

SOUTH AFRICA / JUDGMENT

Welhelmus Niewoudt v Rall (895/07) [2008] ZANCHC 33 (13 June 2008)

[2008] ZANCHC 33

COURT

Northern Cape High Court, Kimberley

BEFORE

F E Mokgohloa

CASE / FILE NUMBER

895/07

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IN

THE HIGH COURT OF SOUTH AFRICA

(Northern

Cape Division)

Case Nr: 895/07

Heard: 16/05/08

Delivered: 13/06/2008

In

the matter between:

GERT

JOHANNES HERMIAS WELHELMUS NIEUWOUDT APPLICANT

And

JOHAN

RALL RESPONDENT

JUDGMENT

Mokgohloa A J:

This is the return day of a rule nisi which was granted on 27 July 2007 in terms whereof the respondent was restrained and interdicted from having any contact with the applicant through a cellphone, telephone or any other manner except through applicant's attorneys. The respondent was further restrained and interdicted from threatening the applicant in any manner whatsoever.

The applicant is a major male farmer who reside at Constantia farm, Daniëlskuil, Northern Cape.

The respondent is a major male director of B+W Instrumentation & Electrical (Pty) Ltd, a company trading as industrial contractors

and reside at 2 Assante, 50 Sixth Avenue, Alberton, Gauteng. His company had a temporal office at Daniëlskuil.

The applicant was married to one Elsabé Niewoudt and one minor child, a boy aged 9 was born out of their marriage. During 2006 they experienced problems in their marriage relationship which led to the applicant leaving the common home i.e 4 Kort Street,

Daniëlskuil. The applicant instituted divorce proceedings against Elsabé.

Subsequently, the respondent started a love relationship with Elsabé. Pursuant to this love relationship the respondent visited Elsabé frequently. He sometimes stayed over at her place. Furthermore the respondent used Elsabé's and applicant's home as a storehouse for his caravan. Incidentally this is the home which used to be the matrimonial home of applicant and Elsabé. This arrangement caused the applicant serious problems and unhappiness particularly as his minor child resided there with Elsabé.

The result of the arrangement referred in paragraph 5 supra, was an avalanche of some text messages through mobile phones between the applicant and respondent. In an attempt to capture the messages and mood reflected in the messages, I have deemed it fit to quote them verbatim. On 7 February 2007 and dates following, the respondent sent the following SMS messages to the applicant:

"1. 07-02-2007

Gerrit kan miskien God van jou koningkryk wees, maar dit is al. 'n Man wat 'n vrou behandel soos jy is nie 'n man nie, maar eerder 'n lafaard. Elzabie is dalk op papier nog jou vrou, maar verder niks. Dit was jou keuse om haar te verneuk en te los, so aanvaar dit. Ek is Elzabie se vriend en glo my ek gaan nie toelaat dat jy haar enige dag verder so behandel nie. Jy is welkom om te probeer, maar ek dink jy het te veel geraamtes in jou kas om verder met jou kinderagtige dinge aan te gaan. As jy iets persoonliks van my doen en late wil weet kontak my gerus. Ek het duisende rande se besigheid met jou slaghuis gedoen, maar nou dat ek weet watter tipe mens jy is stop dit ook dadelik. Jy is meer as welkom om my persoonlik te ontmoet as jy wil. Sal Saterdag daar wees. Groete Johan Rall.

07-02-2007

Johan terwyl jy in my huis bly en jy en Elsabé saam bly en dit die voorbeeld is van hoe Elsabé my kind norme wil leer, dink ek jy kan darem by my kind leer spel, want dit kan jy nie doen nie. Moet ook asseblief nie dink my kind is so dom dat hy dink jy wil wegkruiper speel as jy in die kas spring as hy in die kamer inkom nie. Ek het geen problem as jy wil ontmoet nie so maak net 'n afspraak, alhoewel ek geen doel daarin sien nie.

Jammer vir die Afrikaans, my werk is in engels. Jou seun is 9 jaar oud en besef jy hy gaan 'n groot deel van sy lewe saam met my wees. Jou seun het vir my gesê, ek is lief vir oom. Dink oor dit. Gerrit vergeet van die kinder kak ek is 'n direkteur van die grootste elektriese besigheid in Afrika. Ek wil hê ons moet eendag mekaar in die oë kan kyk. Dis is jou keuse. Ek was nie oorsaak van jou en Elz se probleme nie. Dink oor dit. Sorry ek bly nie by Elz nie, ek kuier wel naweke daar. So jou girl is dit reg so. Onthou kinders vertel alles, lekker aand.

Gerrit ek het baie eiendomme, maak 'n prys en ek koop dit by jou. Het jy gedink as ek en Elz trou en ek vat haar weg, gaan jou seun saam met ons. Jy slap met jou girl en nou wil jy ons vat. Ek en Elz was nog altyd vir jou kind 'n voorbeeld. Ek kan dalk nie spel, maar glo ek het meer as papiere as baie mense. Sal graag dinge met jou wil bespreek, is saterdag daar.

13-02-2007

Die ontvanger sal nogal hou van 'n bietjie goeie inligting. Ek het foto's geneem, en dit sal nogal moeilik wees om te verduidelik.

13-02-07

Ek hoor jy soek my fax no. Dis 'n premisel as jy weet wat dit is. 082 4135 323. Volgende keer wees 'n man en bel my, jy het my no. Groete.

14-02-2007

Ek het gisteraand laat uit Mosambiek gevlieg om hier te wees. So ek is hier. Ek wil jou nog vra hoe was dit in die tronk, jy was mos al daar. Jy het my nou in persoon aangevat. So dra die gevolge soos 'n man. Groete.

Meskien moet Elz en Hen by my in Jhnb kom bly.

25-07-2007

Ek wil jou net graag bedank dat jy aan my gedink het uit jou uitnodiging hof toe. Elsabie wou nie gehad het ek moes daar wees nie en toe dink jy darem aan my. Vra jou prok en hoef regtig nie daar te wees, want julle betaal nie my kostes. Ek sal egter want ek wil jou naam gat maak. Ek het jou mos al gesê, los my uit. Ek kan nie wag vir die 2de Aug want dan is sy klaar met jou en dan gaan ek jou uitsorteer. Het jou mos al gesê jy is nie 'n man se gat werd nie. Ek vlieg spesiaal terug SA toe om jou in die oë te kyk die 1ste. Ek sal nie my vingers klap maar my hande. Groete en sterkte. Sol"

The applicant submitted that the contents of these messages are threatening and harmful to his dignity and reputation and infringe upon his privacy.

The respondent does not dispute that he has a love affair with Elsabé and that he transmitted these messages to the applicant. He further does not dispute that, from time to time he visits and stays over at Elsabé's home. According to the respondent, he sent the first message to the

applicant after he learnt that the applicant was making enquiries about his whereabouts at a local golf club and also because Elsabé reported to him that the applicant was harassing her. The applicant did reply to this message whereafter the respondent responded thereto by sending the third message. According to the respondent, he sent the third message to the applicant to persuade the applicant to stop acting like a child. On the same day, Elsabé made a report to the respondent that the applicant has already taken steps to stop him from visiting her and has laid a charge of malicious injury to property against the respondent at the Police Station. Then the respondent sent the fourth message to the applicant. According to the respondent he sent the fourth and fifth message to the applicant to stop the applicant from harassing him and Elsabé.

The respondent states that on 13 February 2007, he received a report from one of his employees, Heidi Coetzer, that she received a telephone call from the applicant who was pressurising her to give him the respondent's personal particulars. (An affidavit by Heidi Coetzer is attached to respondent's opposing papers). Pursuant thereto, the respondent sent the sixth message to the applicant. According to the respondent, he sent the seventh and eighth messages to the applicant in an attempt to stop the applicant from interfering in his life with Elsabé.

The respondent states further that on 25 July 2007 and whilst he was in Mozambique, he received a telephone call from Elsabé

informing him that the applicant's attorneys have issued a subpoena against him to testify in their divorce case on 1 August

2007 at Kimberley. The respondent then sent the ninth message to the applicant as he believed that the applicant is harassing him through this subpoena as he had nothing to do with the differences between the applicant and Elsabé. According to the respondent, when he used the word "uitsorteer" he did not intend to threaten the applicant with physical violence or any other unlawful way, but he intended to warn him that if the applicant persist in harassing him, he will take legal steps to put the applicant in his place.

The applicant conceded that he did lay a charge of malicious damage to property against the respondent. He stated that he did this because the respondent stored his caravan at the applicant's house (i.e 4 Kort Street Daniëlskuil) and the roof was damaged as a result thereof. The applicant conceded further that a subpoena was issued against the respondent to appear in court on 1 August 2007. According to the applicant, Elsabé in her counterclaim in the divorce papers claimed R22 000.00 per month as maintenance for herself and R3 000.00 per month as maintenance for the minor child. She further claimed an amount of R 2 000 000.00 to enable her to buy a house for herself and a further R250 000.00 every five years for the purchase of a motor vehicle for herself. The applicant stated that it was therefore necessary for the respondent to come and testify in respect of the amount of money he pays to Elsabé for staying at Elsabé's house, and pertaining to the fact that the respondent has stated that he is a director of a big company in Africa (see third SMS).

Melius de Villiers in his book: *The Roman and Roman – Dutch Law of Injuries* at p.27 notes three essential requisites to establish an action for injuria. These are:

“1. An intention on the part of the offender to produce the effect of his act;

11. An overt act which the person doing it is not legally competent to do; and which at the same time is
111. An aggression upon the right of another, by which aggression the other is aggrieved and which constitute an impairment of the person, dignity or reputation of the other.”

These requisites are firmly entrenched in our law. In fact, our courts have without exception, proceeded and defined injuria “as a wrongful act designedly done in contempt of another, which infringes his dignity, his person or reputation. . . . The act complained of must be wrongful; it must be intentional; and it must violate one or other real rights, those rights in rem; related to personality, which every free man is entitled to enjoy.” See *R v Umfaan* 1908 TS 62 at p. 66.

It therefore follows that in an action for injuria one should commence by enquiring whether there has been a wrongful act. Once the wrongfulness of such an act has been determined animus injuriandi will be presumed. The onus will then be on the respondent to rebut such presumption. This he/she can do by raising any one of the recognized grounds of justification.

In order to determine whether the contents of these messages constitute an injuria, regard must be had to the factual background against which these messages were sent. It is clear from the papers that the applicant

and the respondent are not known to each other, they are not even friends. The respondent sent these messages to the applicant during the period when the applicant was going through the divorce proceedings with his wife. Furthermore it is clear that respondent had a love relationship at the time when the applicant and Elsabè were still married. Of equal importance is the fact that respondent, at times, slept at the home which used to be the matrimonial home for the applicant and Elsabè. It can be accepted that a reasonable person in the applicant’s position would feel insulted and gravely offended in the circumstances. To add salt to a festering wound, the respondent boasted about his relationship with the applicant’s wife and son. He even went further and boasted that the applicant’s son loves him (the respondent). He even threatened to take the applicant’s son with him to Johannesburg. Self-evidently this was not only seriously provocative but a serious affront to the applicant. It is clear to me that by so doing the respondent had nothing in mind but to offend and hurt the applicant. The respondent’s reason that he sent these messages to the applicant as an attempt to stop the applicant from interfering and harassing Elsabè and himself is unfounded and totally devoid of any merit. Judging from the language and the persistency of these messages, I find that the respondent’s motive was to injure the applicant’s dignitas and self respect. I further find that his conduct to be wrongful, disturbing and harmful to the applicant’s personality.

I now turn to the question whether the applicant is entitled to a final interdict. Prest CB: The Law of Interdicts at p42-43 states that a final interdict is granted “in order to secure a permanent cessation of an unlawful course of conduct or state of affairs.” Innes JA in *Setlogelo v Setlogelo* 1914 AD 221 stated three requisites for a final interdict as (i) a clear right; (ii) injury committed or reasonably apprehended; and (iii) the absence of ordinary remedy.

I now turn to discuss these requirements individually:

(i) Clear Right

It has been submitted on behalf of the applicant that the applicant has proved that he has a clear right to his dignitas, honour, integrity and peace of mind. The respondent has invaded and infringed these rights through the SMS messages. It is further submitted that the respondent's use of offensive language, slanderous allegations and threats of physical violence is a clear indication of an infringement upon the applicant's right to his privacy and physical integrity. According to the applicant, the respondent's

reference to his relationship with Elsabè and the applicant's minor son in the SMS message was done with the intention to injure the applicant's good name, his reputation and his dignitas. It is further submitted that the words complained of were sent to the applicant with the motive to injure his dignitas, self-esteem and self respect. I agree with the applicant's submissions herein. Self-evidently, the applicant like all citizens has the right to his dignitas, self-esteem, honour and peace of mind. This is an integral part of his personality.

(ii) Injury Committed or reasonably apprehended

The purpose of an interdict is to protect an existing right and not a remedy for the past invasion of a right. (See Presto above at pa 44). It follows therefore that the injury must be a continuing one. In casu the respondent sent these messages to the applicant. Even a letter of demand from the applicant's attorneys failed to stop him. He only stopped after an interim order was granted on 27 July

2007. He threatened the applicant with physical violence and insisted in his messages that they should meet. In particular he stated it quite clearly in his 9th message that he wants to sort the applicant out and put applicant in his place. Without doubt this amounts to threat of some harm. In these circumstances I have no doubt that the applicant had a well-grounded apprehension that respondent intended to cause him

serious harm. It would in my view be foolhardy to expect the applicant to wait for the threatened harm to materialize.

(iii) The Absence of ordinary remedy

It is clear from the papers that the applicant approached this court on 27 July 2007 on an urgent application for an interdict against the respondent. This he did after his attorneys wrote a letter to the respondent dated 15 February 2007 requesting the respondent to desist and stop sending SMS messages to the applicant. Notwithstanding this letter and the consequences of his

continuing to sent messages to the applicant, the respondent continued and sent another SMS message to the applicant on 25 February 2007. It is clear that nothing short of a court action would stop this unlawful conduct by respondent. I am of the view that the applicant had no other remedy but to apply for an interdict .

16. It is not in dispute that the respondent sent numerous SMS messages to the applicant. As alluded to in paragraph 14 supra, I cannot accept the respondent's reason as being justified. To my mind he had only one motive and that was to injure the applicant's dignitas and self respect. The respondent's conduct is wrongful, disturbing and harmful to the applicant's personality. The applicant had tried to stop this wrongful conduct by instructing his attorneys to write a letter to the respondent. The respondent ignored this letter and continued with his unlawful conduct. I therefore cannot find that the applicant's application is vexatious and or unfair. The applicant is entitled to protect his rights to his dignitas, honour and peace of mind. I am therefore of the view that the applicant has satisfied all the requirements necessary for a final interdict.

In the circumstances I make the following order:

The rule nisi granted on 21 July 2007 is here confirmed. The respondent to pay the costs.

F E MOKGOHLOA

ACTING JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION

For the Plaintiff: Adv. Van Rhyn SC

Instructed by: Engelsman Magabane Attorneys

For the Defendant: Adv. Van Niekerk SC

Instructed by: Van de Wall & Vennote

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