**HIGH COURT OF SOUTH AFRICA**
**(GAUTENG DIVISION, JOHANNESBURG)**

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| (1) | REPORTABLE: Electronic reporting only. |
| (2) | OF INTEREST TO OTHER JUDGES: No. |
| (3) | REVISED. |

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Case No. 17/47551

In the matter between:

**KYRIACOU CHRISTODOULOS** Applicant

and

**JOHANNES JACOB, JACOBS** Respondent

***Case Summary*: Interdict - final interdicts aimed at refraining respondent from harassing and intimidating the applicant and enjoining him to 'remove all published defamatory, vilifying and slanderous comments made of and concerning the respondent – Application dismissed.**

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**JUDGMENT**

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**MEYER J**

[1] The applicant, Mr Kyriacou Christodoulos, seeks final interdicts against the respondent, Mr Johannes Jacob Jacobs, aimed at restraining Mr Jacobs from harassing and intimidating him and at enjoining him to 'remove all published defamatory, vilifying and slanderous comments made of and concerning [Mr Christodoulos].

[2] Messrs Christodoulos and Jacobs reside on neighbouring smallholdings in Hallgate, Nigel. Mr Jacobs conducts the business of a tavern on his smallholding, the conduct of which business causes great discord amongst members of that community. In this regard Mr Christodoulos states 'that the entire Nigel community is aware of and share the same sentiments that [Mr Jacobs] is conducting his business unreasonably'. The discord has resulted in the involvement of the SAPS and of the local 'Nigel Rural Emergency and Disaster Management' committee and in Mr Jacobs, during August 2010, obtaining a peace order against Mr Christodoulos in the magistrate's court, Nigel. He lodged a complaint in the magistrate's court that Mr Christodoulos *inter alia* had harassed and threatened him. The peace order or notice advised him what steps might be taken against him if his behaviour towards Mr Jacobs was not corrected.

[3] It appears that Messrs Christodoulos and Jacobs thereafter had stayed out of each other's way. In this regard Mr Christodoulos states that although he disputed that he ever harassed or threatened Mr Jacobs, he was advised 'not to act upon the Peace Notice as [he] really had no intentions of dealing with [Mr Jacobs] in any event'. Mr Jacobs, in his answering affidavit, admits that the two of them have no dealings with one another.

[4] Mr Christodoulos' adult son, Mr Alexi Christodoulos, is also a community member who actively opposes Mr Jacobs' tavern business. The acrimony between them had resulted in Mr Jacobs obtaining an interim protection order against Mr Christodoulos' son on 7 November 2017 in the magistrate's court, Nigel, in terms of s 3(4) of the Protection from Harassment Act No 17 of 2011, which order was not made final on the return day. The alleged incidents of harassing, threatening and intimidating conduct on the part of Mr Jacobs on which Mr Christodoulos in the present application relies, were aimed at his son, and not at Mr Christodoulos. His son, however, is not a party to these proceedings and Mr Christodoulos does not have the requisite *locus standi* to obtain any relief on his behalf.

[5] Mr Christodoulos relies on the definition of 'harassment' in s 1 of the Protection from Harassment Act, which definition includes conduct causing 'harm or inspires the reasonable belief that harm may be caused to the complainant or a related person', and on the definition of 'related person', which means 'any member

of the family or household of a complainant, or any other person in a close relationship to the complainant'. Therefore, he argues, he has the required *locus standi* to obtain an order in these proceedings to protect his son from harassment. I disagree. The order which Mr Christodoulos seeks is a final interdict to refrain Mr Jacobs from harassing and intimidating him, Mr Christodoulos, and not his son.

[6] Moreover, he conflates proceedings in the magistrate's court in terms of the Protection from Harassment Act and motion proceedings for interdictory relief in the high court. The Protection from Harassment Act was enacted *inter alia* to 'afford victims of harassment an effective remedy against such behaviour' by applying to a magistrate's court for a protection order against harassment (s 2). That Act contemplates tailor-made proceedings in the magistrate's court in which a complainant is permitted to apply for a protection order against harassment of any member of his or her family or household or of a person in a close relationship to him or her.

[7] In any event, Mr Jacobs has put up facts to the effect that Mr Christodoulos' son is the aggressor *vis-à-vis* him and not the other way around, and he denies that he harassed or intimidated him. Mr Christodoulos nevertheless elected to argue the matter on the papers. Motion proceedings in which final relief is sought 'cannot be used to resolve factual issues because they are not designed to determine probabilities' (*per* Harms JA in *National Director of Public prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 290D-E). I, therefore, have to accept the facts alleged by Mr Jacobs, unless they constitute bald or uncreditworthy denials or are palpably implausible, far-fetched or so clearly untenable that they could safely be rejected on the papers. Such finding 'occurs infrequently because courts are always alive to the potential for evidence and cross-examination to alter its view of the facts and the plausibility of the evidence. (*Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd* 2017 (2) SA 1 (SCA) at 18A-B). That test was not satisfied *in casu*.

[8] Mr Christodoulos also seeks that Mr Jacobs be directed to remove all published defamatory, vilifying and slanderous comments made by him of and concerning Mr Christodoulos. The alleged defamatory words of and concerning Mr Christodoulos are contained in Mr Jacobs' application for a protection order against

Mr Christodoulos' son, which he made in the magistrate's court, Nigel on 7 November 2017 in terms of the provisions of the Protection from Harassment Act. Therein, he also sought the seizure of Mr Christodoulos' firearm on the basis that Mr Christodoulos was shooting regularly 'over' the business of Mr Jacobs. Mr Christodoulos contends that the statement implies 'that [he is] not an honest law abiding citizen and that [he has] little regard for the firearm and other laws of our country'. The statement, according to him 'is an attack on [his] basic dignity, [his] reputation and good name as well as [his] right to lawfully hold firearms for which [he had] applied'.

[9] In *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others* 2001 (2) SA 242 (SCA) para 17, Smalberger JA said the following:

'Our law confers a qualified, albeit a very real, privilege upon a litigant in respect of defamatory statements made during the course of legal proceedings (*Joubert v Venter* (*supra* at 697)) [1985 (1) SA 654 (A)]. The privilege extends to such statements if they are relevant. The litigant bears the burden of proving that any such defamatory statement was relevant to an issue in the proceedings (*Joubert v Venter (*supra*)* at 700G and 701F – I)). Once the respondents are able to discharge such *onus* the provisional protection of the qualified privilege thus established would be defeated if the appellant could show that the trustees, in making the defamatory statement, were actuated by malice in the sense of an improper or indirect motive, as explained in *Basner v Trigger* 1946 AD 83 at 95 (*Joubert v Venter* (*supra* at 702C – D)).'

[10] The terms of the protection order sought by Mr Jacobs against Mr Christodoulos' son included the seizure of Mr Christodoulos' firearm by a member of the South African Police Service. The statement that Mr Christodoulos regularly shoots 'over' the business of Mr Jacobs was therefore clearly relevant to the issue whether or not Mr Christodoulos' firearm should be seized. An improper or indirect motive on the part of Mr Jacobs has not been established. The following statement made by Mr Jacobs in his answering affidavit is not challenged in Mr Christodoulos' replying affidavit:

'The only platform on which I indicated that the Applicant fires his gun is when I applied for a protection order, which protection order has been heard and dealt with. I have never made any other statement on any social media platform indicating that the Applicant is not abiding the laws of the country. The reason I made this statement is because of the experiences I

have had with bullets being fired in my direction from the direction of the Applicant's property. The statements attached hereinabove are witness of same.'

[11] Mr Jacobs states that his reason for having sought to have Mr Christodoulos' firearm seized was for his safety, and for that of his family and customers. He insists that the statement contained in his application for a protection order was true. His evidence is to the effect that stray bullets emanating from Mr Christodoulos' smallholding land on the roof of the tavern and elsewhere on Mr Jacobs' smallholding. He further relies on the evidence of the manager of his tavern, Mr Berdine Stapelberg, and Messrs Hendrik Johannes Jacobs and Johannes Albertus Jacobs, and Ms Matilde Otter. Their evidence corroborates that of Mr Jacobs in material respects.

[12] In denying these accusations, Mr Christodoulos states:

'What may be the source of these complaints however is that I have provided one of my workers at home with a big drum and a steel pipe to hit the drum with every time birds land in my hot house and fruit orchard in order to keep them away as they have become pests and they feed on all the fruit trees on my property which I take great pride in. The drum makes a loud noise which explains why the Respondent and the above named persons hear what they think are gun shots. When the birds disperse it is just the drum being hit.'

Mr Christodoulos' account does not refute Mr Jacobs' version of stray bullets landing on his smallholding.

[13] Mr Christodoulos argues that the affidavits of Messrs Stapelberg, HJ Jacobs and JA Jacobs and of Ms Otter should be disregarded for failure to comply with reg 4 of the Regulations Governing the Administering of an Oath or Affirmation made in terms of s 10(1)(b) of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963. Regulation 4 reads thus:

'4(1) Below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration

(2) The commissioner of oaths shall-

(a) sign the declaration and print his full name and business address below his signature;

(b) state his designation and the area for which he holds his appointment or the office held by him if he holds his appointment *ex officio*.'

[14] Mr Christodoulos argues that the designation of the commissioners of oaths, the offices held by them and whether the deponents are male or female are not stated in the affidavits of Messrs Stapelberg, HJ Jacobs and JA Jacobs and of Ms Otter. It is settled law that the court has a discretion to refuse to receive an affidavit attested otherwise than in accordance with the regulations depending upon whether there has been substantial compliance with the regulations. In *Lohman v Vaal Ontwikkeling* 1979 (3) SA 391 (T) at 398G-399A, Nestadt J said the following:

'It is now settled (at least in the Transvaal) that the requirements as contained in regs 1,2,3 and 4 are not peremptory but merely directory; the Court has a discretion to refuse to receive an affidavit attested otherwise than in accordance with the regulations depending upon whether substantial compliance with them has been proved or not (*S v Msibi* 1974 (4) SA 821 (T)). In *Ladybrand Hotels v Stellenbosch Farmers' Winery* (*supra*) [1974 (1) SA 490 (O)] a similar conclusion was arrived at. In that case the admissibility of an affidavit was attacked on the basis that the certification did not state that the deponents had signed it in the presence of the commissioner of oaths. It was held that the maxim *omnia praesumuntur rite esse acta* applied, that there was an *onus* on the person who disputes the validity of the affidavit to prove by evidence the failure to comply with the prescribed formalities and that in the absence of such evidence the objection taken failed. In any event, it was held that if the affidavit was defective it should be condoned.

It is of course a question of fact in each case whether there has been substantial compliance or not.'

[15] The statements in question appear on standard pro forma documents that are commonly used by the SAPS when statements are taken and commissioned. The stamp of the police station where the affidavit was commissioned in each instance is affixed to the document, indicating the place – South African Police Service, Nigel, East Rand - and date of commissioning. The town – Nigel - and the date are also completed in manuscript as part of the certification. In each instance the declaration is signed by the commissioning police officer, who also printed his or her rank, number and name. The commissioner of oaths in each instance, however, has omitted to delete one pronoun in the selection 'he/she' that is included in the certification.

[16] Mr Christodoulos places strong reliance on *ABSA Bank Ltd v Botha NO and others* 2013 (5) SA 563 (GNP), but that case, in my view, is distinguishable. There, the deponent declared that she was female, yet the commissioner certified that the

deponent was male. Kathree-Setiloane J drew the inference that the deponent had not signed in the presence of the commissioner (a requirement of reg 3(1)) from that inconsistency and from the fact that neither the deponent nor the commissioner had submitted affidavits confirming that the document was indeed signed by the deponent in the presence of the commissioner (para 12).

[17] In *Goncalves and another v Franchising to Africa (Pty) Ltd t/a Gold Brands* [2016] ZAGPPHC 960 (2 November 2016), the deponent declared that she is female and the commissioner has also failed to delete one pronoun in the selection 'he/she' that was included in the commissioner's certificate. There Brenner AJ held as follows (para 28):

'I respectfully disagree with the judgment in *Absa Bank Ltd v Botha NO & Others* 2013 (5) SA 563 (GNP). In practice, the "he/she" reference in the oath section of affidavits is a frequent occurrence, as is an incorrect reference to gender. These are innocuous and inadvertent errors in the main. I am of the respectful view that judicial notice may be taken of this established fact, and that one should subordinate form to substance. It is plain from the body of Evy's affidavit that she is female and from the body of Pedro's affidavit that he is male. The affidavits *in casu* substantially complied with the formalities prescribed by the Justice of the Peace and Commissioner of Oaths Act 16 of 1963.' (See also *Capriati No v Bonnox (Pty) Ltd and another* [2018] ZAGPPHC 345 (10 May 2018).)

[18] I need not enter the debate whether or not *Botha* was decided correctly in the light of the view that I take that *Botha* is distinguishable from the instant matter and also from *Goncalves*. However, I respectfully agree with Brenner AJ that in practice commissioners of oaths often fail to delete one pronoun in the selection 'he/she' that is included in the certification and that such omission *per se* is innocuous and inadvertent.

[19] This, in my view, is a proper case to hold, as I do, that there has been substantial compliance with the regulations in each instance. I should add that even if the affidavits of Messrs Stapelberg, HJ Jacobs and JA Jacobs and of Ms Otter were to be excluded on the basis that they are invalid, Mr Jacobs' account relating to the stray bullets fails to meet the test for rejection on the papers alone.

[20] I conclude, therefore, that it was lawful for Mr Jacobs to publish the statement in issue in the course of the proceedings in the magistrate's court on 7 November 2017. This conclusion is dispositive of the relief claimed by Mr Christodoulos that Mr

Jacobs be directed to remove all published defamatory, vilifying and slanderous comments made by him of and concerning Mr Christodoulos. I accordingly need not consider other issues, such as whether effect can be given to an order for Mr Jacobs 'to remove' the offensive statement from his application for a protection order and whether a reasonable apprehension of injury – the second requisite for a final interdict – has been established.

[21] In the result the following order is made:

(a) The *rule nisi* issued on 15 October 2018 is discharged.

(b) The application is dismissed with costs, including those reserved on 15 October 2018.

**P.A. MEYER**
**JUDGE OF THE HIGH COURT**

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| Dates of hearing: | 5 December 2018 |
| Date of Judgment: | 11 March 2019 |
| Counsel for Applicant: | Adv V Vergano |
| Instructed by: | Kyriacou Incorporated, Melrose North |
| Counsel for Respondent: | Mr Jaggan |
| Instructed by: | Pranav Jaggan Attorneys, Highlands North, Johannesburg |