

SOUTH AFRICA / JUDGMENT

# Marais v Heuvel (A37/2020)

## [2021] ZAGPPHC 721; 2021 (2)

### SACR 588 (GP) (20 August 2021)

[2021] ZAGPPHC 721

## COURT

North Gauteng High Court, Pretoria

## BEFORE

Strijdom, Makhoba

## CASE / FILE NUMBER

A37/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: A37/2020

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

YES

DATE:

20 AUGUST 2021

In

the matter between:

NEELS

MARAIS

APPELLANT

and

PETER

JOHN

HEUVEL

RESPONDENT

**JUDGMENT**

STRIJDOM AJ

**INTRODUCTION**

1. On 12 March 2020 the Respondent applied for a protection order against the Appellant in terms of section 2(1) of the Protection Harassment Act (Act 17 of 2011).
2. The court a quo issued an interim protection order against the Appellant on 12 March 2020. In terms of the interim protection order the Appellant was prohibited in engaging in / or attempting to engage in harassment of the Respondent, enlisting the help of another person to engage in harassment of the Respondent and not to commit the acts of threatens, assault or verbally abuse the Respondent and not to distribute any photographs or videos of the Respondent on social media.[1]
3. On 7 July 2020 a final protection order in favour of the Respondent was issued in terms of section 9(1) and (4) of the Protection from Harassment Act.[2]
4. The Appellant approached this court to appeal against the final order.
5. In the notice of appeal, the Appellant claims that the trial court Inter alia erred on the following grounds of fact and law[3].
  - 5.1 Rejecting the version of the Appellant without any justifiable grounds.
  - 5.2 Failing to take cognisance of the evidence under oath of four eyewitnesses corroborating the version of the Appellant.
  - 5.3 Finding that despite the Appellant's evidence under oath that this was an isolated incident which will not happen in future and that the Appellant could not provide the court with any assurance that it will not happen in future. In making the aforesaid finding, placing a non-existing and impossible onus on the Appellant.
  - 5.4 The court a quo should have found:
    - 5.4.1 That the respondent verbally and physically assaulted the Appellant;
    - 5.4.2 That the Respondent throughout, was the instigator and aggressor in the altercation that developed;
    - 5.4.3 That the incident was a once off incident, which would not happen again in future on the evidence of the Appellant;

5.4.4 The Respondent failed to make out a case on a balance of probabilities to justify the granting of a final protection order.

## COMMON CAUSE FACTS:

6. The following facts are common cause between the parties.

6.1 The Respondent is the owner of four (4) of seven

(7) units at Dykor Park;

6.2 The Appellant's wife is the owner of two (2) of seven units at Dykor Park;

6.3 The Appellant's wife and the Respondent operate their different businesses from the same premises;

6.4 The incident occurred on 26 February 2020 during a Body Corporate meeting, scheduled at Dykor Park;

6.5 There was an altercation at the meeting between Appellant and the Respondent.

## FACTS

### IN DISPUTE:

7. The following facts are in dispute:

7.1 Whether the Appellant assaulted the Respondent by grabbing the Respondent around his neck and In the process pushed him outside the property;

7.2 Whether the Respondent assaulted the Appellant;

7.3 Whether, the Appellant shoved the Respondent from the property in self- defence;

7.4 Whether the conduct of the Appellant has a repetitive element, or was of such a nature that a single act has the same consequences as in the case of a single protracted incident, when the victim is physically stalked.

### SUMMARY OF EVIDENCE:

8. The evidence in this matter can be succinctly summarised as follows:

8.1 The incident occurred on 26 February 2020 during a Body Corporate meeting scheduled at Dykor Park;

8.2 The meeting was attended by the Respondent, the Appellant, the Appellant's wife, Yvonne Cecilia Barnard, Yolandi Viviers and Daniel Jakobus Gericke. All attendees of the meeting filed confirmatory affidavits, confirming the version of the Appellant which were attached to the opposing affidavit filed by the Appellant in the proceedings before the court a quo.

8.3 The Respondent filed a replying affidavit in response to the Appellant's opposing affidavit.

8.4 An audio recording was taken by the Respondent of what transpired during the meeting conducted on 26 February 2020 and both parties provided transcripts thereof to the court a quo. [4]

8.5 During the -meeting a verbal altercation took place subsequent to which and as a result of the conduct on part of the Respondent led to the discontinuation of the meeting. The Respondent then left the meeting.

8.6 The Respondent's version was that the Appellant attacked him without warning, with his hand around his throat, blocking his air passage and pushed him off the premises.

8.7 Directly after the Respondent left the meeting, a physical altercation between the parties occurred. The Appellant contends that the Respondent was the instigator of the physical confrontation and that he then retaliated. The Respondent contended that the Appellant was the aggressor and instigator of the physical altercation.

8.8 A video recording of the altercation was presented to the court a quo and forms part of the record of proceedings.[5]

#### POINT IN LIMINE:

9. It was submitted by the Respondent that during the proceedings in the court a quo, that the Appellant's attorney indicated to the learned Magistrate that there are four (4) individual videos, taken at the scene of the incident, each from a different camera. However, the Appellant uploaded five (5) video clips onto Caselines. It is further submitted that the Appellant now seeks to introduce further evidence to this court, which was not presented before the court a quo.
10. It was clearly stated in the judgment of the court a quo that both parties have accepted that the court a quo ought to see the video in respect of what transpired on that day and the court a quo has viewed the video.[6]
11. After viewing the video, the court a quo came to the following

#### conclusion:

"It is not extremely clear, these videos. But it seems that at some point...(instinct) on the video that the complainant may have touched or placed ...(indistinct) assaulted the Respondent, but what is very clear from the video that I have seen is that the Respondent is in fact...(indistinct) the complainant out of the building and at a certain point, the complainant then...(instinct) his files down and retaliates and he comes back to try and attack the Respondent but it appears from the video that there does not seem to be any contact".[7]

12. In my view the videos were property placed before the court a quo with the consent of both parties. I have viewed the four video clips uploaded on Caselines (item 8). There appears to be no video footage on the fifth (5th) video clip.

13. There is no conclusive evidence to suggest that the four video clips contained new evidence. In my view the same four (4) video clips were shown to the court a quo by agreement between the parties. There is

no merit in the Respondents point in limine.

#### PRINCIPLES APPLICABLE TO APPEAL ON FACT:

14. It is settled that a court of appeal will not interfere easily with a finding of fact and credibility made by the trial court.[8]
15. In the absence of factual error or misdirection on the part of the trial court, its finding is presumed to be correct. This was also held to be the position in *S v Bailey* 2007 (2) SACR 1 (C).
16. In searching for signs of demonstrable misdirection by the trial court the breaking down of the body of evidence in its component parts is a useful aid to a proper understanding thereof. In *S v Hadebe and others*[9] the court however cautions that one must guard against a tendency to focus too intently on

"... separate and individual parts of what is after all a mosaic of proof. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But once that has been done, it is necessary to step back and consider the mosaic as a whole. If that is not done, one may fail to see the wood for trees."

17. It is not only the finding of the court a quo which must be considered but also especially, the trial court's reasons. Therefore, such reasons ought to be properly formulated and mentioned in the trial court's judgment.[10]

#### EVALUATION OF THE EVIDENCE AND THE FINDINGS OF THE COURT A QUO:

18. From the Judgment by the court a quo it is clear that the learned magistrate provided no indication which evidence was taken into consideration and what comparative weight was attached to the evidence considered.
19. The parties provided contradictory versions of what transpired, whilst the evidence of independent witnesses was ostensibly not taken cognisance of.
20. The learned magistrate gave no reasons why she relied on the evidence of the Respondent and why the evidence of the Appellant as corroborated by his witnesses was rejected.
21. In *S v Trainor* [11] Navsa JA set out the obligation of a trial court:

*"A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must, of necessity, be evaluated, as must corroborative evidence, if any. Evidence of course must be evaluated against the onus on any particular issue or in respect of the case in its entirety."*

## THE VIDEO EVIDENCE:

22. The video footage taken in the reception area of the Appellant's premises clearly shows the Respondent attacking the Appellant as the Appellant staggers backward at the top of the stairs.
23. The video footage also illustrates the Respondent throwing punches at the Appellant. The Appellant can be seen to escort the Respondent from the business premises.
24. The objective evidence of the video footage conflicts with the Respondent's version of being assaulted and exposes him as the aggressor.
25. It is submitted by the Respondent that the learned Magistrate did not misdirect herself on the facts or law and did not err with regard to her factual findings.

## THE PROTECTION FROM HARASSMENT ACT, 17 OF 2011:

26. In section 1 of the Act, "harassment" is defined as:

"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 by unreasonably-
  - (i) Following, watching, pushing or accosting of the complainant or a related person, or loitering outside or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;
  - (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) Amounts to sexual harassment of the complainant or a related person."

27. In considering the interpretation of the term "harassment" as defined in the Act the court in *Mnyandu v Padayachi*[12] decided as follows:

*"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 to widely, the consequence would be a plethora of applications premised on conduct not contemplated by the Act." The court further concluded that:*

"... 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."

28. The learned Magistrate erred in placing an onus on the Appellant to prove that the incident will not happen in future. The learned magistrate remarked as follows in her reasons for judgment:

"The respondent is not able to give this court any further assurance that it will not happen again and further "It is not crystal clear what steps the respondent has taken that this will not happen again." [13]

29. Respondent advances the argument that associates of the Appellant loitered outside of the business premises of the Respondent on 29 May 2020 and that this incident is a definite indication of the future conduct of the Appellant and inspires the reasonable belief that harm may be caused to the Respondent.
30. The mere presence of the so-called associates in my view does not Inspires the reasonable belief that harm may be caused to the Respondent.
31. The incident in question was an isolated event. There is no evidence to suggest any repetitive conduct on the part of the Appellant either proceeding or following thereafter.
32. It cannot be said that the alleged threat (if any) was of such an overwhelming objective oppressive nature which tormented and inculcated serious fear or distress in the Respondent.
33. In my view the learned Magistrate failed to consider whether the Appellant "...has engaged or is engaging in harassment" by considering firstly any repetitive behaviour on the part of the Appellant, alternatively whether this, single incident, was of such overwhelming oppressive nature that it had the same consequences as repetitive behaviour.
34. On a conspectus of all evidence, I am of the view that the court a quo erred on the facts and the law.
35. I am further of the view that the conduct complained of does not constitute harassment as contemplated in terms of the Harassment Act and that the Court a quo erred in granting a final protection order.
36. In the result, I propose that the appeal must be upheld with costs.
37. In the premises we submit that the following order should be made.
- 37.1 The appeal is upheld with costs.

STRIJDOM J J

ACTING JUDGE THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

I AGREE AND IT IS SO ORDERED.

MAKHOB A J

JUDGE OF THE HIGH COURT

Date of hearing: 29 JULY 2021

Date of judgment: 20 AUGUST 2021

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 20 AUGUST 2021.

Appearances:

For the Applicant: Adv L W de Beer

(Instructed by B Bezuidenhout Inc)

For the Respondent: Adv. S F Fisher-Klein

(Instructed by Velilo Tinto & Associates)

[1] Vide: Casellnes p 02·2 vol 1 of record.

[2] Vide: Caselines judgment p05-43 to 49

[3] Vide: Caselines, p05-55 to 60 notice of appeal

[4] Vide: casellnes, p 04-1 to 04 - 6 and p 04-33 to 04-38.

[5] Vide: Caselines item 8

[6] Vide: caselines judgment p.05-44 line14-17

[7] Vide: caseLines p 05-45 line16·25

[8] Vide: R v Dlumayo and Another 1948 (2) SA 677 (A) 705-6

[9] Vide:1997 (2) SACR 641 (SCA)

[10] Vide: S v Nkosi 1993 (1) SACR 709 (A).

[11] Vide: 2017 SA 151 (KZP)

[12] 2017 (1) SA 151(KZP)

[13] Vide: caselines, p 05-46 line 8-16

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