

SOUTH AFRICA / JUDGMENT

Korkie and Others v Ismail and Others (4305/2017) [2018] ZAECPEHC 37 (31 July 2018)

[2018] ZAECPEHC 37

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

G G Goosen

CASE / FILE NUMBER

4305/2017

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, PORT ELIZABETH

CASE NO: 4305 / 2017

Date heard: 26 June 2018

Date delivered: 31 July 2018

In the matter between

JUNE KORKIE First

Applicant

JUNE KORKIE N.O. Second

Applicant

JACK ALLERS GROUP Third

Applicant

WERNER HOLLAND Fourth

Applicant

And

IBRAHIM ISMAIL First

Respondent

MUNEER ISMAIL Second

Respondent

MUSTAFA ISMAIL Third

Respondent

DAWAYDA ISMAIL Fourth

Respondent

WAYNE LESTER JAGGERS Fifth

Respondent

JUDGMENT

GOOSEN, J.

- [1] The applicants commenced urgent proceedings against the respondents on 15 December 2017. They sought an order interdicting the respondents from making threats against the applicants; from damaging or destroying a fence erected at a complex; and from convening a meeting on 19 December 2017 at which a motion of no-confidence in the first to the third applicants was to be tabled. The application was heard on Saturday 16 December 2017 and a rule nisi was issued. Orders as set out above were rendered effective as an interim interdict pending the return date on 30 January 2018. On that day and on several further occasions the operation of the rule nisi was extended. When the matter was finally heard on 26 June 2018, the applicants sought a final order. The respondents opposed the relief.
- [2] The first applicant is the owner of a residential unit in a sectional title scheme established in terms of the Section Titles Act, Act 95 of 1996. The scheme is known as the Allan Hendrickse Complex and is situated in Korsten, Port Elizabeth. The first applicant is also the chairperson of the Allan Hendrickse Body Corporate established in terms of the Act. She joins in this representative capacity as a Trustee acting on behalf of the Body Corporate, as the second applicant. The third applicant is the appointed Managing Agent of the Body Corporate. The fourth applicant is an owner of a residential unit in the scheme.
- [3] The first respondent is also an owner resident at the complex. The second, third and fourth respondents are his adult children who
- reside with him. The fifth respondent is a tenant in one of the residential units.
- [4] The complex consists of 136 sectional title units. It is located in an area which the applicants described as crime-ridden with a high incidence of gang-related criminal activity. The respondents suggest that this description is exaggerated. Nothing, it will be seen, turns on this. It suffices for present purposes to record that concerns about crime and the safety of residents at the complex gave rise to the issues now to be decided.

- [5] It is common cause between the parties that the complex borders onto an area of open ground, which is owned by the municipality. The applicants state that this boundary is not fenced, resulting in easy access to the complex from the open ground. (According to the respondents there was an existing fence which was in need of repair.) Several criminal incidents, including theft of copper pipes at the complex, have occurred. In order to address the issue, the Trustees of the Body Corporate convened a Special General Meeting of the Body Corporate which was scheduled to take place on 26 October 2017. Notices were dispatched to owners on 21 September
2017. The meeting was to take place at the offices of the third respondent in Newton Park. The purpose of the meeting was to obtain Body Corporate permission to install security fencing along the open boundary of the complex, and to authorise the Trustees to sell, maintain and let units for the Body Corporate.
- [6] The meeting did not proceed on 26 October 2017. The reason for this was that no quorum was established as provided for in the Sectional Title Schemes Management Act, 8 of 2011. The applicants accordingly convened a further meeting, apparently in terms of management regulation 19 (4) on 2 November 2017. The applicants allege that a quorum was then established and resolutions were adopted, inter-alia, authorising the installation of a security fence.
- [7] Following this meeting, on 8 November 2017, the fifth respondent sent an email to Ms Cassandra Bennette, an employee of the third respondent, to which was attached a petition signed by 45 owner residents of the complex. The petition records the dissatisfaction of the signatories with the way in which the scheme is managed. In particular the petition cites the fact that meetings are not held at the complex and that decisions are taken by a minority of residents. The signatories called for a Special General Meeting to be convened at which a motion of no-confidence in the Trustees and a resolution rescinding the decisions taken on 2 November 2017 was to be tabled.
- [8] On 15 November 2017 the third applicant wrote to a certain WJ Cornelius, one of the signatories of the petition. In the letter the third respondent asks for confirmation that he is indeed a signatory and suggests that, in the event that he is dissatisfied, he should refer a dispute to the Ombud. In regard to meetings not being held at the complex, the third respondent cites certain security considerations.
- [9] On 22 November 2017 a further letter was sent to the third respondent on behalf of certain concerned owners. In it they take issue with the high-handed tone of the third respondent's earlier letter. In particular, it is suggested that the referral of a dispute to the Ombud would be unnecessary if the owners were given an opportunity to address their concerns with the Trustees and furthermore, that threats of criminal prosecution for non-compliance with certain provisions of the Act amounts to inappropriate intimidation.

- [10] The approach of the third respondent to what appears to have been a reasonable request on the part of a large number of owners for a meeting, appears to have contributed to subsequent events.
- [11] On 6 December 2017 the contractors, Beta Fence, came on site to erect the security fence. The first applicant alleges that on that date the first respondent made a threat to her that he would tear down the fence. An SMS message was sent by the third applicant to the first respondent stating that a criminal charge would be laid against him should he continue to make such threats.
- [12] The first respondent denies having threatened to pull down the fence. He states that he telephoned Mrs Bennette to enquire why they were proceeding with the erection of the fence despite the objections received. He states that she merely laughed when she was confronted with this. He states that he at no stage made any threat to her.
- [13] The first applicant also alleges that the third respondent “attempted to interfere with the contractors” and that the third respondent insulted the fourth applicant in the presence of the contractors. An email was sent to the owner of the unit rented by the fifth respondent advising him of what had occurred and drawing his attention to the fact that he is responsible for the conduct of his tenant.
- [14] The fifth respondent denies that he interfered with the contractors. He admits to being present on the site and that he spoke to some of the persons who were digging fence-post hole, enquiring of them why they were doing so, when some of them were residents who had signed the petition.
- [15] On 13 December 2017 the first and fourth applicants went to check the progress of the works. The first applicant alleges that the first, second, third and fourth respondents approached them. The first respondent is alleged to have threatened to tear down the fence. He then instructed the second, third and fourth respondents to pull down the fence. They pushed down six fence posts and damaged the fence. According to the first applicant, the first respondent instructed “someone” to throw a rock at the first applicant. She did not however, see who did this. The fifth respondent then allegedly joined the fracas and encouraged the destruction of the fence.
- [16] After the fracas the first applicant summoned the South African Police Services. Members of the Police Service arrived at approximately 19h00. After they spoke to the first respondent, the first applicant was advised to approach the Magistrates Court for a protection order. According to the first applicant the contractor returned to the site to repair the damage to the fence on 14 December 2017.

- [17] The respondents deny that they damaged the fence or pushed over any fence posts. The first respondent states that there were at least 50 residents present at the time. He states that when the Police arrived they saw no damage to the fence and that the Police then left. The first respondent admits however that posts were pushed over but states that this could have occurred at some stage that evening by persons unknown.
- [18] As stated at the outset, the applicants seek a final interdict. The only orders sought to be finalised are those set out in paragraphs 2.1 and 2.2 of the interim order, i.e. the orders interdicting the respondents from making threats to the applicants and from damaging the fence. The relief relating to the convening of a meeting at which a motion of no-confidence in the applicants was to be tabled has effectively fallen aside. At the hearing on 16 December 2017 the respondents were present. The issue relating to the meeting was addressed by an undertaking given by the respondents not to table a motion of no-confidence in the Trustees at that meeting.
- [19] Mr Lamprecht, on behalf of the applicants, argued that the facts establish that the respondents, aggrieved by the decision to erect a security fence, unlawfully resorted to self-help. He stated that the denial of involvement in the events of 6 and 13 December 2017 by the respondents, amounts to no more than a bare denial. It was submitted that the respondents concede that there was an incident on 13 December and that the fence was damaged. When regard is had to the positive assertion by the first applicant relating to the involvement of the first to fifth respondents, met only by a bald denial, this court ought to find that there is no genuine and bona fide dispute of fact. Accordingly, it was submitted, the court should find that the requisites for an interdict are established and confirm the rule nisi.
- [20] Mr Naidu, on behalf the respondents, raised several arguments against confirmation of the interim order. The first was that the applicant lacks locus standi in relation to the alleged threat to damage property owned by the Body Corporate, and that the application which purports to be on behalf of the Body Corporate is not authorised. The further arguments related to the existence of disputes of fact which are to be resolved in favour of the respondents. It was accordingly submitted that the application ought to be dismissed on either of these grounds.
- [21] The first applicant seeks relief in both her personal capacity and in her capacity as chairperson of the Body Corporate. There can, of course, be no doubt that she is entitled to seek relief in respect of unlawful threats made against her. It was submitted, however, that in relation to the property interests of the Body Corporate she has no such standing, save in terms of s 41 of the Sectional Titles Act.
- [22] Section 41 provides as follows:

- (1) When an owner is of the opinion that he and the body corporate have suffered damages or loss or have been deprived of any benefit in respect of a matter mentioned in section 36 (6), and the body corporate has not instituted proceedings for the recovery of such

damages, loss or benefit, or where the body corporate does not take steps against an owner who does not comply with the rules, the owner may initiate proceedings on behalf of the body corporate in the manner prescribed in this section.

(2)

- (a) Any such owner shall serve a written notice on the body corporate calling on the body corporate to institute such proceedings within one month from the date of service of the notice, and stating that if the body corporate fails to do so, an application to the court under paragraph (b) will be made.
- (b) If the body corporate fails to institute such proceedings within the said period of one month, the owner may make application to the court for an order appointing a curator ad litem for the body corporate for the purposes of instituting and conducting proceedings on behalf of the body corporate.

(3) The court may on such application, if it is satisfied –

- (a) that the body corporate has not instituted such proceedings;
- (b) that there are prima facie grounds for such proceedings; and
- (c) that an investigation into such grounds and into the desirability of the institution of such proceedings is justified,

appoint a provisional curator ad litem and direct him to conduct such investigation and to report to the Court on the return date of the provisional order.

[23] The requirements of the section are not met in this application insofar as the first applicant seeks in her personal capacity to institute proceedings on behalf of the Body Corporate. The first applicant, however, proceeds in her capacity as a Trustee of the Body Corporate.

[24] Section 36 (6) of the Act provides that:

- (6) The body corporate shall have perpetual succession and shall be capable of suing and being sued in its corporate name in respect of –
- (a) any contract made by it;
- (b) any damage to the common property;
- (c) any matter in connection with the land or building for which the body corporate is liable or for which the owners are jointly liable;

- (d) any matter arising out of the exercise of any of its powers or the performance or non-performance of any of its duties under this Act or any rule; and
- (e) any claim against the developer in respect of the scheme if so determined by special resolution.

[25] Mr Naidu relied on the qualifying phrase “by special resolution” in s 36 (6) (e) to suggest that in the absence of such resolution the Body Corporate is not properly before court and that the first applicant purporting to act as chairperson of the Trustees of the Body Corporate lacks locus standi.

[26] In my view the qualification only applies in relation to proceedings against the developer. The respondent however, placed the authority

of the first applicant to act on behalf of the Trustees and the Body Corporate in issue in its answering affidavit. This was met in reply by the assertion that the first applicant is in fact duly authorised in that capacity, although no resolution of the Trustees is put up in confirmation thereof. Neither party has placed before the court the governing constitution of the Body Corporate which relates to the institution of proceedings. I did not understand the respondents’ objection to be that the Trustees are not entitled to act on behalf of the Body Corporate. Rather it was that the first applicant was not authorised. While it may have been expected that the applicants would put up a resolution of the Trustees to establish unequivocally the authority to bring the proceedings, I accept the clear assertion made under oath made by the first applicant, that she is duly authorised to act on behalf of the Trustees of the Body Corporate. I accept therefore that the Body Corporate is properly before the court to protect its proprietary interests in terms of s 36 (6) (b) of the Act.

[27] In regard to the merits of the application, there can be no doubt that the first applicant has a clear right not to be threatened or intimidated in any manner. The second applicant, i.e. the Body Corporate, also has a clear right to protect its property held in trust in the interests of its members. It was argued by the respondents that the applicants have failed to establish that the

respondents were involved in or responsible for the alleged threats issued to the first applicant and to the damage to the fence. In this regard it was submitted that the denial is not a bald denial. Several affidavits deposed to by other residents, apparently made to the Police, state that the first, second, third and fourth respondents were not involved in damaging the defence or, for that matter, in making threats to the first applicant. Although the provenance of these statements is unclear, their content cannot be ignored. The effect of this is that the respondent’s denial of any involvement in causing damage to the fence is supported by several witnesses. Since the applicants seek final relief in motion proceedings, this dispute of fact is to be resolved on the basis of the well-established principle is set out in *Plascon-Evans Paints Pty Ltd v Van Riebeeck Paints Pty Ltd* 1984 (3) SA 633 (A)). It must therefore be accepted that the applicant has not established that the respondents caused damage to the fence or threatened to do so. A necessary requisite for final relief is therefore not established.

- [28] It is appropriate to highlight, in this regard, the position of the fourth applicant. The fourth applicant, who is a resident in the complex, joined in the application and filed an affidavit confirming the allegations made by the first applicant. Subsequently, however, it appears, that he deposed to an affidavit made to the Police on 30 April 2018 in which he states that the averments in the founding affidavit of the first applicant are not correct. He further denies that the fifth respondent was present at what he describes as the “scuffle of owners” on 30 December 2017 and that the alleged threat made by the fifth respondent to him was “a complete misunderstanding”. It is no doubt the content of this affidavit which caused the applicant’s attorneys to withdraw as attorneys of record for the fourth applicant.
- [29] It is of course not possible to determine the veracity of the affidavits deposed to by the fourth applicant. They however cast doubt upon an important element of the factual basis upon which the applicants rely. These statements furthermore highlight what appears to be a fraught dispute between residents at the complex in regard to issues affecting the management of the complex which this court is not best placed to resolve. I shall return to this issue hereunder when dealing with the costs of the application.
- [30] In regard to the allegations of threats made to the first applicant. There is, similarly, no basis to find that the making of the threats is established on the papers. The first applicant does not allege that she was threatened in some manner, rather the first applicant alleges that the first respondent made a threat to her on 6 December that he would tear down the fence. The first applicant does not state where and in which circumstances of this threat was made. The SMS message apparently sent to the first respondent by the third respondent relating thereto and warning the first respondent of criminal consequences, does not serve to confirm the allegation of the first applicant. There is no suggestion that the first applicant was in the company of Mrs Bennette when the threat was made or that Mrs Bennette herself was threatened. In any event, the alleged threat was one indicating an intention to “tear down the fence” and was not directed at the first applicant. The first respondent in any event, denies making such threat.
- [31] In the circumstances and upon a careful consideration of the papers, I am not satisfied that the evidence, such as must be accepted,
- establishes that the respondents acted unlawfully as alleged or threatened so to act. It follows from this that the applicants have not established an essential requisite for the relief sought.
- [32] That leaves the question of costs. In the ordinary course the costs ought to follow the result. I have, however, already pointed to what appears to be a fraught situation in relation to the ongoing management of the complex and that there are several residents who are dissatisfied with steps taken by the Trustees of the Body Corporate. This fraught situation was certainly not assisted by the tone of the correspondence addressed by the third respondent to the Concerned Owners group when they requested a meeting to address the resolutions adopted on 2 November 2017 and in which they expressed their lack of confidence in the leadership of the Trustees. The tone of that letter, in my view, did nothing

to alleviate the concerns of the residents and may very well have contributed to a “scuffle of owners” and the high emotions which were demonstrated on 13 December 2017.

[33] It is also common cause on the papers that the financial affairs of the Body Corporate are parlous and that it is apparently indebted to the municipality in a substantial sum. Indeed financial management appears to be at the centre of a previous change of Trustees. In the circumstances, it seems to me that it would serve only to exacerbate the situation by burdening the Body Corporate, in effect, with the costs of this application. Whilst I accept that the respondents have been put to the costs of their opposition to this application, I am cognisant of the fact that they have been represented herein by the Legal Aid Board. In all of these circumstances it seems to me both fair and reasonable that each party should pay their own costs.

[34] In the result I make the following order:

1. The Rule Nisi issued on 16 December 2017 is discharged.
2. Each party is ordered to pay its own costs.

G. G. GOOSEN

JUDGE OF THE HIGH COURT

Appearances: For the Applicants

Adv. I. Lamprechts

Instructed by Brown, Braude & Vlok Inc.

For the Respondents

Mr. V. Naidu

Instructed by Legal Aid, Port Elizabeth

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