REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: A391/2018

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

19 Sept 2019
DATE

SIGNATURE

In the matter between:-

MICHAEL PASHUT

Appellant

and

JOHANNES CHRISTIAAN KLOPPER

Respondent

JUDGMENT

FMM SNYMAN (AJ)

[1] Some years ago Mahatma Gandhi said that it is difficult, but not impossible, to conduct strictly honest business. In today's economic

climate that benchmark seems to be set higher and higher with each passing year. At the heart of this appeal lies a dispute between two individuals whose differences are being publicly aired. Looking past all the smoke in all the mirrors one would see that the *"bottom line"* is actually a commercial dispute between motor vehicle financiers for the potential business generated from the South African Teachers Union.

[2] This appeal is brought against the final order in terms of the Protection from Harassment Act 17 of 2011 (the Harassment Act) granted by the Magistrate's Court for the District of Tshwane, Pretoria. On 8 March 2018 the learned Magistrate granted an interim *ex parte* order against the appellant (Pashut) after finding that Pashut has committed various acts of harassment against the respondent (Klopper). The final order (the Harassment Order) is dated 25 September 2018. In this appeal Pashut seeks to have the Harassment Order discharged with costs on an attorney-and-client scale against Klopper.

[3] The Protection from Harassment Act 17 of 2011 (the Act) commenced on 27 April 2013 and to date, limited case law has been reported on this Act. In fact, I could only find one reported judgment being that of **Mnyandu v Padayachi 2017 (1) SA 151 (KZP)** which also was an appeal from the Magistrate's Court, but dealt with different issues.

[4] In the notice of appeal and written submissions filed on behalf of the appellant in this court, the judgment *a quo* was assailed on three broad propositions.

The Harassment Act is not applicable and/or were incorrectly applied:

[5] The following grounds of appeal were set out in the notice of appeal as a basis upon which it is contended that the learned Magistrate erred, which would warrant that the Harassment Order be set aside:

- The Act is not applicable where a dispute of public interest plays out in the public domain.

- The letter or the spirit of the Act is not applicable to the facts.

- The South African Educators Union (Suid Afrikaanse Onderwys Unie - SAOU) members are not related parties in terms of the Act.

- That the members of SAOU had to be within the personal sphere of Klopper to be regarded as related persons.

- Treating the legal notion of harassment in broad and abstract terms where it has a specific meaning in the Act and is defined precisely.

- Not considering the legal requirements to justify harassment in terms of the Act.

Misinterpretations of the Harassment Act

[6] It was submitted on behalf of the appellant that the learned Magistrate misinterpreted the Harassment Act in the following respects:

- By misstating the pertinent background facts.

- In failing to set out fully and chronologically the material facts that set out the dispute.

- The fundamental rights of privacy, dignity and life were equated to be defined to suit the Act, where various other remedies would be available.

- The finding that harassment is constitutionally protected as well as the role of the Constitution.

- By failing to textualise the meanings of harassment and harm separately and individually.

- By finding that "serious fear and harm" met the necessary degree of harm required by the Harassment Act without laying a basis for such finding.

- By failing to apply the objective test and finding that the conduct was *"calculated in an objective sense to cause alarm or distress"* or that it is *"objectively judged to be oppressive and unacceptable."*

- By failing to take into account that some of the offensive communications were not addressed to Klopper, but addressed to individuals not being related people in terms of the Act.

- By failing to analyse, specify and identify which evidence and/or electronic mail the learned Magistrate has accepted to fall under the ambit of the Act.

- By equating conduct that is *"unbecoming and harmful"* to harassment.

- Failure to find that the content of the communication between the parties is indicative of a row / disagreement between the parties more akin to a dispute, troublesome or bothering conduct instead of harassment.

- By failing to stipulate the basis or factors used to find the conduct unreasonable and that harm was suffered.

- By finding that the communications were an attack on Klopper, whereas the communications were made in the protection of the interests of SAOU members.

Failure to comply with the strict requirements in *ex parte* applications

[7] The following grounds were submitted to be evident in illustrating that the learned Magistrate failed to comply with the strict requirements in *ex parte* applications:

- In finding that the founding affidavit did meet the standards of an *ex parte* application and survives the benchmark of *uberrimae fides* (uttermost good faith).

- In finding that the founding affidavit has made out a *prima facie* case for a protection order against harassment.

- That the interim protection order should not have been granted in the first place due to lack of disclosure.

- By finding that the information provided in the founding affidavit is sufficient disclosure to comply with the legal requirements of an *ex parte* application.

- It was also argued by Mr Meiring that the deponent to the founding affidavit (Klopper) should not only have referred to the annexures attached to it, but should have repeated the specific relevant and harassing parts in the founding affidavit itself to comply with the requirements of *ex parte* proceedings.

[8] The first two categories deal with the application and interpretation of the Harassment Act, which I will deal with in one category. I will firstly deal with the requirements of an *ex parte* application.

[9] Should the Court find that the requirements for an *ex parte* application were not met, it follows that the Harassment Order has to be set aside and the appeal should thus succeed.

[10] However, should the requirements suffice, the second leg to the appeal is enacted and the conduct of Pashut should be evaluated in the context of the Harassment Act, to analyse whether it substantively amounts to harassment.

Factual Matrix

[11] The facts that form the backdrop for the interdict are common cause. The parties engaged in e-mail correspondence with each other and to other individuals which e-mails contained reference to the one party. The extent of the electronic communication is approximately the upper echelon of 300 (three hundred) pages. These correspondences were attached to the various affidavits before Court.

[12] Klopper is the Chief Executing Officer (CEO) and General Secretary of the South African Teachers Union (SAOU). It also bears mentioning that Klopper is one of three directors in the company FINSA Brokers (Pty) Ltd and has been from the year 2004. FINSA provides financing for principals, educators and members of SAOU to purchase or rent vehicles for use by the schools.

[13] Pashut is a motor vehicle dealer trading under the name Minibusses Wanted t/a Commercial Auto & Bus. Prior to 2018 and for a period of about 4 years, Pashut has been a frequent a sponsor when the SAOU held gatherings and meetings. I will refer to Pashut and the entity Minibusses Wanted interchangeably.

[14] Pashut's sponsorship were terminated early in 2018, which termination set off a string of events which ultimately resulted in the Harassment Order and this appeal.

The events leading to the affronting correspondence

[15] The dispute's origin can be traced back to late 2017 and more specifically a meeting on 17 January 2018 where possible sponsorships were discussed between Pashut and Klopper. These sponsorships were earmarked for an event of SAOU to take place on 8 and 9 March 2018 in Port Elizabeth, as well as the annual School Principal Symposium to take place on 9 and 12 September 2018 in Port Elizabeth. As mentioned above, Pashut's offer of sponsorship was not accepted.

[16] In the founding affidavit Klopper mentions that concerns were raised about the business model used by Pashut as well as the possibility that the finance agreement to buy vehicles for the schools were not in line with section 36 of the Schools Act, 84 of 1996[1]. Section 38 provides that the MEC of Education for that province must give permission for a school to purchase a vehicle for the school.

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[1] Section 36 reads as follows:
"Responsibility of governing body
(1) A governing body of a public school must take all reasonable measures within its means to supplement the resources supplied by the State in order to improve the quality of education provided by the school to all learners at the school.
(2) Despite subsection (1), a governing body may not enter into any loan or overdraft agreement so as to supplement the school fund, without the written approval of the Member of the Executive Council."

[17] Klopper, as CEO of SAOU sent a newsletter on 5 February 2018 to all SAOU members, addressed to the School Principals. The heading of the newsletter was *"School Principals: avoid the risk of disciplinary hearings and financial mismanagement"*.

I quote the relevant parts:

> *"It has come to the attention of the SAOU that the business practices of certain dealers who provide school vehicles and other school equipment to school do not always comply with the prescribed statutory requirements. In the process, school principals run the risk of exposing themselves and the school to substantial risks, i.e disciplinary investigations and forensic investigations on the basis of possible financial mismanagement.*
>
> *<u>Advice to principals</u>*
> *The following advice is provided to ensure that principals are able to avoid unnecessary and serious risks.*
>
> 1. *Except for FINSA (Pty) Ltd, the SAOU has no formal relationship with any dealer or financier in regard to the provision of vehicles and/or school equipment. FINSA is an integral part of the SAOU Group, complies fully with all the statutory requirements and has provided sound financing advice to schools for several decades.*
>
> 2. *Any credit transaction in which a school is a party, must comply with the prescriptions of the National Credit Act, 2005 (NCA) and the SA Schools Act, 1996 (SASA).*

.....

6. *Note has been taken of the following dubious practices*

a. *... discrepancies between the book value and the purchase price of used vehicles...*

b. *...*

c *some of the dealers entertain principals on expensive excursions, give expensive gifts and even pay certain expenses, etc. Such actions are not necessarily a transgression, provided that it is divulged to the SGB during the formal meeting when a decision is taken to purchase the vehicle or conclude the financing agreement. If such information is not formally divulged the recipient may be guilty of a conflict of interest and unlawful influence. Such conflicts of interest must be formally minuted."*

[18] Although not mentioned by name, it was conceded during argument by Mr Pretorius that the education community is small and as such it was accepted that the newsletter had reference to dealers which includes Pashut.

[19] This newsletter let loose the cat among the pigeons. Pashut vehemently denied any wrongdoing, and a set of electronic mails (e-mails) between Pashut and Klopper as well as the members of SAOU ensued.

[20] The information contained in the e-mails are the basis on which the Harassment Order was granted.

Compliance with the principles of *ex parte* applications

[21] It is trite that an applicant must make out his / her case in the founding affidavit and annexures thereto, and that full disclosure is required in *ex parte* proceedings.

[22] In reference to the meeting on 17 January 2018, Klopper states as follows in his founding affidavit:

> *"Ten einde hierdie stukke so kort as moontlik te hou, word daar nie in besonderhede ingegaan op die inhoud van die gesprek nie. Applikant behou homself die reg voor om mettertyd, indien nodig, volledig daarmee te handel."*

[23] Klopper further states in the founding affidavit: *"Kortom, Applikant en Respondent kon nie 'n ooreenkoms bereik tot die terme en voorwaardes van die borgskap nie en is daar besluit om nie van die Respondent se finansiele bydrae gebruik te maak nie."*

[24] Klopper proceeds in the founding affidavit:

> *"Die spreekwoordelike vet was daarna in die vuur en het die Respondent begin met 'n kampanje, hoofsaaklik teen my gerig*

waar e-posse op 'n gereelde basis aan hoofde gestuur word waarin ek belaster word, van onbevoegdheid beskuldig word, gesê word dat ek onregmatig myself verryk, met die duidelike innuendo dat ek nie te vertrou is nie en in werklikheid kriminele gedrag openbaar."

[25] The abovementioned quotes were argued by Mr Meiring on behalf of Pashut, to be an example that Klopper failed to comply with the *ex parte* principles of full disclosure. The argument was that the content of the e-mails, and more specifically the harassing part(s) of the content should be set out expressly in the founding affidavit, instead of merely laying a basis and referring the Court to the annexures.

[26] Mr Meiring further argued that Klopper should have attached the letter dated 22 February 2018 in which the attorneys on behalf of Klopper proposed mediation. He argued that it was crucial to note the significance of the aforesaid correspondence in that it:

(a) characterised the dispute as one between SAOU and Pashut (as opposed to being between Klopper and Pashut); and

(b) that no allegation of harassment or harm was made. In fact, he argued, mediation was proposed as a solution to the dispute.

The argument was that in failing to attach this letter to the founding affidavit, the *ex parte* principle of *uberrimae fides* is not met. In answer thereto, Mr Pretorius argued on behalf of Klopper that it is nonsensical to attach a letter of which the proposal of mediation was ultimately refused by Pashut.

[27] Mr Meiring argued on behalf of Pashut that the founding affidavit does not comply with the strict requirements of disclosure in *ex parte* matters. The non-disclosures and misstatements of which the appellants complained of, were two pronged:

- That the founding affidavit did not specify the purported harassing words and could not rely on the attachments to be "read in" as if it was part of the founding affidavit.

- That the affidavit failed on a substantive basis to make out a case *ex parte* in that certain aspects were not mentioned and/or brought to the Court *a quo's* attention in the founding affidavit.

[28] The question that this Court have to determine, is whether there indeed was non-disclosure or failure to mention relevant facts in the founding affidavit, and if there was, it should be determined whether such failure to disclose was material.

[29] In analysing whether a party failed to comply with the rule of full disclosure in *ex parte* proceedings, it is necessary to be mindful of the purpose and reason for the existence of the mentioned rule. My analysis of the case law in relation to the principles applied in case law, leads me to identify the following dual purpose for the rule:

[29.1] Information must be placed before the presiding Judge / Magistrate which information might have influenced the decision of the Judge / Magistrate hearing the *ex parte* application; and

[29.2] Information set out in the founding papers should be clear and specific enough to enable the opposing party to know exactly what case to meet on the return date.

[30] The following annexures were attached to the founding affidavit, and I repeat the reference thereto in the founding affidavit *verbatim*. This exercise needs to be done in order to be placed in a position to fully evaluate whether the requirements of *uberrimae fides* in *ex parte* applications have been met or not:

- Annexure A: *"Op 26 Januarie 2018 het ek 'n brief aan die respondent gestuur, 'n afskrif waarvan hierby aangeheg word as Aanhangsel A in terme waarvan ek die respondent gewaarsku het om op te hou met sy belastering van die SAOU en die personeel."*

- Annexure B: *"Ek het aan SAOU se prokureurs Erasmus Ingelyf opdrag gegee om 'n soortgelyke brief aan die respondent te stuur, 'n afskrif van welke brief hierby aangeheg word as Aanhangsel B."*

- Annexures C and D: *"Ek het daarna algemene nuusbriewe aan die hoofde van skole gestuur, gedateer 5 Februarie 2018 en 12 Februarie 2018..."*

- Annexures K to L: *"Ek heg hierby 'n reeks e-posse wat inter alia deur die regsverteenwoordigers van die SAOU en die respondent aan lede van SAOU gestuur is as Aanhangsels K tot L. Die inhoud is selfverduidelikend en benodig nie verdere toeligting nie."*

- Annexure M: *"Die laaste e-pos wat deur die Respondent aan lede van die SAOU uitgestuur is gedateer 6 Maart 2017 word hierby aangeheg as Aanhangsel M.*

Significantly there are no reference made to Annexures E to J.

[31] One of the questions before Court is whether the references to the annexures, without specifically repeating the offensive and harassing content thereof in the founding affidavit, would meet the requirements of *uberrimae fides* in *ex parte* applications. I am required to determine whether Klopper has made out a case for the relief sought in his founding affidavit.

[32] It bears mentioning that the length of the founding affidavit is 6 pages with annexures of 51 pages. The respondent filed a detailed answering affidavit which is 26 pages long and attached 258 pages of annexures.

The replying affidavit together with its supporting affidavits are 41 pages.

Material disclosure

[33] I will deal individually with the content of the annexures set out above and the basis in the founding affidavit referring to same in order to determine whether material disclosure has taken place or not.

[33.1] Annexure A: *"Op 26 Januarie 2018 het ek 'n brief aan die respondent gestuur, 'n afskrif waarvan hierby aangeheg word as Aanhangsel A in terme waarvan ek die respondent gewaarsku het om op te hou met sy belastering van die SAOU en die personeel."*

[33.2] This annexure is an e-mail from Klopper to Pashut and senior members of SAOU, in which the attorney of Klopper is carbon copied (CC'ed) reads as follows:

- *I do not wish to comment on the content (sic-of previous mails), except to state that it will be referred to our legal counsel to advise us of our rights in regard to your utterances of defamation, libel and threats to the Union.....*

- .... *"If you continue with your threats and/or defamation by mail, personal discussion or with members of the SAOU in regard to the Union and/or staff members, we reserve the right to address the issue on the basis of appropriate legal remedy."*

[33.3] I am satisfied that annexure A reflect the nub of the letter's content, namely that Pashut is warned to cease his actions which is regarded as libel, defamation and threats to the Union and/or staff members which includes Klopper.

[34] Annexure B: *"Ek het aan SAOU se prokureurs Erasmus Ingelyf opdrag gegee om 'n soortgelyke brief aan die respondent te stuur, 'n afskrif van welke brief hierby aangeheg word as Aanhangsel B."*

[34.1] In the letter attached as Annexure B, Mr Meiring argued that the following sentence of the letter dated 30 January 2018 should have been included in the founding affidavit: *"Any further attempts by you to spread lies and other disparaging remarks regarding the SAOU or its stakeholders, will be met by litigation without further reference to you."*

[34.2] I am satisfied that annexure B reflects the nub of the letter's content, namely that Pashut is warned by the attorneys of Klopper to stop with his actions which is regarded as libel,

defamation and threats to the Union and / or stakeholders which includes Klopper.

[35] Annexures C and D: *"Ek het daarna algemene nuusbriewe aan die hoofde van skole gestuur, gedateer 5 Februarie 2018 en 12 Februarie 2018..."*

[35.1] In these newsletters the name of Pashut or his business was not mentioned. As mentioned, Mr Pretorius conceded during argument that the educator community is small and that it reasonably would be expected by the recipients of the newsletter to know that Pashut is (one of) the dealers that is spoken of. In the newsletters, Klopper warns school principals to ensure that any credit agreements / loans or rental agreement complies with the applicable legislation.

[35.2] I deem the attachment of the newsletters as necessary since it played a material part in the subsequent actions of the parties.

[35.3] I am satisfied that it is not a requirement for the content of the newsletters to be repeated in the founding affidavit.

[36] The founding affidavit refers to the annexures "A" to "D" and then from Annexures "K" to "M". Annexures "E" to "J" are annexed to the founding affidavit as mentioned above, but no reference to it is made to

the annexures in the founding affidavit. The status of Annexures "E" to "J" is thus that it is not before the Court, and similarly did not serve before the court *a quo* in consideration of the granting of the *ex parte* order.

[37] The content of Annexures "E" to "J" has to be scrutinised to find whether:

(a) It contains material facts that should have served before the Court *a quo*; and whether

(b) It contains information that might have influenced the learned Magistrate in coming to a decision on the *ex parte* application.

[38] Annexure E is a letter from Pashut to Klopper and two others. In the e-mail Pashut mentions the following:

> *"What is very clear and is now going to be brought out into the open and that includes getting the education department involved is the irrational and immoral approach taken by Klopper.*
>
> *Chris (sic- Klopper) you chose this path after sitting in a meeting with me and Louis and Eddie and you have no reason to prejudice other people because of your greed and arrogance.*
>
> *What is clear is that you are not FIT to hold the position you do and trying to work with you and meet with you as I did last*

Wednesday is just a pointless exercise as you wear (sic-two) hats and I have no respect for an individual who does that."

[38.1] In this e-mail, although not mentioned in the founding affidavit, Pashut refers to Klopper as being irrational, immoral, greedy and arrogant and unfit to hold the position he does at the SAOU.

[38.2] Paragraph 12 of Klopper's founding affidavit repeats the accusations: *"..... e-posse op 'n gereelde basis aan hoofde gestuur word dat ek onregmatig myself verryk, met die duidelike innuendo dat ek nie te vertrou is nie en in werklikheid kriminele gedrag openbaar."*

[38.3] Having regard to the content of the letter, I do not regard it as a requirement that Klopper should specify which part of the letter is offending.

[38.4] Objectively viewed, the letter in its totality is dubious and quite insulting (not necessarily harassing), and I doubt whether repetition of the content there-of would in itself result in the founding affidavit being in line with the *ex parte* principles, as opposed to attaching the letter and referring thereto.

[39] Annexure F is a letter that Pashut circulated to all the school principals on 7 February 2018. In this e-mail, Pashut reveals that the entity named FINSA (Pty) Ltd has three directors, of which Klopper is one. The other two directors are Edward Fourie and Louis Swanepoel, both of whom also are involved in the management of SAOU. This was not denied by Klopper in any of the correspondence.

[39.1] The fact that Klopper is one of three directors of FINSA (Pty) Ltd is a material fact that could have influenced the decision made whether to grant the *ex parte* order or not.

[39.2] In the first newsletter (attached as Annexure "C") it is mentioned that: *"Except for FINSA (Pty) Ltd, the SAOU has no formal relationship with any dealer or financier in regard to the provision of vehicles and/or school equipment."* This strengthens the duty to inform the Court what the status is of Klopper in relation to FINSA.

[39.3] In the second newsletter Klopper seems to address several questions arising from the first newsletter. Some of the questions are who the shareholders of FINSA is, who are the directors of FINSA and whether they are on the FINSA payroll. Annexure "C" reflects that the answers to these questions were not given. Had there not been a conflict of

interest, it is dubious as to why Klopper did not answer directly that he is one of the three directors.

[39.4] Merely attaching the document, with no reference to it in the founding affidavit, and no basis of the content of the attachments, does not comply with the requirements of *ex parte* applications.

[40] Annexure G is an e-mail from Pashut addressed to Klopper dated 8 February 2018. In this letter Pashut mentions that he regards Klopper and Swanepoel as unfit to hold positions of trust in respect of SAOU and FINSA. He also accuses them of abuse of trust and conflicts of interest.

[40.1] The fact that Klopper and Swanepoel are two of three directors of FINSA (Pty) Ltd is a material fact that could have influenced the decision made whether to grant the *ex parte* order or not.

[40.2] It should have been disclosed in the founding affidavit and failure to do so, results in the affidavit failing to comply with the requirements of *ex parte* applications.

[40.3] Merely attaching the document, with no reference to it in the founding affidavit, and no basis of the content of the

attachments, does not comply with the requirements of *ex parte* applications.

[41] Annexure H: is a letter from Pashut addressed to the School Principals dated 12 February 2018. In this letter Pashut mentions that several members have requested him to be the "unofficial spokesman" of the Union and address concerns of the members, namely matters of transparency, good corporate governance, conflicts of interest and the discharge by the Executive of the SAOU.

[41.1] The fact that Pashut has apparently been requested by the members of SAOU to address the aforementioned issues, is a material fact that should have been disclosed to the Court *a quo.*

[41.2] Merely attaching the document, with no reference to it in the founding affidavit, and no basis of the content of the attachments, does not comply with the requirements of *ex parte* applications.

[42] Annexure I is an e-mail addressed to the Principal Amanzimtoti High School dated 13 February 2018 in which the information contained in the second newsletter is criticised, namely that Klopper and Swanepoel do not disclose their directorship in FINSA.

[42.1] The fact that Pashut questions the impartiality of Klopper and Swanepoel holding office in both SAOU and FINSA, is a material fact that should have been disclosed to the Court *a quo*.

[42.2] Merely attaching the document, with no reference to it in the founding affidavit, and no basis of the content of the attachments, does not comply with the requirements of *ex parte* applications.

[43] Annexure J is an e-mail addressed to the Principal of Laerskool Magalieskruin dated 19 February 2018.

[43.1] Many of the issues addressed in the aforementioned letters are repeated. Pashut also criticised the dual directorship in SAOU and FINSA of Klopper and Swanepoel as well as the structures within SAOU.

[43.2] Merely attaching the document, with no reference to it in the founding affidavit, and no basis of the content of the attachments, does not comply with the requirements of *ex parte* applications.

[44] Annexures K to L already referred to above: *"Ek heg hierby 'n reeks e-posse wat inter alia deur die regsverteenwoordigers van die SAOU en*

die respondent aan lede van SAOU gestuur is as Aanhangsels K tot L. Die inhoud is selfverduidelikend en benodig nie verdere toeligting nie."

[44.1] In these letters dated 26 February 2018 the offer of mediation is proposed by Klopper's lawyer, and is turned down by Pashut.

[44.2] Having regard to the content of the letters, I am satisfied that the offer of mediation which is ultimately rejected, does not have to be disclosed in more detail. No material information is contained in this annexure that might influence the Court's decision.

[45] Annexure M referred to above: *"Die laaste e-pos wat deur die Respondent aan lede van die SAOU uitgestuur is gedateer 6 Maart 2017 word hierby aangeheg as Aanhangsel M."*

[45.1] This letter is mostly a repetition of the content of the letters to the School Principals in Annexures "E" to "J".

[45.2] In the letter Pashut criticises the position of Klopper as CEO in the SAOU as well as the director of FINSA.

[45.3] Having regard to the content of the letter, I am satisfied that material information is contained herein that might have influenced the Court's decision.

[46] In summation, the content of the information contained in Annexures "E" to "J" is of such a nature that it might have influenced the Court *a quo*'s decision whether to grant the interdict or not. It is also material information. The most important information that could have influenced the Court *a quo* is the fact that Klopper is a director of FINSA (Pty) Ltd and that FINSA is the only approved financier of SAOU, of which Klopper is the Chief Executive Officer. This is material information that Klopper should have disclosed in his founding affidavit. In failing to do so, he has not complied with the requirements of *uberrimae fides*.

[47] It is trite law that all material facts must be disclosed, whether to the advantage of applicant or not, and whether disputed by the applicant to be the truth or not. It is also trite law that any facts which may influence a court in coming to a decision, and the withholding of material facts entitles a court to set aside the order.

[48] In the resent matter of **Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs** 2019 (3) SA 251 (SCA) at paragraph [46], [50], [90] and [148] it was held by the majority that:

> *"[46] The duty of utmost good faith, and in particular the duty of full and fair disclosure, is imposed because orders granted without notice to affected parties are a departure from a fundamental principle of the administration of justice, namely, audi alteram partem. The law sometimes*

allows a departure from this principle in the interests of justice but in those exceptional circumstances the ex parte applicant assumes a heavy responsibility to neutralise the prejudice the affected party suffers by his or her absence.

...

[51] This is consistent with the approach in English law, that if material non-disclosure is established a court will be 'astute to ensure that a plaintiff who obtains [an ex parte order] without full disclosure, is deprived of any advantage he may have derived by that breach of duty'.

...

[90] The Minister's skewed disclosures and non-disclosures were extensive. They related to matters that must have influenced the judges hearing the ex parte applications. Indeed, I do not think ex parte orders would have been granted if fair disclosure had been made. The Minister gave no satisfactory explanation for her inadequate disclosures and material non-disclosures.

...

[148] She was granted the provisional winding-up orders wrongly because she had not justified her resort to ex parte proceedings and had not disclosed material information to the court. She had also not established any right, in terms of s 157(1)(d), to pursue this relief in the public interest. The court below therefore ought to have discharged the provisional orders."

[49] In **Pountas Trustee v Lahanas** 1924 WLD 67 it was held at page 67:

"An applicant must stand or fall by his petition and the facts alleged therein and that although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the

application is the allegation of facts stated therein because those are the facts which the respondent is called upon to confirm or deny."

[50] The principle of disclosure in *ex parte* proceedings is clear. In **NDPP v Basson National Director of Public Prosecutions v Basson** 2002 (1) SA 419 (SCA) the Supreme Court of Appeal held at paragraph [21]:

> *'Where an order is sought ex parte it is well established that the utmost good faith must be observed. All material facts must be disclosed which might influence a court in coming to its decision, and the withholding or suppression of material facts, by itself, entitles a court to set aside an order, even if the non-disclosure or suppression was not wilful or mala fide"*
> *See also* ***Schlesinger v Schlesinger*** *1979 (4) SA 342 (W) at 348E – 349B.'*

[51] This Court has a discretion to allow an order to stand, despite failure to disclose properly, but only if the discretion prevails when fairness to both parties is warranted. When failure to disclose is found, the Court would normally frown upon the lack of full disclosure and dismiss the relief sought.

[52] In **MV Wisdom C United Enterprises Corporation v STX Pan Ocean Co Ltd** 2008 (3) SA 585 (SCA) it was said by Farlam JA:

> *"[20] As far as the first complaint is concerned I am satisfied that the respondent's submissions in the arbitration, which were annexed to the founding affidavit, contained sufficient information to convey to the judge what she required to know for the purpose of deciding that the respondent had made out a prima facie case in respect of its claim."*

[53] In **Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs** 2019 (3) SA 251 (SCA) the Supreme Court of Appeal recently confirmed the principle of disclosure in *ex parte* proceedings on page 267 in paragraph 45:

> *"[45] The principle of disclosure in ex parte proceedings is clear. In **NDPP v Basson National Director of Public Prosecutions v Basson** 2002 (1) SA 419 (SCA) this court said:*
>
> *'Where an order is sought ex parte it is well established that the utmost good faith must be observed. All material facts must be disclosed which might influence a court in coming to its decision, and the withholding or suppression of material facts, by itself, entitles a court to set aside an order, even if the non-disclosure or suppression was not wilful or mala fide (**Schlesinger v Schlesinger** 1979 (4) SA 342 (W) at 348E – 349B).'"*

[54] Having determined that the *ex parte* application was fundamentally flawed due to failure to disclose material information, no further consideration has to be given whether the granting of the interdict was substantively correct and in line with the Protection from Harassment Act 17 of 2011.

[55] It follows that the interdict should be set aside.

[56] In the result, the following order is made:

1. The appeal is upheld.
2. The respondent is ordered to pay the appellant's costs.

LM MOLOPA-SETHOSA, J
JUDGE OF THE HIGH COURT

FMM SNYMAN, AJ
ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 20 AUGUST 2019
DATE OF JUDGMENT: __ SEPTEMBER 2019

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