

SOUTH AFRICA / JUDGMENT

Soares v Geber and Another
(2024-087263) [2024] ZAGPPHC 798;
2025 (1) SACR 493 (GP) (16 August 2024)
[2024] ZAGPPHC 798

COURT
North Gauteng High Court, Pretoria

BEFORE
Strijdom

CASE / FILE NUMBER
2024-087263

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IN
THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)
Case
Number: 2024-087263
(1)
REPORTABLE: NO.
(2)
OF INTEREST TO OTHER JUDGES: NO.
(3)
REVISED.

DATE: 2024-08-16
SIGNATURE
In

the matter between:

ROGERIO
CAETANO SOARES
Applicant
and
MAGISTRATE
GEBER
First Respondent
RYAN
ERASMUS
Second Respondent

This
judgment 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
handing down is deemed to be 16 August 2024.

JUDGMENT

STRIJDOM J

[1] This is an urgent application wherein the applicant seeks and order in respect of Part A, in the following terms[1]:

1.1 That condonation be granted for the non-compliance with the Forms and Rules of Court and that the matter be heard as one of urgency.

1.2 That the proceedings under Germiston case no 301/2024 be stayed pending the determination of Part B hereof.

1.3 That on receipt of the reasons of Additional Magistrate Geber and the record of proceedings the applicant is given leave to supplement his papers for the review application.

[2] The first respondent did not file a notice of intention to oppose the application. The matter is opposed by the second respondent.

[3] At the commencement of the application the Court ruled that the matter is urgent and condone non-compliance with the Forms and Rules of Court.

[4] The applicant and the second respondent are neighbours and have enjoyed an unfortunate unpleasant relationship.

[5] The second respondent complains, inter alia, that the applicant has conducted himself in an aggressive and abusive manner towards his wife.

- [6] This led the second respondent to institute proceedings against the applicant in the Germiston Magistrates' Court in terms of the Protection from Harassment Act 17 of 2011 ("the Harassment Act").
- [7] It was stated by the applicant in his founding affidavit[2] that that while the proceedings were pending in the Magistrates Court, Magistrate Geber had met with the legal representative of the second respondent in his chambers after court proceedings on 19 June 2024 in the absence of the applicant's legal representative.
- [8] The applicant's legal representatives requested that the first respondent recuse himself from the proceedings as the applicant has a reasonable apprehension that the first respondent and the second respondent's legal representative discussed the matter in the absence of the applicant's legal representative as the second respondent's legal representative was in chambers for a lengthy period of time. The applicant is of the view that the first respondent may be biased and that he would not receive a fair trial.
- [9] The first respondent refused the recusal application and stated that there was no proper application before him.
- [10] The first respondent, after delivering his judgment not to recuse himself, cited the ethical rules of the Legal Practice Council ("LPC") and he scathed the applicant's legal representative's conduct, despite not alleging any breach of the rules of the LPC. He further quoted Section 108 of the Magistrates' Court Act relating to the arrest of persons in Court, in that when someone is in contempt of Court, they may be removed and locked up, and that it was permissible for him to seal the doors of the Court room.
- [11] A court orderly entered the court room and locked the court doors whilst the applicant and his legal representatives were in the court room. The applicant and his legal representatives feel threatened, intimidated and fearful to appear before the first respondent due to the hostile environment which he created and further due to his untoward conduct on 02 August 2024.
- [12] The applicant opines that the circumstances that he found himself in were hostile as the first respondent has detained him and his legal representatives in his Court room and that they are in no position to appear before the first respondent on 19 August 2024 for the reasons given in his founding affidavit.
- [13] The second respondent's attorney explains that on a previous occasion, out of courtesy, he informed the first respondent that the second respondent would not be present at the next hearing due to a prior commitment and that the applicant's representatives had already left, hence them not being present when this message was conveyed to the first respondent. That was the extent of the interaction, and the merits of the matter were not discussed.
- [14] It is therefore common cause that the second respondent's attorney has communicated with the first respondent in the absence of the applicant's representatives.

- [15] The first respondent did not contest the averments made by the applicant against him concerning his conduct in Court and the alleged discussion with the second respondent's attorney.
- [16] There are cases where the circumstances are such that it is not only possible but desirable to decide such a dispute on the papers. This is such a case in my view on account of the nature and extent of the admitted and undisputed facts seen in the light of the evidence and the probabilities.
- [17] It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it would be difficult to do so. Justice can be defeated by an over-fastidious approach to a dispute raised in the affidavits.
- [18] I have carefully perused the affidavits and after considering the nature and extent of the factual disputes, I have come to conclusion that the balance of probabilities favoured the version of the applicant.
- [19] If the interdictory relief sought is interim in effect, form and substance the applicant must establish the following to succeed:
- (a) a right prima facie even though open to some doubt;
 - (b) a well-grounded apprehension of irreparable harm if the interim relief is not granted;
 - (c) a balance of convenience in their favour; and
 - (d) the lack of another remedy adequate in the circumstances.
- [20] It was submitted by the second respondent that even if the Court accept the version of the applicant, the applicant has not met any of the requirements for an interim interdict.

Prima facie right

- [21] Section 34 of the Constitution guarantees access to Courts and provides as follows:

"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court or, where appropriate, another independent and impartial tribunal or forum."

- [22] It was stated in *Olympic Passenger Service (Pty) Ltd v Ramlagan*[3] that:

"It thus appears that where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicant's prospects of ultimate success may range all the way from strong to weak."

[23] The Court has a discretion, to be exercised judicially upon a consideration of all the facts.

[24] In my view the applicant has established a clear right to have a fair hearing in the Magistrates' Court. I am also of the view that the applicant has a strong prospect of success in the review application as he has demonstrated the prejudice that he has already suffered and may suffer if the matter has to proceed before the first respondent.

Irreparable harm

[25] In the event that the harassment application is adjudicated, and a final order is granted against the applicant in favour of the second respondent before the review application has been disposed of, the applicant will suffer significant harm that may be irreparable.

[26] A "reasonable apprehension" of injury is one which a reasonable man might entertain when faced with certain facts. The test is objective. It must be decided, on the basis of the facts established, whether there are any grounds for the entertainment of a reasonable apprehension by the applicant. Where the unlawful infringement of a litigant's rights are threatened he need not wait for an actual infringement to occur but can approach the Court for an order to restrain conduct which would constitute such an infringement.

Balance of convenience

[27] The essence of the balance of convenience is to assess which of the parties will be least seriously inconvenienced by being compelled to endure what may prove to be a temporary injustice until the answer can be found at the end of a trial. The stronger the prospects of success, the less need for the balance of convenience to favour the applicant.

[28] In my view the balance of convenience favours the applicant. I must agree with the submission made by the applicant that he stands to suffer significant inconvenience and harm if the harassment application is adjudicated and a final order is granted. The second respondent stands to suffer less inconvenience if the harassment proceedings are temporarily stayed, taking into consideration that no further allegations have been made by the second respondent of any allegations in relation to the Harassment Act.

No other satisfactory remedy

[29] It is trite that the grant of an interdict is a discretionary remedy. One of the main factors which the Court is enjoined to take into account in deciding whether to exercise its discretion is whether there is any other remedy to the applicant which can adequately protect him in his right.

[30] It is evident that on the evidence before me the applicant does not have an alternative remedy available that can adequately protect him in his right. He may be subjected to an unfair and biased trial.

Conclusion

[31] On a conspectus of all the evidence before me I am persuaded that the applicant has passed the threshold for the requirements of an interim interdict and that a proper case has been made out for the stay of the proceedings in the Germiston Magistrates' Court under case number 301/2024, pending the review of the Magistrate's refusal to recuse himself, to be heard on an urgent basis.

[32] In the result, the Draft Order marked "X" is made an order of Court.

J.J. STRIJDOM

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2024-087263 HEARD ON: 13 August 2024 FOR THE APPLICANT: ADV. L. LIEBISCH
INSTRUCTED BY: Alice Swanepoel Attorneys FOR THE 2nd RESPONDENT: ADV. J.P. STEENKAMP
INSTRUCTED BY: Thotharan Attorneys DATE OF JUDGMENT: 16 August 2024

[1] Caselines: 01-1 to 01-5 Notice of Motion

[2] Caselines: 02-1 to 02-19

[3] 1957 (2) SA 382 (D)

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