

SOUTH AFRICA / JUDGMENT

Hobkirk v Bricker and Another (6972/2022) [2023] ZAGPJHC 68 (23 January 2023) [2023] ZAGPJHC 68

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mazibuko

CASE / FILE NUMBER

6972/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, JOHANNESBURG)

CASE

NO: 6972/2022

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

NO

23

January 2023

In

the matter between:-

DOMINIQUE

HOBKIRK

APPLICANT

and

SHERYL

LYNN BRICKER

FIRST

RESPONDENT

CARL

BRICKER

SECOND

RESPONDENT

JUDGMENT

Mazibuko AJ

Introduction

1. This is the return day of a rule nisi in which the applicant seeks final relief against the first and second respondents. The application is opposed. On 2 August 2022, Wepener J granted interim interdictory order in favour of the applicant against the respondents.
2. A rule nisi was issued, calling upon the respondents to show cause why the interim order should not be made final. The rule was extended a few times until the hearing of the matter in the opposed motion court.
3. The applicant resides in one of the units in a secured complex in Illovo, whilst the first and second respondents, siblings, live together in another. For this judgment, the first and second respondents shall be referred to by their first names, Sheryl and Carl, and together as respondents.

Applicant's case

4. In her affidavit, the applicant averred that on 3 May 2022, she saw Sheryl standing on the fire escape directly opposite her front door with her phone pointed towards her home in a manner indicating that she was either videoing or photographing her.
5. She confronted her, and a verbal altercation between them ensued. The applicant laid a complaint with the homeowners association.
6. In the second incident, the respondents came to the applicant's home with two armed CAP personnel. During their interaction, it was revealed that the respondents had been observing the applicant to the point of knowing what she was doing, how she was spending her time and with whom.
7. The aforesaid incident was investigated by Complex care and another resident allegedly observed Sheryl a few days before outside the applicant's Unit taking photos.
8. On 17 June 2022, Sheryl approached the Randburg Magistrates' Court and obtained an interim protection order against the applicant, prohibiting the applicant from threatening, harassing, insulting and/or swearing at and abusing her in any manner. The applicant is also prohibited from contacting and communicating with Sheryl.
9. On 20 June 2022, Sheryl and SAPS members came to serve on the applicant the protection order and a warrant of arrest. Which service occurred immediately upon the applicant's return home from a holiday. According to the applicant, this further confirmed that the respondents were watching her movements.

10. The protection application was to be heard on 29 July 2022; however, Sheryl filed her replying affidavit the morning of the hearing. The application was postponed to 20 July 2022.

11. Though legally represented since 3 May 2022, on 18 July 2022, Sheryl addressed an email to the applicant's employer, copying the Global Chief Operating Officer, the head of legal South Africa, and the applicant's colleague.

12. It was argued on behalf of the applicant that the said email was an act of harassment, demonstrating the respondents' malicious intentions. An attempt to defame and harass the applicant personally and professionally.

13. In her founding affidavit, the applicant alleged that the respondents' conduct made the applicant fearful of residing in her own home, so much so that she lived with her parents after being served with Ms Bricker's protection order. The applicant was so fearful of the respondents and their unrestrained rant against her that she upgraded her security to include a one-way glass film and was provided a personal protection officer by her employer.

14. The applicant launched an urgent ex parte application three days after the email to her employer was sent. The interim order was then granted on 2 August 2022.

15. According to the 2 August 2022 order, the respondents were interdicted and restrained from:

15.1. Making unsolicited contact in person with the applicant.

15.2. Approaching and/or entering and/or being within 20 meters of the applicant's apartment, Unit [...] and/or parking bay at [.....]

situated at [...], Illovo.

15.3. Making any communication, whether in writing, including electronically or on social media platforms, telephonically or in person, that insults and/or seeks to undermine or harm the applicant's reputation and dignity.

15.4. Harassing, threatening, intimidating, or verbally or physically assaulting her.

15.5. Defaming, insulting, and tarnishing the applicant's good name and reputation in any manner, way, or form.

15.6. Publishing injurious falsehoods about the applicant.

15.7. Communicating, engaging, or attempting to engage with the applicant or the members of the [...] Body Corporate and /or Complex Care Security, in any manner whatsoever, for purposes of maligning, defaming, discrediting and/or causing harm to the applicant and her reputation and/or to establish her whereabouts.

15.8. Communicating, engaging or attempting to engage with the applicant's employer/s, clients, work colleagues, business associates,

acquaintances or third parties professionally affiliated with her for purposes of maligning, defaming, discrediting and/or causing harm to the applicant's career, her ability to earn an income and her reputation.

15.9. Sharing or disseminating any electronic materials, recordings, Photographs, videos, or any other audio-visual content of the applicant which has been recorded by the respondent(s) to any third party in any manner whatsoever.

15.10. Interfering with the applicant's employer and place of employment.

15.11 Making any direct or indirect contact with the applicant.

15.12

Harassing and threatening her.

15.13 Videoing and/or taking photographs of her.

15.14 Standing on the fire-escape stairwell opposite the applicant's front door and peering through her window; and

15.15. Invading the applicant's privacy.

16. In her replying affidavit, she averred that she had suffered emotional and psychological stress, which required urgent medical intervention as a result of the respondents' conduct. She also has been diagnosed with severe anxiety, which requires therapy.

17. If the order is made final, no prejudice will be suffered, and they will be prohibited from doing what they ought not to.

Respondent's case

18. In its defence, the respondents contended that the applicant failed to fully and properly disclose material facts when she sought the interim order.

19. It was submitted on their behalf that the applicant had not established any clear rights that the respondents would infringe, nor any injury actually committed or reasonably apprehended. Further, she has not established an absence of any other satisfactory remedy available to her.

20. The respondents contend that neither the contents nor the fact that the email was sent to the applicant's employer by Sheryl, in concert with Carl, gives rise to any reasonable apprehension of the risk of irreparable harm. Such an email was nothing more than an innocent attempt by her to "investigate and test the veracity of the allegations" made against them by the applicant. Also, nothing more than a request to obtain documents from the applicant's employer in order to do so.

21. The respondents' further contention is that the applicant could and should have addressed a letter first to their attorneys than

approaching the Court.

22. The respondents' contention in this regard is that the parameters of the interim interdict, which effectively prevents them from unlawfully conducting themselves towards the respondent, have far-reaching consequences and is too wide. Thus, it is prejudicial to them.

Issue

23. The question to be answered is whether the applicant failed to disclose material facts as alleged. Also, whether she has established clear rights that the respondents would infringe on and that no other remedy is available to her. Whether the interim interdict parameters have far-reaching consequences or are too wide. Also, whether or not the applicant has indeed discharged

her onus claiming final relief.

Law and Discussion

Reconsideration application

24. Before the application could proceed, the applicant, through its counsel and as per her supplementary heads filed just before the hearing, she attempted to address the Court on the effects of the previous orders as they relate to the consideration and determination of the final relief as sought.

25. The respondent, through its counsel, opposed this venture by the applicant, contending that it needed more time to appraise itself with the contents of the supplementary heads of argument. The matter stood down to a later day in that week of the opposed motion roll for the respondents' counsel to consider the applicant's supplementary heads.

26. On resumption, the applicant, through its counsel, argued that this Court needed to consider the findings of Senyatsi J during the reconsideration proceedings as he considered the matter and found no material non-disclosures which would warrant the setting aside of the order and dismissed the respondents' reconsideration application.

27. By way of reconsideration, the respondents had their version placed before the Court and ventilated. The respondents have demonstrated no such imbalances, injustices and oppression flowing from the order granted against them. They have already ventilated their purported

issues.

28. The applicant demonstrated, as was accepted by Wepener J and confirmed by Senyatsi J, that she had a clear right to protect, that she had actually suffered harm at the hands of the respondents and that she had the reasonable apprehension of further harm being perpetrated against her. Further, she had no alternative remedy, which entitled her to her relief on an interim basis.

29. The respondents, through its counsel, contended that Senyatsi J did not dismiss their reconsideration application as no such application was ever made. He simply refused to discharge the Rule Nisi granted by Wepener J.
30. On reading the papers, it appears that on 18 August 2022, the respondents filed a notice of motion for reconsidering the applicant's application in terms of Uniform Rule 6(12)(c). In which they sought an order that: "(a) the application be dismissed, with costs.... (b) alternatively, that the application be struck from the roll, without any relief being granted to the applicant, with costs....".
31. "The purpose of Rule 6(12)(c) of the Uniform Rules of Court is to afford an aggrieved party mechanism to revisit and redress imbalances and the injustices flowing from an urgent application that was granted in his absence. A reconsideration may involve a dismissal of the order granted ex parte or an amendment of it". See *Oosthuizen v Mijs* 2009 (6) SA 266 (W) at 267
32. In reconsideration proceedings, the evidence contained in the application that led to the granting of the ex parte order is considered anew. The respondent is afforded an opportunity to give their version. The test is whether the applicant has made out a good case for the interdict it obtained in the ex parte application.
33. In casu, on 23 August 2022, the reconsideration proceedings were before Senyatsi J. He considered the matter and granted an order: "1. The application for discharge of Rule Nisi is refused."
34. It is evident, then, that Senyatsi J did not dismiss the applicant's ex parte application nor strike it from the roll with no interim relief with costs, as sought by the respondents. Instead, he found that the applicant had made out a good case for the interim interdict it obtained in the ex parte application. He also made no amendments to the ex parte order.
35. In examining the papers and litigation history of this matter, to determine what weight and influence the previous orders have regarding the applicant's application seeking a final relief against the respondents. Wepener J considered only the applicant's application (ex parte) in granting the interim interdict. Whilst, Senyatsi J had the benefit of hearing both parties during the reconsideration proceedings.
36. The relief contained in the rule nisi is interim in nature and subject to confirmation or discharge by the Court. It cannot be final or definitive of the parties' rights. See *Moonisami v Palani* 2020 JDR 0808 (KZD) at paragraph (8).
37. At the reconsideration proceedings, considering anew the evidence contained in the application led to the granting of the ex parte order and that evidence by the respondents. Senyatsi J considered not extinguishing the interim interdict Wepener J previously granted in the ex parte application. In the instances; of Wepener J hearing the ex parte application, he issued an interim interdict, and Senyatsi J did not discharge it. In my respectful view,

Senyatsi J left it as is. The interdict did not change its nature nor improve its status. It remained interim.

38. The applicant is now before Court seeking relief making the same interim interdict final.

Non-disclosure of material facts

39. In ex parte applications, the applicant's duty of utmost good faith in disclosing all material facts in their knowledge was in *Schlesinger v Schlesinger* 1979(4) SA 342(W),

endorsed by the Supreme Court of Appeal, as follows:

"Although on the one hand, the petitioner is entitled to embody in his petition only sufficient allegations to establish his right, he must, on the other, make full disclosure of all material facts which might affect the granting or otherwise of an ex parte order.

The utmost good faith must be observed by litigants making ex parte applications in placing material facts before the Court, so much so that if an order has been made upon an ex parte application and it appears that material facts have been kept back, whether wilfully and mala fide or negligently, which might have influenced the decision of the Court whether to make an order or not, the Court has a discretion to set the order aside with costs on the grounds of non-disclosure. It should, however be noted that the Court has a discretion and is not compelled, even if the non-disclosure was material, to dismiss the application or set aside the proceedings.....

Unless there are very cogent practical reasons why an order should not be rescinded, the Court will always frown on an order obtained ex parte on incomplete information and will set it aside even if relief could be obtained on a subsequent application by the same applicant."

40. The respondents' contention regarding non-disclosure by the applicant of material facts during the ex parte application relates to the letter addressed by the applicant's erstwhile attorneys dealing with her initial record of the incident/s in question, the respondents' response to the Community Schemes Ombud Services (CSOS) application, and the respondents' replying affidavit in Sheryl's protection order against the applicant.
41. Regarding the letter by the applicant's erstwhile attorneys, the applicant made allegations concerning this issue when she stated in her affidavit the incidents on 3 May 2022. Indeed, she did not annex her erstwhile attorneys' letter. It is unclear, though, for what purpose the respondents would want the applicant to attach that letter and how its non-disclosure to Court differs from the averments in her founding papers. In my view, the non-disclosure of the letter does not amount to the non-disclosure of material facts for the purposes of an ex parte application, as the applicant made necessary averments in her founding affidavit in this regard.
42. Regarding the non-disclosure of the respondents' response to the CSO's matter and Sheryl's protection order against the applicant, the applicant made averments in her founding affidavit relating to same. There were no documents attached.

43. On reading the papers, the applicant disclosed material facts regarding the complaint about her allegedly infringed rights, which she sought interim relief for. What she did not reveal was the documentation. Regarding the extent of the non-disclosure, I could not find that by not attaching the respondents' response when she sought the ex parte order, she was ultimately granted. In doing so, she has breached her duty of utmost good faith and has misled the Court.
44. Further, I have no reason to believe the Court hearing the ex parte application would have considered the matter differently had there been the disclosure of the documentation in question. I am satisfied that since the non-disclosure is not material and/or critical, there is no ground to set aside the interim order.

Applicant's clear rights

45. The requirements for final relief are a clear right, an injury actually committed or reasonably apprehended, and the absence of any other satisfactory remedy. Relief can only be granted where the facts, as stated by the respondents and the admitted facts in the applicant's affidavits, justify granting such final relief.
46. In determining final relief, the Court examines facts, as set out by the applicant together with those by the respondents, which the applicant cannot dispute to consider whether, having regard to the inherent probabilities, the applicant should, on those facts, obtain final relief. See *Webster v Mitchell* 1948 (1) SA 1186 (W), *Gool v Minister of Justice & Another* 1955 (2) SA 682 (C).
47. It was argued on behalf of the applicant that she launched the application to protect her prima facie right. This includes the right to dignity, privacy, a good name, reputation, a home, freedom of movement, and the right to practice her profession free from interference. Such rights are enshrined in sections 10, 12, 14, 21 and 25 of the Constitution. Also, the respondents harassed, defamed, intimidated, threatened, and maligned the applicant personally and professionally; thus, she was entitled to the final interdict.
48. The question is, were the respondents complicit in sending the email to the applicant's employer?
49. In deciding this question, the following undisputed facts are relevant. On Sheryl's version, she sent the email in question to request information and documentation relating to the protection orders between them. She had a confrontation with the applicant. Sheryl addressed such an email to the applicant's employer, though she had legal representation.

50. The respondents contend that neither the contents nor the fact that the email was sent to the applicant's employer by Sheryl, in concert with the second respondent, gives rise to any reasonable apprehension of the risk of irreparable harm. The respondents' further contention that the applicant could and should have addressed a letter first to their attorneys rather than approaching the Court cannot stand. I agree with the submission that the respondents' conduct was evidently unrestrained and unpredictable.
51. Perusing the respondents' email to the applicant's employer, it appears Sheryl intended to report the applicant that she was using her employer's property, the email address, for personal issues.
52. Further, it was to embarrass and cast negative smears on the applicant's character as she gave her version of the incidents between them and the applicant and the applicant's relationships. I could not find any ground on what business Sheryl had making such reports or sharing such information with the applicant's employer.
53. In my view, by doing that, she invaded the applicant's right to privacy, dignity, reputation, and integrity, as well as the right to practice in her profession, free from intrusion.
54. Out of the 3 full pages of the said email, only about eight sentences refer to her request. The rest, she goes to lengths about the 5 May 2022 incident and other matters to embarrass the applicant. She chose not to instruct her legal representatives to request the said information and documents.
55. The Court is satisfied that the applicant has established clear rights that the respondents have infringed. She also has established a breach or infringement by the respondents of her clear rights. Which conduct of the respondents entitles her to the final relief she is seeking, as she will accordingly suffer irreparable harm if the relief she seeks is not granted. The Court is persuaded, for all the reasons provided, to exercise its discretion in confirming the rule.
56. The question is whether an adequate alternative remedy is available to the applicant regarding the relief provided. I agree with the submission that if the order is not made final, the respondents' conduct will go unconstrained and cause irreparable harm to the applicant's dignity, privacy, reputation, and freedom of movement, as well as the right to practice in her profession, free from intrusion.
57. In my view, interdicts are pitched towards preventing conduct such as that of the respondents when they harassed and belittled the applicant by sending unwarranted emails to her employer and committing all the above acts of harassment, as already discussed.
58. The respondents' contention that the parameters of the interdict, which effectively prevents them from unlawfully conducting themselves towards the applicant, has far-reaching consequences and is too broad, thus prejudicial to them, cannot be sustained. No cogent

facts were presented before Court on how the final interdict is far-reaching and prejudicial to the respondents. It is common cause that the parties' apartments are far from each other. The respondents had been watching her and knows her whereabouts. The parties already apply for harassment orders against each other. This Court is satisfied that the respondents would suffer no prejudice if the final interdict is issued. The application seeking final relief against the first and second respondents is justified to succeed.

59. In the premises, the following order is made.

Order:

1. Paragraph 2 (inclusive of sub-paragraphs 2.1 to 2.1.6) of the rule nisi granted on 2 August 2022, subsequently extended on 24 October 2022, is confirmed.
2. The respondents are interdicted and restrained from:
 - 2.1. Making unsolicited contact in person with the applicant.
 - 2.2. Approaching and/or entering and/or being within 20 meters of the applicant's apartment, Unit [...] and/or parking bay at [...], Illovo.
 - 2.3. Making any communication, whether in writing, including electronically or on social media platforms, telephonically or in person, that insults and/or seeks to undermine or harm the applicant's reputation and dignity.
 - 2.4. Harassing, threatening, intimidating, or verbally or physically assaulting her.
 - 2.5. Defaming, insulting, and tarnishing the applicant's good name and reputation in any manner, way, or form.
 - 2.6. Publishing injurious falsehoods about the applicant.
 - 2.7. Communicating, engaging, or attempting to engage with the applicant or the members of the [...] Body Corporate and /or Complex Care Security, in any manner whatsoever, for purposes of maligning, defaming, discrediting and/or causing harm to the applicant and her reputation and/or to establish her whereabouts.
 - 2.8. Communicating, engaging or attempting to engage with the applicant's employer/s, clients, work colleagues, business associates, acquaintances or third parties professionally affiliated with her for purposes of maligning, defaming, discrediting and/or causing harm to the applicant's career, her ability to earn an income and her reputation.
 - 2.9. Sharing or disseminating any electronic materials, recordings, photographs or videos, or any other audio-visual content of the applicant which has been recorded by the respondent(s) to any third party in any manner whatsoever.
 - 2.10. Interfering with the applicant's employer and place of employment.
 - 2.11. Making any direct or indirect contact with the applicant.

2.12. Harassing the applicant.

2.13. Threatening her.

2.14. Videoing and/or taking photographs of her.

2.15. Standing on the fire-escape stairwell opposite the applicant's front door and peering through her window; and

2.16. Invading the applicant's privacy.

3. The first and second respondents are to pay the costs of this application, jointly and severally, the one paying the other to be absolved.
4. The first and second respondents are to pay the costs of the ex parte application, the reconsideration application and the rule nisi on an attorney and client scale, jointly and severally, the one paying the other to be absolved.
5. The applicant is to pay the costs occasioned by the postponement on 24 October 2022.

N. MAZIBUKO

Acting Judge of the High Court of South Africa

Gauteng Division, Johannesburg

This judgment was handed down electronically by circulation to the parties' representatives by email by being uploaded to Case Lines.

Representation

For the applicant: Ms N. Strathem

Instructed by: Ultrich

Roux and Associates

For the respondent: Mr ME Stewart

Instructed by: Northmore

Montague Attorneys

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