

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 1036/2004

In the matter between:

MOHAMED SALEEM HASSEN

1st Applicant

AYESHA HASSAN

2nd Applicant

SHIRAZ HAMID

3rd Applicant

RODNEY SUBRAMONEY

4th Applicant

And

EBRAHIM AMOD

1st Respondent

KAYROONISA AMOD “Also known as Kay”

2nd Respondent

SHAMIM AMOD

3rd Respondent

CORAM: **EBRAHIM, J**

DELIVERED ON: **27 MAY 2004**

[1] The applicant applies, *inter alia*, for –

- (a) a referral of certain issues for the hearing of oral evidence;
- (b) that pending the determination of those issues at such hearing, for a temporary interdict restraining the respondents from:
 - (a) assaulting, threatening to assault, and inciting other persons to assault or threaten to assault or in any manner harassing or interfering with the Applicants;
- (b) visiting and/or entering or being on the Applicants’ premises situated at Shop

No 5 and Shop No 24,. Lediboho Shopping Centre, QwaQwa, Free State;
(c) verbally abusing the Applicants and publishing false and defamatory statements about and concerning the Applicants.”

[2] The background to this application which is common cause is the following:

2.1 The first applicant is the son-in-law of the first respondent.

There is a history of friction between them for the past nine years which has manifested itself over that period in minor arguments between them.

2.2 On 16 March 2004 a confrontation occurred between them in which the third and fourth applicants and the second and third respondents were also involved. It is not necessary to set out the exact and precise details of the confrontation in chronological sequence. Suffice it to say that verbal abuse was exchanged between the first, third and fourth applicants and the respondents which escalated into a physical fight between the parties. It would appear that the applicants as well as the respondents suffered physical injury which ultimately led to both the applicants as well as the respondents laying criminal charges of assault against each

other.

2.3 As a result of the charges laid by the respondents, the first, third and fourth applicants were arrested and detained in custody. They were later released after a formal bail application was brought.

2.4 No charges were pursued against the respondents and to date they have not been prosecuted on any of the charges of assault laid by the applicants.

2.5 On 22 March 2004 the present application was launched on an urgent basis, but postponed for the filing of answering and replying affidavits. At that time the parties exchanged reciprocal undertakings not to perform any acts which impacted adversely on the dignity, person and property of the other.

[3] At the hearing of the application Mr Fischer, for the respondents, made an application to strike out the record of the bail proceedings, certain photographs of the scene of the altercation between the

parties as well certain passages in the replying affidavit which made reference to the record of the bail proceedings.

The application for the striking out was premised on the submission that no reference was made to the record of the bail proceedings in the founding papers.

- [4] In support hereof Mr Fischer referred to the authority of **POUNTAS' TRUSTEE v LAHANAS 1924 WLD 67** at par 68 for the trite principle that in application proceedings an applicant must stand or fall by his founding affidavit and all facts alleged in it as those are the facts that the respondents are called upon to admit or deny.

Although it is true that no reference is made to the record of the bail proceedings in the founding affidavit in paragraph 22 thereof the first applicant does make reference to the actual bail proceedings and makes allegations concerning what transpired thereat. In particular allegations are made that –

- (a) the investigating officer was called out of the court and when he returned the charges were further amended to armed

robbery with aggravating circumstances;

(b) that the daughter of the first and second respondent was present at these bail proceedings; and

(c) that the learned Magistrate in his judgment expressed concern over the constant amendment of the charges and to the State's baseless opposition to the granting of bail.

From these facts the applicants allege that the instructions to amend charges were influenced by the first and second respondents' daughter, Ms Haseena Amod. The answering affidavit only admits the presence of the first and second respondents' daughter at the bail proceedings, but simply denies the rest of the contents of paragraph 22. Having regard to the contents of the transcript of the bail proceedings, this denial is false.

[5] In my view the record of the bail proceedings do not introduce new allegations but convincingly demonstrates the falsity of the denial on oath of allegations made in paragraph 22 of the founding affidavit. The striking out application would have the effect of concealing from the court the dishonesty of the denial in the answering affidavit. The allegations in the founding affidavit are

merely vindicated by the record of the bail proceedings. In any event, even if the record of bail proceedings were to be considered as additional material which ought to have been included in the founding affidavit, the court has a discretion to permit an applicant to introduce new evidence in a replying affidavit when the evidence was not available at the time of the signing of the founding affidavit.

See: Bayat v Hansa 1955 (3) SA 547 (N) at 553C-G;

Shakot Investments (Pty) Ltd v Town Council of the

Borough of Stanger 1976 (2) SA 701 (D) at 704G-H;

Shephard v Tuckers Land and Development Corporation (Pty) Ltd
(1) 1978 (1) SA 173 (W) at 178A;

Dawood v Mahomed 1979 (2) SA 361 (D) at 364

Baeck & Co SA (Pty) Ltd v Van Zummeren 1982 (2) SA 112 (W) at
116A-E;

Skjelbreds Rederi A/S v Hartless (Pty) Ltd 1982 (2) SA 739 (W) at
742D;

Bowman NO v De Souza Roldao 1988 (4) SA 326 (T) at 327H;

Djama v Government of the Republic of Namibia 1993 (1) S 387
(Nm) at 391F;

Driefontein Consolidated GM Ltd v Schlochau 1902 TS 33 at 38;

Registrar of Insurance v Johannesburg Insurance Co Ltd (1) 1962 (4)
SA 546 (W);

Kleynhans v Van der Westhuizen NO 1970 (1) SA 565 (O) at 568F;

Cohen NO v Nel 1975 (3) SA 963 (W) at 966F;

Cowburn v Nasopie (Edms) Bpk 1980 (2) SA 547 (NC) at

565B-D;

Shepherd v Mitchell Cotts Seafreight (SA) (Pty) Ltd 1984 (3) SA 202 (T) at 205F;

Pienaar v Thusano Foundation 1992 (2) SA 552 (B) at 578C-D.

[6] In its replying affidavit the applicants explain the record of the bail proceedings was not available to them at the time the application was launched, and that it only subsequently became available. In the course of the argument the respondents were offered, and declined, the opportunity of filing an additional answering affidavit. Other than challenging the authenticity or accuracy of the record, it would appear very little could be said in any event having regard to the contents of the record of the bail proceedings. The application to strike out should therefore fail.

[7] The respondents also raised *in limine* the argument that the applicants should have joined the daughter of the first respondent, the Office of the National Director of Public Prosecutions, the Minister of Safety and Security and certain members of the South African Police Services. This argument is premised on the allegation of the applicants that the said daughter, a member of the staff of the Director of Public Prosecutions in Bloemfontein, Ms

Haseena Amod, improperly used her office and influence on the South African Police Services in the investigation and prosecution of the applicants. The test for joinder is a direct and substantial interest in the proceedings. See AMALGAMATED

ENGINEERING UNION v MINISTER OF LABOUR 1949 (3)

SA 637 (A) at 649. An interest is a legal interest in the subject matter of the litigation which may be prejudicially affected by the judgment of the Court. See HENRY VILJOEN (PTY) LTD v AWERBUCH BROS 1953 (2) SA 151 (O).

- [8] The relief sought by the applicants is interim relief directed only at the three respondents and not at Ms Amod or the South African Police Services. I do not intend to make any final finding on the conduct of Ms Amod in her capacity as a member of the staff of the Director of Public Prosecutions. The investigation of events and the *prima facie* allegations relating to Ms Amod are best undertaken by the Director of Public Prosecutions. By reason of the order I intend to make, I do not intend to pre-empt any action that might be taken by the Director of Public Prosecutions.

The respondents argument fails to identify any legal interest of the parties it suggests should be joined which is affected by the interim order sought by the applicants. I am not persuaded that there is any such interest. Accordingly in my view the argument of non-joinder also fails.

- [9] Turning now to the merits of the application it is contended by the applicants' counsel that the applicants have made out a *prima facie* case for the relief sought in that they have satisfied all the criteria necessary for the granting of interim relief. It is true, as was argued by applicants' counsel, that the applicants have the right to enjoy freedom, physical integrity, dignity and reputation, and that such rights are constitutionally entrenched rights. The moot question, however, is whether they have established the other requirements necessary for the granting of interim relief, the first being whether it has been properly shown that the applicants have a well-grounded apprehension of irreparable harm if the interim relief sought is not granted. In other words, have the applicants placed any or sufficient evidence before this Court to indicate that their fears of attack on and interference with these fundamental rights have been substantiated?

[10] On examining the applicants version the following is clear:

1. It has been established that there is a history of feud between the respective parties and that the incident on 16 March 2004, although a culmination of the friction between the parties, was not an isolated incident. It had been preceded that morning by a confrontation between some of the applicants and the first respondent.
2. Only one set of complainants were prosecuted, namely the applicants despite the fact that the applicants had laid similar charges against the respondents as had been laid against them by the respondents.
3. The applicants were deprived of their liberty and detained in custody for two days in the absence of conclusive and clear evidence from the respondents as to precisely which of the applicants stole the first respondent's cash and pointed the firearm at him as alleged by the first respondent. The charges laid by the applicants against the respondents were neither investigated nor prosecuted – the respondents on

laying the charges were allowed to leave the police station.

4. There were unnecessary delays and postponements, firstly, in bringing about the bail proceedings and, secondly, in the duration of the proceedings themselves in order to allow for the amendment of the charges against the applicants to more serious charges. This took place in the presence of the first respondent's daughter, Ms Amod, all of this being admitted by the respondents. Disturbingly, however, the respondents fail to explain Ms Amod's presence which gives rise to an inference in favour of what the applicants allege concerning Ms Amod's involvement in this matter, i.e. that the arrest and prosecution of the applicants did not go uninfluenced by Ms Amod.

[11] As applicants' counsel explained, these factors gave rise in the applicants minds to a serious and grave fear and concern that this kind of manipulation may be repeated again, in the event of respondents forcing a confrontation between the parties which he argued was likely in view of the proximity of their respective businesses. The real possibility existed therefore in applicants

minds that false charges could again be levelled against them and sanctioned by the members of the South African Police Service which could result in further detention in custody for the applicants.

- [12] Mr Fischer, for the respondents, argued that these factors alone did not constitute factors which were sufficient to give rise to the apprehension of fear on the part of the applicants. He argues that it was clear on the papers that respondents denies all the allegations of assault, verbal abuse and defamation. He submits that on applicants papers, no factual basis has been laid in the evidence for applicants contentions of fear of assault and abuse and that such allegations are purely speculative. He contended that there was something more than just belief on the part of the applicants. He argued the applicants had to show that it was “an ongoing process”. As I understood the argument, there must have been some further act on the part of the respondents after the applicants had been released on 18 March 2004 on bail to have given rise to the fear and belief, in the applicants minds, that there was a possibility of a further assault being perpetrated on them or their dignity being further impaired or further false charges being laid against them.

He argued that in the absence of such an ongoing process, if every person who is detained in custody and charged thereafter approached the High Court for an interdict on the basis that they believed the charges were falsely laid, this would make a mockery of the administration of justice in this country.

[13] I, however, am unable to agree with these submissions. It is a fundamentally entrenched right of every person that he is entitled to protection against bodily harm and damage to his reputation and preservation of his dignity and integrity

It is common cause that the first applicant and first respondent conduct business in close proximity with each other and the opportunity for trouble might well occur given the history of their interaction with each other. This is a matter which must necessarily give rise to a feeling of apprehension in the minds of the applicants especially when regard is had to the fact that factors are present in this matter which *prima facie* create the impression that the prosecution of the applicants has not been completely uninfluenced. Moreover, the applicants have demonstrated that they have no alternative remedy other than to approach the Court

for this relief, in that charges laid against the respondents were ignored and nothing became of those charges. On the contrary, the applicants were summarily arrested and put in custody where they remained for two days.

- [14] Mr Fischer also argued that there was no urgency in the matter and that the application was therefore on that ground also ill-founded. With this submission I am also unable to agree. To my mind there is something extremely urgent about a person being deprived of his liberty. The conduct of the respondents in laying charges against the applicants (which, according to applicants were false charges) resulted in the deprivation of applicants liberty. In my view that in itself was sufficient to create a feeling of fear and intolerance in the minds of the applicants, at the possibility that it might happen again given the history of this matter, and an urgent desire for protection from the Court. They were unable to take up their plight with the authorities which left them no alternative but to approach this Court for the appropriate relief.

- [15] In my view the applicants have made out a *prima facie* case for the relief sought in accordance with the test laid down in **WEBSTER**

v MITCHELL 1948 (1) SA 1186 (W) at 1189:

“The use of the phrase “*prima facie* established though open to some doubt” indicates I think that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, *prima facie* established, may only be open to “some doubt”. But if there is mere contraction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief.”

- [16] I need hardly add that it is patently obvious that the question of prejudice to the applicants if the interdict be refused weighed against the prejudice to the respondents, if it be granted, clearly falls in favour of the applicants. To the respondents there is in fact

no prejudice at all. The charges laid by the respondents against the applicants will not be affected in any manner by the granting of this interdict.

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

1. The application to strike out is dismissed.
2. The respondents are ordered to pay the costs of the applicants' opposition to the application for striking out.
3. In terms of Rule 6(5)(g) I direct that oral evidence be heard in regard to the following:
 - (a) the alleged assaults by the first, second and third respondents upon the first, third and fourth applicants, on 16 March 2004;
 - (b) the laying of charges by the first, second and third respondents against the first, third and fourth applicants arising from the incidents which occurred on 16 March 2004;
 - (c) the alleged threats of assault, false and defamatory statements and other verbal abuse made by the respondents to and concerning the applicants.
4. The parties shall be entitled to subpoena and call any

witnesses to give evidence relevant to the said issues, provided that, if any party wishes to call the evidence of a witness of whom an affidavit had not been filed, such party shall file an affidavit of such witness with the Registrar not less than one week before the date of hearing of such oral evidence, and serve a copy thereof upon each other party.

5. The application is postponed to a date to be fixed by the Registrar for the hearing of such oral evidence, after the conclusion of the criminal case, in Case No. 500/04, in the Regional Court in Harrismith.
6. Pending determination of the application (including such further hearing) a temporary interdict shall operate restraining the respondents:
 - (a) from assaulting, threatening to assault, and inciting other persons to assault or threaten to assault or in any manner harassing or interfering with the applicants;
 - (b) from visiting and/or entering or being on the applicants' premises situated at Shop No.5 and Shop No.24, Lediboho Shopping Centre, QwaQwa, Free State;
 - (c) from verbally abusing the applicants and publishing false and defamatory statements about and concerning the applicants.

7. The provisions of Rules 21(2), 35, 36 and 37, shall apply to the further conduct of the proceedings.
8. All questions of costs relating to this application shall stand over for determination at the further hearing.

[18] Before concluding this judgment, I wish to touch on two ancillary matters. The first relates to the applicants submission that the costs of 13 May 2004, the day this application was due to be heard, must be borne by the respondents in view of the fact that it was due to the respondents' counsel's unavailability on that day that the matter had to postponed to 14 May 2004. I am inclined, however, to agree with Mr Fischer that no order for costs be made in regard to 13 May 2004 in view of the practice rules of this Division which allow for counsel to take no more than two opposed matters on the Motion Court day with the attendant risk to counsel from other Divisions that the particular matter in which they are involved, may spill over to the next day, as was the case in this matter. I therefore make no order as to costs in regard to 13 May 2004.

The second relates to the allegations concerning Ms Amod's role in this matter. I direct that a copy of this judgment be forwarded to the office of the National Director of Public Prosecutions for his attention.

S. EBRAHIM, J

On behalf of Applicants:

Adv. C.J. Hartzenberg SC
Assisted by Adv. S. Nankan
instructed by
Israel Sackstein Matsepe Inc

On behalf of Respondents:

Adv. P.U. Fischer
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