant has failed to make out a case for the relief sought and that the application should be dismissed with costs on an attorney and client scale.

7. Whilst urgency remained in issue when the matter came before me being, says Respondent, not urgent or brought with self-created urgency, being also an abuse of the court process, nevertheless there was before me a full set of the papers filed in accordance with the time table set by Hartle J and this by agreement between the parties.
8. Nevertheless, I will also deal with the question of urgency herein.

URGENCY

9. Urgency must be judged against the background of Rule 6(12) of the Uniform Rules of Court and Rule 12(d) of the Eastern Cape Practice

Directions[1].

10. Urgent applications require an Applicant to persuade the Court that non-compliance with the Rules, and the extent thereof, is justified on the grounds of urgency. Applicant must demonstrate inter alia that it will suffer real loss or damage were it to rely on normal procedure.
11. The Rules adopted by an Applicant in such an application must, as far as practicable, be in accordance with the existing Rules both as to procedure and time periods applicable.
12. A Respondent faced with an urgent application, and to avoid the risk of judgment being given against it by default, is obliged provisionally

to accept the Rules set by Applicant and then, when the matter is heard, make its objections thereto if any[2].

13. In *Nelson Mandela Metropolitan Municipality & Others v Greyvenouw CC and Others* [3] Plasket AJ (as he then was) said as follows:

“[37] It is trite that Applicants in urgent applications must give proper consideration to the degree of urgency and tailor the notice of motion to that degree of urgency. It is also true that when Courts are enjoined by Rule 6(12) to deal with urgent applications in accordance with procedures that follow the Rules as far as possible, this involves the exercise of a judicial discretion by a Court 'concerning which deviations it will tolerate in a specific case'.

- [38] ... it is not in every case in which the Applicant may have departed from the Rules to an unwarranted extent that the appropriate remedy is the dismissal of the application. Each case depends on its special facts and circumstances. This is implicitly recognised by Kroon J in the *Caledon Street Restaurants CC* case when he held - looking at the issue from the other perspective, as it were - that the 'approach should rather be that there are times where, by way of non-suiting an Applicant, the point must clearly be made that the Rules should be obeyed and that the interest of the other party and his lawyers should be accorded proper

respect, and the matter must be looked at to consider whether the case is such a time or not'.

...

[40] ... Indeed, the erstwhile Appellate Division has on a number of occasions turned its back on such formalism in the application of the Rules. For instance, in *Trans-African Insurance Co Ltd v Maluleka Schreiner JA* held that 'technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits'. ... in *D F Scott (EP) (Pty) Ltd v Golden Valley Supermarket, Harms JA* held that the Rules 'are designed to ensure a fair hearing and should be interpreted in such a way as to advance, and not reduce, the scope of the entrenched fair trial right' contained in s 34 of the Constitution.”[4]

14. There are degrees of urgency of course. An Applicant must set out explicitly the circumstances which render the matter urgent such as to justify the curtailment of the Rules, procedures and time periods adopted. That there will be a loss of substantial redress, if not heard on the basis chosen, must be shown.
15. An Applicant cannot create its own urgency by simply waiting till the normal rules can no longer be applied.[5]
16. If the above is satisfied other issues come to be considered, some of which are:
 - 16.1 Whether Respondent can adequately present its case in the time given;
 - 16.2 Other prejudice to Respondent and the administration of justice;
 - 16.3 The strength of Applicant's case and any delay in asserting its rights (self-created urgency).

THE APPROACH TO APPLICATIONS

17. In general terms then the Court can entertain motion proceedings when there are no genuine disputes of fact.
18. Disputes of fact which are discerned in any application are dealt with in terms of Rule 6(5)(g) which permits the hearing of oral evidence in appropriate circumstances.
19. It is clear from the authorities that whilst undesirable to settle disputed facts on affidavit, the first step in considering this issue is to carefully examine such alleged disputes to determine if these are real, bona fide and material.
20. A real, genuine dispute of fact is a question of fact for the Court to decide[6].
21. There must also be an enquiry as to whether such dispute, if established, is relevant and material to the issue to be decided.
22. A real dispute usually arises where Respondent denies material allegations by Applicant and produces positive contrary evidence.

This can only arise where the party raising the dispute has seriously and unambiguously addressed the disputed fact in the answering

affidavit[7]. For a genuine dispute to arise Respondent must satisfy the Court that there are reasonable grounds that he would be able to establish a defence in action proceedings[8].

23. In simple terms a motion proceeding will not be referred to oral evidence or cross-examination unless it is clear that there is a material, real or genuine dispute of fact on the affidavits[9], and will then be decided on the papers.

24. However oral evidence should be allowed if there are reasonable grounds for doubting the correctness of the allegations relevant[10], and if this is not sought the application will be dismissed.

25. It must be remembered that even where facts are in dispute on the papers, but the Court is satisfied nevertheless, that on Respondent's

facts, with those of Applicant which are admitted by Respondent (or at least not denied) that Applicant is entitled to relief, it will make such an order[11].

26. If there is no positive evidence to contradict Applicant's assertions, but a Respondent denies these and Respondent alleges that Applicant's witnesses are biased and untruthful, seeking a referral to oral evidence or arguing that the matter should have been by way of action, Respondent must set out the importance of the evidence it proposes to elicit (by cross-examination of Applicant's deponents) and explain why the evidence is not available. Respondent must, to be successful in the argument, satisfy the Court that there are reasonable grounds such as to establish the defence relied on. Such cases are rare indeed as pointed out in *Minister of Land Affairs and Agriculture v D & F Wevell Trust & Others* [12].

27. It is Applicant, not Respondent, who runs a risk by bringing the claim on motion. That is because, as with any motion proceedings, to the extent that any facts are genuinely in dispute, they must be resolved in favour of Respondent[13]. This much was clearly conceded by Applicant.

28. The SCA has accordingly held that:

"It may be assumed... that an Applicant who presses for a decision on the papers in the face of a factual dispute, by necessary

implication consents to the matter being decided on the basis that the Applicant is prepared to have the matter decided on the basis set out in *Plascon Evans...*". [14]

29. The Court went on to say that "although there are evidently disputes of facts these are not 'real' disputes of fact if either party can succeed on the version of the other party".[15]

30. The *Plascon Evans* rule is well known:

“It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the Applicant’s ... affidavits, which have been admitted by the Respondent..., together with the facts alleged by the latter, justify such order. It may be different if the Respondent’s version consists of bald or uncreditworthy denials, raises fictitious disputes of facts, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers”.[16]

31. That is the legal context in which on the Herbal Zone case must be understood. The SCA affirmed that defamation claims, which include an order for final interdictory relief, can be brought on paper (at paragraphs 36 and 37). However, a Respondent can ask for a case to be referred to trial, if he meets certain requirements. The Court held that “the mere ipse dixit of a Respondent would [not] suffice to prevent a court from granting an interdict. ... It is not sufficient

simply to state that at a trial the Respondent will prove that the statements were true and made in the public interest, or some other defence to a claim for defamation, without providing a factual basis therefor”. In fact, what is required is that “a sustainable foundation be laid by way of evidence that a defence as truth and public interest or fair comment is available to be pursued by the Respondent”.[17]

32. Perhaps it is worth restating that on the Plascon approach, the authorities are clear that a defamation claim may be advanced on motion, including a matter seeking final relief. In this regard whilst there may be somewhat different considerations in such an application in defamation, as opposed to non-defamation matters, the principles applicable to applications are themselves no different. That is not to say that a Respondent in appropriate

circumstances cannot ask for the matter to be referred to trial (or argue that it should have been brought by action) and the Court held in Herbal Zone in this regard that:

“... the mere ipse dixit of a Respondent would [not] suffice to prevent a court from granting an interdict ...” [I]t is not

sufficient simply to state that at the trial the Respondent will prove that the statements were true and made in the public interest,

without providing a factual basis therefore”.[18]

33. In fact, what is required is that “a substantial foundation be laid by way of evidence that a defence such as truth and public interest or fair comment is available to be pursued by the Respondent”.[19]
34. Hix Networking dealt with an interim interdict where it suffices to establish a prima facie right. In this matter the application is for a final interdict and accordingly applicant had to show a clear right and its infringement on a balance of probabilities.

35. The court in *Hix Networking* dealt with the proper approach of a court to an application for an interdict to restrain the publication of defamatory matter in that context. It was importantly pointed out that in cases involving an attempt to restrain publication these must be approached with caution having regard to the fact that freedom of speech is a right not to be overwritten lightly. In *Hix Networking* the court stated that “The appropriate stage for this consideration would in most cases be the point at which the balance of convenience is determined. It is at that stage that consideration should be given to the fact that the person allegedly defamed ... will, if the interdict is refused, nonetheless have a cause of action which will result in an award for damages. This should be weighed against the possibility, on the other hand, that a denial of a right to publish is likely to be the end of the matter as far as the press is concerned”.[20]
36. As this matter is one in which a final order is required, as I have already set out above, there must be clear right and an infringement of that right on a balance of probabilities.
37. Again, in *Herbal Zone* (*supra*) it was emphasised that an interdict of the nature sought in this matter (to prevent the publication of defamatory matter) is directed at preventing the party interdicted from making statements in the future. If granted the court pointed out, it impinges upon the parties’ constitutionally protected right to freedom of speech. “For that reason such an interdict is only infrequently granted, the party claiming that they will be injured by such breach ordinarily being left to their remedy of claim for damages in due course.”[21]
38. In *Midi Television (Pty) Ltd v Director of Public Prosecutions*[22] Nugent JA said:
- “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.”*
39. Having set this out in *Herbal Zone* the court continued:
- “A corporate entity such as Herbs Oils is entitled to claim damages based on defamation. This includes both pecuniary damages for actual financial loss and general damages for harm to its commercial reputation. No attempt was made to show that Herbs Oils had suffered loss as a result of the publication of the advertisement and circular, much less that it would suffer irreparable harm in the future by further publication of such material. Nor did it allege that damages would not be an adequate remedy for such publication. Indeed the third respondent’s founding affidavit entirely lack allegations in regard to these two elements of the claim for an interdict.”[23]*
40. I will deal later herewith relevant to this matter.
41. The above approach has been supported recently in *Manuel v EFF* [24]; *Gqubule Mbeki v EFF* [25] and *Hanekom v Zuma*[26].

42. In Manuel (supra), final interdictory relief was sought on motion relating to the publication of defamatory material. Applicant sought a declarator

that the statements were false and defamatory and an order that these be removed. Further relief sought was an interdict preventing further defamatory statements, the publication of an apology and damages.

BACKGROUND

43. The founding affidavit for Applicant company is given by Brent Hean (“Hean”) the CEO of the West African Subsidiary of Applicant. There is no supporting affidavit by Hannington the main protagonist.
44. It is immediately apparent that the thrust of the application is purportedly aimed at Respondent seeking to interdict him from “harassing the directors, staff and shareholders of the Applicant” and particularly Hannington. As already pointed out above much of what is sought to be interdicted is unsubstantiated on the facts

which disconnect is at no time explained.

45. That being as it may be the crux of what is aimed at is in fact that Respondent be interdicted from “defaming the Applicant and Hannington ... or otherwise attempting to spread false narratives which would bring the Applicant and Hannington into disrepute.”
46. In the “synopsis” referred to in the founding affidavit the crux of the complaint is that Respondent seeks to “utilise instances which arose as a consequence of the business relationship between the Respondent and one of the Applicant’s employees, in relation to a completely unrelated entity, in an effort to extort the Applicant and alternatively its employee into payment of a substantial sum of money by close of business 15 August 2022”. The employee referred to is Hannington.
47. The founding affidavit then sets out that the business relationship referred to is one which relates to “a business relationship external to the relationship between Hannington and Applicant, emanating from both parties’ involvement in the entity Buffelsfontein (Pty) Ltd ...”.
48. Whilst not easy to follow in the founding affidavit it is alleged that on 21 May 2021 as a result of a business interest of one of the subsidiary companies of the Applicant (EIE Group) Hannington engaged the services of the Respondent to obtain an extension of a lease agreement. It is unclear whether this was Hannington personally or acting on behalf of the Applicant. It is then alleged that inasmuch as the EIE Group was a subsidiary of the Applicant Respondent was paid out of the accounts of two other entities within the group of companies – this without explaining why. It is then alleged that subsequently in March 2022 a dispute arose between Hannington and the Respondent (again it is not clear whether this was Hannington personally or for Applicant) “in respect of the management of the Buffelsfontein entity”. Applicant says that Respondent alleged that he was owed funds in

respect of services rendered under a loan account in the

Buffelsfontein entity which he alleged had not been settled, a contention disputed by “the co-shareholders of the Respondent in the Buffelsfontein entity”.

49. It is thus contended thereafter that the relationship between “Hannington and Respondent” deteriorated drastically and that Respondent proceeded to harass and threaten Hannington. It is alleged that during March 2022 the “true colours of the Respondent” became apparent when he was alleged to have claimed an entitlement to funds which says Applicant were not due to him in respect of the Buffelsfontein entity.
50. Explaining this further Applicant contends that Respondent’s allegation was that he was owed money by the Buffelsfontein entity but in a disingenuous fashion imputed such alleged indebtedness to Applicant in circumstances in which Applicant had discharged its obligations to him and had nothing to do with the Buffelsfontein entity.
51. It follows that Applicant alleges that Respondent held out that Hannington had commercially blackmailed him and had misappropriate company funds of the Applicant. This it was said was untrue.
52. It will be noted that up to now, there seems to be a confusing lack of clarity as to the position of Hannington and Applicant and whether what is said relates to one or the other or both.
53. It followed says Applicant that the relationship between Hannington and Respondent deteriorated drastically and Respondent proceeded to “harass and threaten Hannington”.
54. Applicant alleges that the allegations were unsubstantiated and that Respondent had been fully paid in terms of the Respondent’s performance in obtaining the extension of the “lease agreement”.
55. Again this is confusing to say the least.
56. In any event it is alleged that on 13 August 2022 after Respondent had been fully paid nearly a year before, Respondent issued an invoice in the sum of R1 400 000,00 to Applicant and Hannington which was not due or payable. The invoice saying that if payment was not received by 16h00 14 August 2022 that a series of steps would be taken. The affidavit fails to deal with the origin of this claim in any way setting out simply that this was false and giving no background to it bar that this claim was being made.[27]
57. In fact it would seem to be that an email from Respondent of 13 August 2022 (BH23) in fact forms the crux of the complaint by Applicant (and apparently Hannington) and is quoted below:

“I will lodge affidavits and report your conduct to all of, The Registrar of SA Companies, ENX Board, EIE Board, Board of new EIE

owners, Gary Neubert, SA Chartered Accounts Board as well as all and any other interested entity or party. I will report what I believe to be a commercial blackmail crime as well as fraudulent misappropriation of ENX funds to SAPS and request them to open a docket and lay a criminal charge against you to be investigated and prosecuted.”

58. It is then alleged that Respondent proceeded to harass and threaten Hannington by way of sending innumerable text messages to him in one of which the following “unlawful threat” is alleged:

“Maybe you would like to start off by thinking about how you going to explain that to the people I will be sending my affidavits and statements to.

Then after that, consider what else I have up my sleeve ...”

59. It is thus alleged that not only is there no basis for the impropriety alleged against Hannington but that both Applicant and Hannington now stand to suffer severe reputational harm should the conduct of Respondent not be interdicted.
60. It is repeated that this was simply Respondent’s attempt to “extort” Applicant into paying monies that were not due to him.
61. The papers then continue to attempt to distinguish the transactions relevant to the Buffelsfontein entity dispute and what is referred to as the “EIE Group incident”.
62. Put shortly, it is alleged that the Buffelsfontein dispute stretches over the period May 2021 to March 2022 being the period within which the business relationship between Respondent and Hannington (in his capacity as director of the Buffelsfontein entity) soured which it is alleged gave rise to the alleged unlawful conduct of Respondent. This dispute arose between the Buffelsfontein entity and the Walmer Country Club, Respondent alleging that he was instrumental in resolving the dispute which “resulted in the shareholders of the Buffelsfontein entity being paid”. Respondent alleges, says Applicant, that he was entitled to a 5% fee in respect of the facilitation of the settlement.
63. In respect of the EIE Group incident it is alleged that in May 2021 the EIE Group was experiencing difficulty in having the lease agreement in respect of its Eastern Cape business premises extended. Hannington it is said asked Respondent for assistance mandating Respondent accordingly and Respondent was successful in speedily obtaining the extension sought, there developing however, says Applicant a dispute regarding the scope of Respondent’s brief. It is alleged that this dispute formed the basis of the ill-founded allegation of commercial blackmail by Respondent with reference to a particular text message BH10A.[28] BH10A is in fact a lengthy series of text messages between Hannington and Respondent. Respondent alleges that not only were the allegations false but that the dispute was resolved and Hannington authorised payment of R250 000,00 to Respondent. Applicant concedes that the incident was not flattering (presumably to Applicant and or Hannington), when taken out of context but does not constitute anything unlawful as is averred by Respondent who it is alleged mischievously misinterpreted the statement of

Hannington. One has to guess at the statement referred to in the context of the pages of text messages annexed. This approach is of course impermissible and if a part of an annexure is to be referred to this should be expressly and specifically referred to in the papers. It is then alleged that a further transaction was concluded (it is not said between whom) in respect of which Respondent was paid a sum of approximately R60 000,00 which marked the end of the relationship between Respondent and the EIE Group.

64. It is alleged that Respondent confuses the 5% “collection fee” agreed to between himself and Hannington in respect of the Buffelsfontein entity (nothing to do with Applicant) with the R250 000,00 payable in terms of a separate agreement as a service fee for Applicant in respect of its Eastern Cape premises lease agreement extension. It is alleged that the Respondent then attempts to allege an indebtedness to him by Applicant, which is false, referring to the claim for R1 400 000,00.
65. It is said that this is what precipitated the application being Respondent’s “unlawful acts” relating to unsolicited WhatsApp messages to Hannington annexed marked BH14 to BH20. Again Applicant fails to mostly set out any part of these messages in the body of the affidavit to which there is a complaint. The only allegations made arises from the following as set out in the Hean affidavit:

Annexure BH21 in which there is a message demanding payment: ‘Yes, I told Bobby I will walk away from Buffelsfontein then an hour later I find out EIE deal done, not rented. Pay me and it all goes away. Don’t pay and wear it all’.

Annexure BH22 a message which reads: ‘I saved EIE millions. If you don’t pay me I will expose the entire house of cards Step by Step ... THE END.’

An email of 13 August 2022 (BH23) from Respondent to Applicant at his ENX Group email as follows:

“Andrew

This offer supersedes all previously sent offers and is submitted WITHOUT PREJUDICE.

I will accept the following terms in full and final settlement.

1. Payment of attached R1.4 mil invoice before COB 15th August 2022.
2. Unconditional full confidentiality and non-disclosure of settlement terms by both parties.
3. All and any issues/details pertaining to any related matters hereto and between us, will remain undisclosed and never be revisited by either party ever.
4. No further actions can ever be brought against either party by either party in this matter.

Failing the above being accepted ...

1. The above proposed offer is hereby withdrawn and terminated as of COB on Monday 15 august 2022.
2. I reserve my rights in law.
3. I will institute civil proceedings and issue summons for the full 5R fee of the entire EIE sale amount, with costs and apply for a summary judgment on an urgent basis.
4. I will sue for irreparable professional reputational damages I have suffered as a direct result of your conduct, or seek alternative relief thereto.
5. I will lodge affidavits and report your conduct to all of, The Registrar of SA Companies, ENX Board, EIE Board, Board of new EIE owners, Gary Neubert, SA Chartered Accountants Board as well as all and any other interested entity or party.
6. I will report what I believe to be a commercial blackmail crime as well as fraudulent misappropriation of ENX funds to SAPS and request them to open a docket and lay a criminal charge against you to be investigated and prosecuted.

I am done playing your games when the wellbeing of my family is on the line.

I saved EIE millions and am entitled to be paid. *Piss or get off the pot!*"

66. Thereafter Applicant complains of the "most chilling" message of 15 August 2022 as follows:

"Andrew. Your intentions are now abundantly clear, so let me set out mine. Later today I will email you my draft affidavit. We both know exactly what transpired and what you did to me and why, so you will be fully aware of the factual accuracy contained therein. My affidavit is not my civil claim, to which my legal team are currently busy working on, which will be served soon after COB today if no payment is made today, should it be necessary."

My affidavit is aimed at doing to your professional reputation exactly what you and Brent collectively managed to do to mine with both your antics. The only major difference is that you managed to collectively destroy my professional reputation irreparably based on lies, whereas I can and will destroy yours with the factual truth. I have previously made you aware of who will receive my affidavit but subsequently added many others involved in all ENX structures and our common circles. Should payment not be effected by COB today will proceed to the nearest SAP station and sign my final draft affidavit under oath and begin distributing it first thing tomorrow morning to all and sundry. In parallel thereto, will instruct my legal team to initiate all related civil and criminal legal proceedings I have preciously alluded to. I have already incurred legal costs which I will also claim from you. I further record that my latest acceptable settlement offer as emailed to you is to be retracted and expires at COB today failing EFT being

done. We both know that I effectively save ENX millions and also what you did to me and why. I have given you a fair and equitable chance of settling this issue like a man. I am happy to take half the comm and settle and move on without any repercussions. COB today I push the button and won't deviate from my course of action nor ever communicate with you again. Piss or get off the pot. BS."

67. That forms the crux of the entire matter as set out in the founding affidavit and which is aimed at Hannington not Applicant and to which Hannington does not respond by affidavit in this application as I will set out more fully in due course.
68. Respondent's answer casts considerable light on the real issues between the parties which were far from clear in the founding papers to say the least. How this was not all set out and disclosed is difficult to understand.
69. The fundamental issue which Respondent highlights in answer is that Respondent is attempting to obtain payment from Applicant through Hannington in respect of an amount alleged to be owing to him in what he refers to as settlement negotiations with Applicant or its CEO Hannington.
70. It should immediately be said that the papers disclose that Hannington made a settlement offer to Respondent of R500 000,00 in this regard which Respondent did not accept.
71. Respondent set out that in summary Respondent alleges an indebtedness by Applicant to himself denies that he has made threats or harassed anyone save to threaten to expose the "factually true conduct of [Hannington], to the board of the Applicant".
72. Again in summary the following appears in respect of the alleged business dealings referred to by Applicant.
73. In respect of the Buffelsfontein entity, this related to that entity acquiring ownership of a certain portion of land situated on the Walmer golf course in Port Elizabeth. This was to be developed and sold at a profit. Respondent was paid a salary by the Buffelsfontein entity for the work he was doing on behalf of the project and accrued the loan accounts for unpaid salary of which Hannington was aware. The sale agreement, however, was cancelled and the entity then had to set about recovering funds it had paid to the seller of the land. Respondent alleges that he was nominated as the managing director the Buffelsfontein entity and given the task of recovering the money from the seller to receive a 5% fee of whatever was recovered. The money was recovered and the R250 000,00 referred by Applicant was, says Respondent, 5% of the total amount recovered by the Buffelsfontein entity. Respondent alleges that the shareholders or some of them were not happy with his appointment and the collection fee and he was asked to step away from the issue and let Hannington handle things as incoming managing director. Hannington, he says, told him that he, Hannington, would

find a way of paying the amount to make up the losses this to be paid through Applicant. This gave rise, says Respondent, to Hannington

engaging with him on the idea of extending the lease on one of Applicant's properties this being his way of paying him the

R250 000,00 fee that was due on the Buffelsfontein entity issue. Having secured the lease extension Respondent refers to a WhatsApp

message from Hannington stating "you have just got a replacement fee of the R250K". He then invoiced Hannington for the payment of the R250 000,00. On 26 May 2021 it appears that Hannington in response instructed Respondent to issue two invoices each for R125 000,00 dated May 2021 and June 2021. This was done. The invoices clearly state that this relates to the lease extension matter. Resigning from Buffelsfontein, as a condition of the above, Hannington before payment insisted that the resolution relevant to his resignation from Buffelsfontein was signed by all the shareholders. The first R125 000,00 was paid from ENX Leasing Investments Company, the second tranche however being delayed as Hannington had texted to say that this would be regarded as being for a full payment review of properties in PE for EIE. Respondent says that this was a manipulation but that he was finally paid by an entity called SAFICON in July 2021.

74. Respondent then continues to set out the basis of his now claim against Applicant.

75. Respondent states that when submitting the original property proposal linked to the sum of R125 000,00 he saw an opportunity for Applicant to save what he refers to as a vast sum of money. In fact, it turns out that this precipitated the entire dispute between the parties that remains relevant to this matter. Respondent worked out a proposal advising Applicant to bypass all third parties and property developers and by a particular property at Kempston Road, Port Elizabeth, directly from the owner via Respondent contracting Respondent to manage a new/build turnkey project for them which would on Respondent's estimate save over R10 million on the other quotes that Applicant had, to achieve the same goal. Respondent alleges that he and Hannington discussed this and agreed to a fee of 5% which equated to around R2.6 million to Respondent. There followed a series of negotiations and email exchanges relating

to the project and Respondent's fee. Herein lies the dispute. It would seem that Applicant went ahead with the deal proposed by Respondent (denied by Hean) at the time Hannington (alleges Respondent) misleading Respondent at the time as to whether the deal had been done or not, suspecting that EIE was circumventing Respondent and had concluded the deal behind his back as it were

Respondent attended the site and had saw that a building project had commenced. He says that on 11 August 2022 he found out through a reliable source that Applicant had in fact done the deal at his price of R53 million and was taking transfer of the property, thereby in Respondent's mind, this justifying his fee which was then earned. He says he was the effective cause of saving the Applicant millions of rand and that Applicant effectively admitted this by paying him R63 800,00

for his disbursements relevant. It is this deal that Respondent says Hannington responded to when offering him R500 000,00 as a settlement. Applicant, however, in its founding affidavit version does not mention this in any detail at all, save to allege that there was no basis for the underlying invoice.

76. In reply to these allegations a technical point is taken by Applicant that Respondent was not registered with the Property Practitioners Regulatory Authority and continues to say that this do not justify the threats and extortion upon which Applicant relies. Applicant says that the payment of the R63 800,00 was made under “duress”. Whilst not denying the Kempston Road project Applicant (having not mentioned this in any detail in its founding affidavit) does not admit Respondent’s role as the effective cause thereof.
77. It suffices to say that the reply is very brief in this regard and fails to join issue with the detail alleged, in any meaningful way.
78. Whatever the position in this regard, there can be no doubt that the real crux of the dispute between the parties surrounds Respondent’s claim to the sum of R1, 4 million. The correspondence and WhatsApp messages amply support the fact that this was the cause of the real dispute between the parties and the reasons for the exchange of text messages and emails.
79. Respondent insist that these funds were owing to him and admits reacting in an “emotive fashion” having just saved Applicant millions of rands but it (Hannington) refusing to pay his share of the money to which he was entitled.
80. Indeed, in argument, as I understand it, Applicant’s counsel did not contend that this subsequent property transaction was not the entire cause of the now dispute and alleged threats.
81. This remains, however, overlaid by the previous disputes which had developed with Hannington and transactions, the alleged misleading of the Board of Directors says Respondent, by Hannington attached to the R250 000,00 transactions split into two payments of R125 000,00 each.
82. In short Respondent contends that the R1.4 million as per his invoice arose from the Kempston Road property, Hannington having made it clear to him that he would be paid a fee irrespective whether he was to act as project manager of the process or whether this was done on the basis of the proposal as Respondent refers to it. Respondent sets out that Hannington “almost immediately” offered him R500 000,00 in settlement after he had made Applicant and Hannington aware that he had become party to the information that the deal was done.

83. Respondent denies having harassed Hannington saying his intention was always to have the matter settled without going to court but that he was not satisfied with the R500 000,00 offer. He says that what followed was “without prejudice negotiations in an attempt to get what was his due”.
84. Having offered Respondent a settlement of R500 000,00 Hannington then informed Respondent who had not yet accepted same that the offer was withdrawn.
85. In WhatsApp messages attached to the answer it is clear that on 12 August 2022 Respondent having demanded R1 325 000,00 Hannington responded as to whether he was prepared to give a discount after some exchange, Hannington messaging “how does R500K sound”.
86. Later on 15 August 2022 Hannington texted “my offer is off the table because you did not accept it”.
87. It will be appreciated, that it is quite extraordinary that Applicant did not deal with this fully in its founding papers as it is clearly the origin of much of what passed between Hannington and Respondent.
88. The real essence of the matter then comes down to whether, against this full background, there is any legitimate legal basis for the relief sought.
89. That Applicant now contends that no monies were due to Respondent in respect of the Kempston Road deal, there is also no doubt that Hannington offered to settle same seemingly accepting that some monies were due.

THE BASIS OF APPLICANT’S COMPLAINTS

90. The basis upon which the Applicant proceeds commences with the relief sought which, when trimmed of all unsupported in the affidavits, comes down to Respondent being interdicted from harassing Applicant and the CEO (Hannington) and from “defaming the Applicant and Hannington and or otherwise attempting to spread false narratives which would bring Applicant and Hannington into disrepute”.
91. This must be seen against the legal

background.

92. Dealing firstly with the allegation that Respondent seeks to “extort” it must be remembered that this crime is committed when a person unlawfully and intentionally obtains some advantage, which may be patrimonial, from another by subjecting the latter to pressure which induces that person to hand over the advantage. The threat or pressure required as an element of extortion may be for example, one of defamation or as frequently happens of arrest or prosecution[29]. This threat may be express or implied by words or deeds. The unlawfulness required for extortion is that the threat or intimidation must have been exercised unlawfully. One must then look at the way in which the threat was made and the results envisaged. As an example if an employer discovers that an employee has stolen

money and threatens to lay a charge of theft with the police unless the employee returns the money the pressure is not exercised unlawfully because the employer is entitled by law to lay a charge of theft with the police says Snyman[30].

93. There are many circumstances in which it is lawful to exert pressure upon another person. The unlawfulness lies in the way the pressure is used rather than the nature of pressure as explained in Principles of Criminal Law, Jonathan Burchell[31]. Burchell suggests that it must be unlawful to use that pressure for the purpose for which it is used. This depends on the nature and circumstances of the threat. The example given is that in instances of blackmail (a form of extortion) the mere revelation of the information that may be embarrassing to another is not self-evidently unlawful. It is only unlawful if the objective of the threat is to exact some advantage which is not due to the extortioner, that becoming unlawful. This makes it clear that in this matter Respondent's version he was not attempting to gain an advantage which was not due to him – on the contrary he was on his version attempting to extract the R1.4 million due. This immediately discloses that the Applicant's reliance on extortion cannot succeed.[32] This accords with decisions such as Mahomed[33] and Mntonintshi[34] and I do not agree with Snyman (supra) 418 that these decisions are wrong and I following the authority in this division which I am persuaded is clearly wrong.
94. Burchell points out that it is not unlawful to institute legal proceedings in order to assert one's rights. It is thus, in principle, not necessarily unlawful to threaten that legal proceedings will be instituted unless some advantage is obtained. It is only unlawful if the advantage was not due.
95. The question at all times in this matter, is that on Respondent's version what he sought to obtain, (the payment of the R1.4 million), was a sum due to him and therefore not an advantage not due which he attempted to obtain by extortion. That this was not due is insufficiently dealt with not only in the founding affidavit but also in reply.
96. As previously said the unlawfulness lies in the way that the pressure is used rather than its nature and it must be found to be unlawful to use that pressure for the purpose for which it is used. This is determined largely by the nature and circumstances of the threat.
97. This overlaps somewhat with the crime of compounding. This consists in unlawfully and intentionally agreeing, for reward, not to prosecute a crime which is punishable otherwise than by a fine only. In essence, compounding arises where someone agrees not to prosecute on condition that a reward is paid to him. The obtaining of a reward means an advantage which operates as a quid pro quo. The question was posed as to whether someone obtains a "reward" if what he gets is his own property, Kuper J holding that he does not in *Du Ploy NO v National Industrial Credit Corporation Ltd*[35]. The reasoning was that what is "reprobated by the law" in punishing compounding is "the taint" of extortion which is attached to the transaction when someone receives anything to which that person is entitled to. A person is entitled to return of his own property, therefor in agreeing not to prosecute in consideration for its return is not receiving something to which he is not entitled to.

98. At the end of the day, it must be appreciated, that there is a major distinction between extortion and compounding where a party seeks to negotiate payment of what he believes is and may well be due to him threatening consequences. Those consequences must be linked to an unlawful threat as set out above which it seems to me is not established in papers and proper approach thereto. The compounding argument also does not assist Applicant as there is insufficient on the papers to establish that the “crime” was one punishable by a fine only nor was the “reward” one not due, on the proper approach to the papers.
99. Turning to defamation. Defamation is the intentional infringement of another person’s right to his good name being the wrongful, intentional, publication of words or behaviour concerning another which has the effect of injuring that other’s status, good name or reputation.
100. The person who proves that the publication is defamatory and that it refers to that person provides prima facie proof of wrongfulness, a presumption of wrongfulness then arising which places the onus on a defendant to rebut it. A defendant may do so by proving a ground of justification these being both the traditional grounds of justification in defamation cases and the so-called new grounds of justification as may be developed in accordance with the boni mores of our constitutional democracy. The traditional grounds are usually regarded as privilege, truth in the public interest, fair comment, private defence provocation and consent, the new grounds being usually media privilege, any political privilege.
101. A trading corporation is entitled to claim for general damages caused by defamatory statements injuring its reputation as a business.
102. A statement is defamatory if it has a tendency, or is calculated to, undermine the status, good name or reputation of the person complaining thereof. It is a question of law whether the words complained of are reasonable capable of conveying to the reasonable reader or listener a meaning which defames the person complaining thereof. The intent to defame is necessary the publication of defamatory material being presumed to have intent, defendant having the onus of proving the absence thereof.[36]
103. It is trite that a party may obtain an interdict based on defamation but it has been said that the courts should be slow to grant interim interdicts.[37]
104. In this particular matter, Applicant in the context of its founding affidavit and the complaints therein contained, and the remaining facts relevant adjudged upon the Plascon-Evans test will determine the issue as to whether or not an Applicant has established sufficient for the relief sought based on defamation.

105. It cannot be overlooked, that Applicant, in my view, failed to set out the full facts relevant to its claim in its founding papers virtually ignoring the issues that really underlie the Respondent's claim against Applicant and his attempts to secure payment to himself, he being visibly angered and upset by the attitude that it had been adopted by Hannington.
106. It must also be emphasised that in this matter Hannington is not an Applicant, it being only the ENX Group Pty Ltd that is relevant hereto although it seeks to cast the net wider relevant to the relief sought in respect of itself and of Hannington as its CEO.
107. I will deal more fully herewith as to whether any case has been made out relevant to Hannington himself in this regard.
108. It must also be remembered that Applicant's main complaints in fact relate to the correspondence, text messages and the like which mostly adhere to Hannington himself as opposed to and distinguishable from Applicant.
109. In a set of extremely lengthy heads, Applicant's main arguments are that the matter was urgent, that the hearsay evidence in the founding affidavit being inadmissible in respect of the facts making an argument for relief final in nature and in the context of Plascon-Evans as elucidated above.
110. Applicant alleges that on the proper approach Respondent does not deny the contents of the founding affidavit insofar as it avers that he made threats which were "unlawful" and intended to defame or exert pressure and that in essence the facts on the correspondence and text messages are common cause. Applicant argues that Respondent tenders no explanation for the choice words uttered by him and particularly in regard to his threat to distribute an affidavit (the contents of which remain unknown) which was drafted and would be distributed with the sole intention of "destroying the reputation of Hean and Hannington" (notably not Applicant); that he would embark upon the civil route of litigation; that he would pursue the route of criminal prosecution.
111. Applicant goes on to argue that the relationship between Hannington and Respondent (notably not Applicant) became acrimonious from March 2022 onwards as a result of Respondent's believing that he was owed funds by Applicant. It is argued that Respondent maintains that Hannington "commercially blackmailed him" and misappropriated his funds. Apart from contending that Respondent was not a registered estate agent and precluded from acting as one Applicant submits that regardless of whether there was an indebtedness or outstanding money due and owing to Respondent (by whom is not stated in the heads) that "his conduct constitutes harassment, and extortion."
112. Applicant contends that it is uncontested that on 13 August 2022 Respondent issued an invoice for R1.4 million to "Applicant and Hannington" stating simultaneously that if payment were not received by 16h00 on 14 August 2022 he would lodge affidavits and report "your conduct" to all of the Registrar of SA Companies, EIE Board, Board of new EIE owners, Gary Neubert, SA Chartered Accounts Board as well as all and any other interested entity or

parties. That he would report what he believed to be “commercial blackmail crime” as well as fraudulent misrepresentation of ENX funds to SAPS and request them to open a docket and lay a criminal charge “against you to be investigated and prosecuted”. That Respondent sends a barrage of WhatsApp messages to Hannington threatening what he had up his sleeve and to summarise that if he was not paid he would “expose the entire house of cards Step by Step.”

113. Applicant points out that on 15 August 2022 Applicant sent a further communication to Hannington (paragraph 53 of the founding affidavit) stating that the affidavit he referred to was not his civil claim but was aimed at doing to “your professional reputation exactly what you and Brent collectively managed to do to mine...” This indicated that the people referred to above would receive his affidavit but added that others involved in all ENX structures and common circles would be included as he referred to. This repeated the threat to go to the SAPS sign the affidavit and distribute this first thing the next day to all and sundry.
114. Applicant argues that it has a clear right not to be defamed and that whilst Respondent was entitled to legitimate investigations this did not include the kind of threats and alleged defamation that were being made. It was argued that Respondent had no right to refer to Applicant (presumably meaning Hannington) as a fraud or dishonest person or businessman. It was argued that the threat was to spread this “narrative” far and wide.
115. It was argued that these threats constituted harassment referring to the Protection from Harassment Act, which in my view was unhelpful the question of harassment not being raised in the context of the Act but unhelpfully as Applicant is a company does not fall, in my view, within the definition of those subject to that particular Act, nor was I persuaded to the contrary when I raised this in argument.
116. In respect of extortion it is argued that Respondent committed the common law offence thereof. Appreciating that Hannington was not an Applicant (as he should have been) Applicant argues that this threats were also directed against it as opposed to Hannington. In this regard it is pointed out that in the reply Respondent states that “the Applicant” failed to pay what was due and owing; that he had saved Applicant money as a big corporate and that his legal team was in the process of formulating a claim against Applicant and Hannington and that the messages sent were sent without prejudice in negotiation with Applicant.
117. In my view this argument falls dismally short of meeting the mark in justifying Applicant in asserting that the threats and complaints were directed against it as well as Hannington. Indeed, in the argument and on the heads Applicant’s counsel had difficulty in my view, in providing any real substance thereto in this regard.

RESPONDENT’S ARGUMENT

118. Respondent argues that Applicant has launched the application distorting the truth. It is submitted that the papers do not meet the test for defamation or harassment and that in fact it is an attempt to muzzle Respondent.

119. It is argued that Applicant failed to take the court into its confidence in not placing the entire facts and background of the matter before it, a complaint with some considerable justification, not even so in not such of itself to be of great assistance to Respondent necessarily.
120. It is pointed out that there is no supporting affidavit from Hannington and much of what is said falls outside Hean's knowledge. This of course does not meet the argument that the facts and the correspondence is inevitably common cause.
121. It is argued effectively that Respondent effectively was forced to beg and plead for his payments in every instance this no different in respect of the claim for R1.4 million.
122. In respect of this latter issue which is central to the entire matter it is argued that it is clear that there was a contract between Respondent and Applicant and on the facts as properly dealt with in terms of Plascon Evans and supported by the offer to pay him R500 000,00, it must be accepted that the sum was indeed owing.
123. It is argued that Applicant has not set out what conduct of Respondent defames or impugns its good name and that it did not know what Respondent intended to publish or whether it would in fact be defamatory. It is argued that there is no basis set out for an allegation that Applicant would be harmed in its name or reputation. It was argued that no right thinking person would attribute the conduct of Hannington to Applicant nor were the allegations made by Respondent to be attributed to Applicant. It is argued that in effect all Respondent does is inform Hannington that his conduct (not Applicant's) would be brought to the attention

of the relevant parties.

124. Reliance is made on Hix Networking Technologies CC (supra) where the court held that:

"The result is that if the injury which is sought to be restrained is said to be a defamation, then he is not entitled to the intervention of the Court by way of interdict, unless it is clear that the defendant has no defence. Thus if the defendant sets up that he can prove truth and public benefit, the Court is not entitled to disregard his statement on oath to that effect, because, if his statement were true, it would be a defence, and the basis of a claim for an interdict is that an actionable wrong, i.e. conduct for which there is no defence in law, is about to be committed."[38]

125. In this context it is argued that Respondent set out a defence presumably his entitlement to be paid as a defence to defamation this attributed to Hannington's dishonesty and his claim being fully valid and enforceable, what was said being true and in the public interest.
126. It is argued in any event that this does not constitute harassment or compounding and that no other case has been made out.

127. As to urgency it was argued that the matter was not urgent and had never been urgent and should be dismissed on that basis alone. Costs are sought on the scale as between attorney and client.

CONCLUSION

128. Having considered the issues as to urgency and having regard to all matters relevant including the interim order by agreement I am satisfied that the matter is sufficiently urgent to be heard and determined.
129. As to a final interdict such as that sought in this matter the position is as follows.
130. A final interdict may be granted on application if no bona fide dispute of fact exists.
131. The requirements are:
- a. A clear right;
 - b. An injury actually committed or reasonably apprehended; and
 - c. The absence of similar protection by any other ordinary remedy.”
132. Irreparable injury, though relevant in the context of interim interdict, is not a requirement for the grant of a final interdict.
133. A clear right is a matter of substantive law.
134. No other adequate remedy must be present such as to be adequate in the circumstances, ordinary and reasonable being a legal remedy giving similar protection.
135. Applicant faces various difficulties in this matter being predominantly:
- 135.1 The fact that it did not fully disclose in this urgent application (intended to be ex parte), the full facts and circumstances as Respondent more than correctly points out, waiting for Respondent to raise the Kempston Road issue which was the fundamental basis for the defamation and harassment contended for, dealing with that in reply, and hardly satisfactorily[39];
- 135.2 The issue as to whether Applicant as opposed to Hannington, who is not an Applicant, is the subject matter of the alleged threats and defamation as summarised and referred to more fully above attributable to Hannington and not Applicant;
- 135.3 Whether those attributed to Hannington can be taken as referring to or referencing or applying to Applicant;
- 135.4 Whether the statements and threats complained of amount to defamation, harassment or compounding;
- 135.5 Whether a proper case has been made out for the relief sought both in respect of Applicant and Hannington, he not being an Applicant.

135.6 Specifically, whether in the end seeking a final interdict, Applicant complied with the necessary requirements therefor, as I have already set out above, referring to Hix Networking (supra) and Herbal Zone (supra) to succeed Applicant having to show a clear right and its infringement on the balance of probabilities;

135.7 Further, whether Applicant was not defeated by the answer put up for Respondent and whether a sustainable foundation was laid by way of evidence that a defence such as truth and public interest or fair comment is available to be pursued by Respondent;

135.8 Whether Applicant showed a clear right and its infringement on the balance of probabilities as set out in Herbal Zone.

136. It is necessary only to deal with the complaints made in the founding affidavit as that is all Respondent was obliged to meet, Applicant not being able to extend or make out its case in reply.
137. The first complaint relates to the communication of 13 August 2022 in which there is, in its introduction thereto by Applicant, a passing reference to an invoice in the amount of R1.4 million stating that this had no link to Applicant which is patently not accurate, thereby disclosing immediately the fact that Applicant was not taking the court into its confidence in this regard.
138. The statement referred to already quoted above refers to the conduct of Hannington (although it is said this was to Applicant and Hannington) this lacks a proper basis in my view on a reading of the communication and in the fact that it was addressed to Hannington specifically for attributing this to refer to Applicant at all. The threat in this communication to institute civil proceedings is unobjectionable and the threat to lodge affidavits with those mentioned adheres to the conduct of Hannington and cannot at any stretch be said to be attributable to the Applicant. It is a reference to what was alleged to be the fraudulent misappropriation

by Hannington of ENX funds and the charge to be laid against Hannington, not Applicant.

139. Whether or not it was an objectionable defamatory communication in respect of Hannington is a different matter. It is certainly on the face of it defamatory, but Respondent alleges that this was true and that he would have had a defence had Hannington proceeded against him in this regard at least on the allegations to be taken into account on the proper approach to the papers on the usual test. As to the complaint in para 23 of the founding affidavit this is clearly not aimed at nor does it attach to the Applicant but to Hannington – it is a threat to publish in this context.
140. BH23 addressed to Hannington referred to as “Andrew” is a threat to bring legal proceedings but I repeat what I have referred to above, with the same result.

141. There is in BH21 a reference back to the Buffelsfontein matter and the allegation that in this regard by innuendo Hannington was responsible. In BH22 is a reference to the saving of EIE millions, clearly a reference to the Kempston Road project and the threat to expose the entire house of cards step by step is hardly unlawful, or defamatory in respect of Applicant or Hannington.
142. Finally, the so-called “chilling message” of 15 August 2022 was again addressed to Hannington referring to the intended affidavit which relates specifically to Hannington’s professional reputation in terms and to that of Brent Hean. It is a reference to the fact that Respondent’s professional reputation has been destroyed and referring to the ability to destroy Hannington’s reputation (not Applicant). It is effectively a complaint to and about Hannington personally and with only passing reference to the “ENX millions”.
143. Again in my view even if defamatory, it is highly debatable that this refers to Applicant the company, and in my view this cannot be accepted.
144. As I have already set out above, in any event, an interdict such as that which is sought is infrequently granted the Applicant needing to demonstrate that it would be injured by such publication something that would normally be left to a remedy in a claim for damages in due course. In this matter no attempt whatsoever by Applicant is made to show that it has suffered loss or that it would suffer irreparable harm in the future by further publication of such material nor did it allege that damages would not be an adequate remedy for any such publication the founding affidavit being mainly devoid of any such allegations relevant to these two elements of a claim in an interdict.
145. In any event once again, Respondent puts up sufficient to establish that he has a potential defence hereto as to justification relevant to truth and public benefit, more than adequately expressed in his answer though not in those exact terms, the sum on his allegations being due and claimable.
146. I am similarly unpersuaded that extortion or compounding, in respect of which Applicant and Respondent filed supplementary heads, has been established and certainly not in respect of Applicant by reference thereto.
147. In the result, I am entirely unpersuaded on the appropriate test with application to the facts stated in the papers, that Applicant has made out a case for the relief sought in any way at all. Not only is this not said or such as to be understood to refer to Applicant, there is in each instance effectively a justification defence of truth and public interest sufficiently raised, even if Applicant is implicated, or has put up sufficient to justify its interdict sought on the facts in respect of Hannington, this potential defence being sufficient to meet the allegations of defamation at this stage of the proceedings on application. As already set out there is no need for me to determine whether the defence will succeed at trial and in the words of Herbal Zone, it seems to be a colourable defence and a factual basis has been laid for it that cannot be rejected out of hand.

148. In short, this being an application for a final interdict at the end of the day, Applicant has failed to show a clear right and its infringement on the balance of probabilities.
149. In the result the application falls to be dismissed.
150. Insofar as costs are concerned, there is no reason whatsoever nor was any stated in argument as to why the costs should not follow the result in the normal way.
151. In respect of Respondent's claim for attorney and client costs, and notwithstanding the fact that there is some merit in its submissions that there was inadequate disclosure in the founding papers concerning the Kempston Road property deal and the basis of Respondent's claim but this, on its own, is in my view, not such as to establish an entitlement to costs on an attorney

and client basis. The matter is not sufficiently vexatious, to establish this, nor, in my view, does it meet the well- established

principles relevant in this regard.

ORDER

152. The following order issues:

1. The application is dismissed.
2. Applicant is to pay Respondent's costs including those reserved by Hartle J.

M.J. LOWE

JUDGE OF THE HIGH COURT

Appearing on behalf of the Applicant: Mr. N. Jagga instructed by Jagga Inc Attorneys, Port Elizabeth, Ms. Carinus.

Appearing on behalf of the Respondent: Mr. Karuaihe instructed by Andrew Miller & Associates, Mr. Miller.

Date heard:

15 September 2022.

Date delivered:

8 November 2022.

[1] *Bobotyana v Dyanti and Others* 1198/20 ECD Mbenenge JP.

[2] *Caledon Street Restaurants CC v D'Aviera* [1998] JOL 1832 (SE). In re: Several Matters on the Urgent Roll [2012] 4 All SA 570 (GSJ) [15]

[3] 2004 (2) SA 81 (SE) [37], [38] and [40].

- [4] But see: Murray & Others NNO v African Global Holdings (Pty) Ltd & Others 2020
- (2) SA 93 (SCA) [35], [38], [39] and [40]
- [5] Lindeque and Others v Hirsch and Others, In Re: Prepaid24 (Pty) Limited (2019/8846) [2019] ZAGPJHC 122 (3 May 2019) [10]; Masipa & Another v Masipa 2020 JDR 1054 (GP); Edrei Investments 9 Ltd (In Liquidation) v Dis-Chem Pharmacies (Pty) Ltd 2012 (2) SA 553 (ECP); Bandle Investments (Pty) Ltd v Registrar of Deeds and Others 2001 (2) SA 203 (SE) 213; East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/33767) [2011] ZAGPJHC 196 (23 September 2011) [6] and [9] – The fact that Applicant now wants the matter resolved urgently does not render the matter urgent; Ntozini and Others v African National Congress and Others (18798/2018) [2018] ZAGPJHC 415 (25 June 2018) 415.
- [6] Dorbyl Vehicle Trading and Finance (Pty) Ltd v Northern Cape Tour and Charter Service CC [2001] 1 All SA 11 (NC) 123-4.
- [7] Wightman t/a J W Construction v Headfour (Pty) Ltd and Another [2008] ZASCA 6; 2008
- (3) SA 371 (SCA) [13].
- [8] Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others 2008
- (1) SA 184 (SCA) [56].
- [9] Van Wyk v Botha [2005] 2 All SA 320 (C) at 328.
- [10] Khumalo v Director-General of Co-operation and Development and Others [1990] ZASCA 118; 1991
- (1) SA 158 (A), 167G-168B.
- [11] Transman (Pty) Ltd v South African Post Office and Another [2013] 1 All SA 78 (SCA) at [16].
- [12]
- [2007] ZASCA 153, 2008 (2) SA 184 (SCA) [56]-[60]. President of the RSA and Others v M & G Media Ltd 2012
- (2) SA 50 (CC) [34]; Hoffman v Pension Funds Adjudicator and Others [2012] 2 All SA 198 (WCC) 43
- [13] Reddy v Siemens Telecommunications (Pty) Ltd 2007
- (2) SA 486 (SCA).
- [14] Ngquma v Staatspresident; Damons NO v Staatspresident; Jooste v Staatpresident 1988
- (4) SA 224 (A0 at p 243 F-H.
- [15] Ngquma at p243 D-E.
- [16] National Director of Public Prosecutions v Zuma [2009] ZASCA 1; 2009

(2) SA 277 (SCA) at para 26.

[17] Herbal Zone (Pty) Ltd and Others v Infitech Technologies (Pty) Ltd and Others [2017] 2 All SA 347 (SCA) at 361D – 362A; Hix Networking Technologies v System Publishers (Pty) Ltd and another 1997 (1) SA 391 (A).

[18] Herbal Zone (Pty) Ltd and Others v Infitech Technologies (Pty) Ltd and Others [2017] 2 All SA 347 (SCA) at 361D – 362A.

[19] Herbal Zone (Pty) Ltd and Others v Infitech Technologies (Pty) Ltd and Others [2017] 2 All SA 347 (SCA) at 361D – 362A.

[20] Again in the context of an interim interdict.

[21] Herbal Zone [36]

[22] (WC)

[2007] ZASCA 56; 2007 (5) SA 540 (SCA) para [20]

[23] Herbal Zone [36]

[24] 2019 (5) SA 21 0 (GJ)

[24] 2019 (5) SA 21

0 (GJ)

[25]

[2020] ZAGPJHC 2 24 January 2020

[26]

[2019] ZAKZDHC 16 September 2019

[27] This lack of explanation is what was said to be an ex parte application is extraordinary and which indicates either that Hean was unaware thereof or that he choose not to disclose same. There is no version put forward by Hannington.

[28] The offending portion of this is not identified or quoted and this is therefore not properly dealt with as it should have been.

[29] S v Lepheana 1956

(1) SA 337 (A).

[30] Criminal Law 6th Ed LexisNexis page 419 paragraph 8.

[31] Juta 5th Ed 738.

- [32] Applicant, in supplementary heads, sought to persuade me that extortion is committed even where the advantage is due where the act is aimed at the acceleration of an advantage even if due, referring to *Goolabjith v Govender* 2009 JDR 1278 (KZD) and *Diamond v O’Sullivan* 2015 JDR 0335 (GJ).
- [33] 1929 AD 58, 67
- [34] 1970
- (2) SA 443 (E).
- [35] 1961
- (3) SA 741 (W) at 746.
- [36] *Le Roux v Dey* 2011
- (6) BCLR 577 (CC), 2011 (3) SA 274 (CC).
- [37] *Hicks Networking Technologies CC v System Publishers (Pty) Ltd*
- [1996] ZASCA 107; 1997
- (1) SA 391 (SCA); *Herbal Zone Pty Ltd and Others v Infitech Technologies (Pty) Ltd and others*
- [2017] 2 All SA 347 (SCA).
- [38] *Hix Networking* pages 15 – 16.
- [39] Whilst to be frowned upon this is not by any means necessarily such as to deprive Applicant of success if otherwise it is entitled thereto on all the facts.

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