

SOUTH AFRICA / JUDGMENT

Horner v Baranov (AR384/22) [2023] ZAKZPHC 126 (3 November 2023)

[2023] ZAKZPHC 126

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Annandale, Mngadi

CASE / FILE NUMBER

AR384/22

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR384/22

In the matter between:-

GRANT HORNER

APPELLANT

(Respondent in court a quo)

and

GARY DAVID BARANOV

RESPONDENT

(Applicant in court a quo)

JUDGMENT

ANNANDALE, AJ

- [1] This is an appeal against the confirmation of an interim protection order against the appellant by an additional magistrate. The respondent abides the decision of this court on the merits.

- [2] The issue in this appeal is whether the learned magistrate was correct in finding that the conduct on the basis of which the protection order was sought constitutes harassment as envisaged in the Protection from Harassment Act, 17 of 2011 (the Act).
- [3] Section 1 of the Act contains the following definitions which are relevant to the resolution of that issue: in relevant part defines harassment as follows:-

“harassment” means directly or indirectly engaging in conduct that the respondent knows or ought to know –

(a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably –

(i). . .

(ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or

(iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to, or brought to the attention of, the complainant or a related person; or

(b). . .

“harm” means any mental, psychological, physical or economic harm.”

The law

- [4] The law on what constitutes harassment and how conduct alleged to be in violation of the Act is to be evaluated is settled. In *Mnyandu v Padaychi* 2016 4 All SA 110 (KZP) (*Mnyandu*), a full bench of this division conducted an extensive review of the genesis of the Act and comparable legislation in other jurisdictions

before expounding on the correct interpretation of ‘harassment’. It is the only judgment on the topic to which we were referred and which we could find. It is therefore both appropriate and convenient to quote from it to a somewhat larger degree than would usually be necessary.

- [5] The following paragraphs of *Mnyandu* bear directly on the issue before us:

[44] Given the comprehensive ambit of the Act, it is essential that a consistent approach be applied to the evaluation of the conduct complained of, although the factual determination will depend on the circumstances under or context within which the alleged "harassment" occurred. If the conduct against which protection is offered by the Act were to be construed too widely, the consequence would be a plethora of applications premised on conduct not contemplated by the Act. On the other hand, too restrictive or narrow a construal may unduly compromise the objectives of the Act and the constitutional protection it offers. Therefore, the interpretation of the term "harassment" as defined in the Act, is significant.

[65] It is apparent from these cases that the offence of harassment is not merely constituted by a course of conduct that is oppressive and unreasonable but that the consequences or effect of the conduct ought not cause a mere degree of alarm; the contemplated harm is serious fear, alarm, and distress. The legal test is always an objective one: the conduct is calculated in an objective sense to cause alarm or distress, and is objectively judged to be oppressive and unacceptable.

[68] Based on its examination of international legislation, the SALRC recommended that the recurrent element of the offence should be incorporated in the definition of "harassment". The definition in the Act states that "harassment" is constituted by "directly or indirectly engaging in conduct. . . ". However, although the definition

does not refer to "a course of conduct" in my view the conduct engaged in must necessarily either have a repetitive element

which makes it oppressive and unreasonable, thereby tormenting or inculcating serious fear or distress in the victim. Alternatively,

the conduct must be of such an overwhelmingly oppressive nature that a single act has the same consequences, as in the case of a single protracted incident when the victim is physically stalked.

[71] In my view the conduct of the appellant in sending the email may have been unreasonable, as she allowed her emotions to cloud her perception, but I am not persuaded that her conduct was objectively oppressive or had the gravity to constitute harassment.'

[6] Whether the conduct complained of constitutes harassment must consequently be determined in accordance with these principles. The issue arises in the context of the following facts.

The facts

[7] The respondent and the appellant's brother live in the same residential estate. There is a level of animosity between the respondent and the appellant's brother and there are legal proceedings pending between them relating to various disputes.

[8] On 1 November 2021 whilst the appellant was visiting his brother, there was an incident in which the appellant's Rottweiler dog bit the respondent's Maltese Poodle and the respondent's finger. There is some contestation regarding exactly how the incident happened, particularly whether the appellant had his hand on his dog at the time, or whether the animal had simply been let loose in the common area of the complex where the incident occurred.[1] It is unnecessary to determine whose version of events on this score is correct because the incident was plainly not one of harassment

even on the respondent's version that the appellant let his dog loose without regard for others. The dog bite incident is however important context for what followed.

- [9] The respondent was with his dog and his four children[2] aged between 3 and 7,[3] at the time of the dog bite incident and found it very traumatic. His Maltese was admitted to the vet[4] for surgery and the respondent attended at the emergency room of a nearby hospital. The medical report records that he sustained a superficial laceration to his right thumb.[5] The respondent found the incident extremely traumatic, and he and his children underwent psychological therapy as they have a fear of large dogs. The respondent also laid two criminal charges against the appellant[6] as a result of this incident, one for keeping a ferocious dog and another for malicious damage to his property, the poodle.
- [10] The respondent made it clear he intended to lay a civil claim against the appellant too. This was forestalled by the conclusion of a settlement agreement in terms of which the appellant agreed to pay R22,000 to the respondent as compensation for his loss and damage arising out of the dog bite incident, in exchange for which the respondent undertook not to pursue any further civil
- claims against the appellant.
- [11] After 1 November 2021 the appellant visited his brother without incident, although the respondent did regard the fact that the appellant brought his dogs with him as insensitive.[7]
- [12] On 19 February 2022, after the settlement agreement had been concluded and the agreed payment made, the respondent and his son were walking in the common area of the residential estate with their dog when the appellant arrived to visit his brother and a verbal exchange ensued.
- [13] The respondent alleged that the appellant said, 'hey big boy, I see you got your way' in apparent reference to the settlement agreement, to which the respondent replied, 'Excuse me?' The appellant denies this exchange. The learned magistrate found that the respondent's version was more probable in the light of evidence that the appellant had sought to include certain additional matters in the settlement agreement, which the respondent refused to accept. The settlement was ultimately concluded effectively on the respondent's terms. I see no basis upon which the finding of the court below on the score can be faulted.
- [14] It is common cause that the appellant enquired 'how's your hand?' to which the respondent replied, 'mind your own business' and the appellant countered with words to the effect 'karma is a bitch' and 'karma will get you.'
- [15] It was on the basis of the events of 19 February 2022 that the respondent applied for, and was granted an interim protection order on 23 February 2022 in the following terms:

'The (appellant) is prohibited by this court from:

- a) engaging in or attempting to engage in harassment of

- (i) the (respondent)and/ or
 - (ii) the following related persons:
 - (a) Alana Baranov -wife
 - (b) L[...] B[...] -child;
 - (c) F[...] B[...] - child;
 - (d) A[...] B[...] -child;
 - (e) S[...] B[...]— child
 - (b) Enlisting the help of another person to engage in harassment of the complainant (respondent) and/or above related persons; and/or
 - (c) Committing any of the following acts/s:
 - (i) Not to assault, threaten and intimidate the complainant (respondent) and related persons in paragraph 3. 1 (a)(ii);
 - (ii) Not to enter into the (respondent) complainant's residence at no.1[...] C[...] L[...], Driftwood Estate, Prestondale, Umhlanga;
 - (iii) Not to enter the Driftwood Estate, gated complex with the (appellant)'s rottweiler or any other vicious dog.'
- [16] Between the grant of the interim order, and the return date, the appellant visited his brother on numerous occasions without incident.[8] Having considered the affidavits, filed by both parties, and having heard limited oral evidence, the learned magistrate confirmed the interim order on the extended return date.

Analysis

- [17] It will be apparent from the factual exposition above, that the respondent's application for a protection order was based on the single incident of the verbal exchange of 19 February 2022. That being so, by virtue of Mnyandu,[9] the learned magistrate had to be satisfied that, viewed objectively, the appellant's conduct was of 'such an overwhelming
oppressive nature' as to make it 'oppressive and unreasonable, thereby tormenting or inculcating serious fear or distress' in the respondent. It is not without significance that the court below does not reference this test at all.
- [18] The learned magistrate appears to have approached the application as if the dog bite incident was itself an act of harassment and the events of 19 February 2022 (which she mistakenly refers to as having occurred on 19 November
2021) as a 'follow up incident'[10] and thus part of a pattern of behaviour.

- [19] The judgment is however not altogether clear on this score. It deals with a debate about whether the dog bite could be referred to and then finds that the incident was relevant as it 'set the scene for the problem that ensued which resulted in the complainant approaching the court'[11] which is suggestive of the events of 1 November 2021 being of contextual relevance only. The court below also however referred to those events as the catalyst for the incident in February, the following year, which suggests a causal link and the perception of a pattern of conduct.
- [20] Despite the unfortunate lack of clarity in the judgment itself, there are two matters that indicate the court below approached this as a 'pattern of conduct' type of case. The first is that the court found that the respondent and his family had been physically and emotionally traumatised by the events of 1 November 2021.[12] That finding is tantamount to a finding that the dog bite incident constituted harassment, given the definition of that term in the Act. Second, that is the only reading of the judgment which can explain the fact that the learned magistrate confirmed the interim protection order, which prohibited the appellant not only from engaging in conduct in relation to the respondent and his son who was present with him on 19 February 2022, but from conduct in relation to the respondent's wife and his other three children who were not present. These parties were said by the respondent to have been affected and badly traumatised by the dog bite incident (although his wife was not present), not the events of February 2022. There was simply no basis upon which the events of 19 February 2022 could have grounded the relief the court granted.
- [21] To the extent the learned magistrate found that the respondent's conduct on 1 November 2021 amounted to harassment, that was a misdirection. There is nothing, even on the respondent's version of the events surrounding the dog bite incident, to suggest that the appellant was in anyway engaging in conduct which he knew or ought to know would cause harm to the respondent in the sense envisaged in the Act.
- [22] Even if the extensive analysis of the events of the dog bite incident and its effect on the respondent and his family were regarded by the court below only as relevant to the context in which the verbal exchange of 19 February 2022 must be evaluated, the finding of the court below that the appellant's conduct on 19 February 2022 was harassment and intimidation, [13] cannot stand.
- [23] The court below took issue with the fact that the appellant addressed the respondent as 'big boy', which the learned magistrate found was very undesirable, did not create a good impression and amounted to a confrontational approach.[14] The learned magistrate did not however find that the utterance of those words was harassment, and was undoubtedly correct on that score.

- [24] The finding of the court below that the appellant's conduct on 19 February 2022 was harassment, was based on its assessment that the appellant telling the respondent that karma was going to get him and that 'karma is a bitch' amounted to the appellant 'placing some kind of curse' on the respondent.[15] The court below found that the utterance of these words 'obviously had the effect of causing trauma to the complainant' and would have the same effect on any reasonable person.
- [25] In my view this finding constitutes a misdirection both on the law and the facts. Colloquially, karma is the concept that one's own actions influence what happen to one in the future. Bad deeds beget bad luck if you will. The very nature of karma is therefore that a person determines their own luck. The construction of the court below of the statement that 'karma will get you' as a curse, is linguistically incompatible with this concept and in any event doesn't amount to the appellant intending to cause harm. In addition, in my view the statements cannot objectively be regarded as being of such an overwhelmingly oppressive nature that their utterance on a single occasion would be such as to torment and distress the respondent to the degree required for that verbal communication to constitute harassment. To echo the words of the court in Mnyandu, the appellant's utterances were unfortunate but I am not persuaded that his conduct was objectively oppressive or had the gravity to constitute harassment.
- [26] It follows that the court below erred when it confirmed the interim protection order and the appeal must succeed.
- [27] The appellant initially sought an order of costs against the respondent, even though he abided its result. No costs were awarded against the appellant in the court below and the respondent did not oppose the merits of the appeal. Despite this, the appellant sought costs against the respondent. At the hearing before us, the appellant indicated that it no longer persisted in seeking that relief.
- [28] I consequently grant the following order:
1. The appeal is upheld.
 2. The order of the court below confirming the interim protection order granted on 23 February 2022 is set aside and replaced with the following:

'The interim protection order granted on 23 February 2022 is discharged.'

I concur

MNGADI J

JUDGMENT

RESERVED:

4 AUGUST 2023

JUDGMENT

HANDED DOWN:

03 NOVEMBER 2023

Appearances

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[1] P 44 para 6 cf p 61 lines 1 -3

[2] P 6 line 3

[3] P 5 table in para 3

[4] P 14

[5] P 16

[6] P 14 l25 – 30

[7] P 62 l 25 – 30

[8] P 63 para 11

[9] Ibid para 68

[10] P 144 lines 16 -21

[11] P 136 lines 12 - 17

[12] P 128 lines 1 -4 , and 141 lines 15 – 20

[13] P 144 lines 16 – 21

[14] P 141 lines 4 - 6

[15] P 143 lines 1 -5

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