IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

19 May 2022 Moovaye

DATE SIGNATURE

CASE NO: A213/21
DATE: 19 May 2022

In the matter between:-

BENJAMIN KHAZAMULA MATHEVULA	First Appellant
JENNIFER SUZAN KEKANA	Second Appellant
REA TATSAWANE BALOI	Third Appellant
LEPUDI NTHABISENG MORETSELE	Fourth Appellant
HENDRIETTA NTHAWA MATHEBULA	Fifth Appellant

V

ORIGIN MANUFACTURERS AND DISTRIBUTORS

t/a HOME HYPER CITY

(REGISTRATION NUMBER: 2011/006622/07) Respondent

JUDGMENT

KOOVERJIE J (Mbongwe J concurring)

[1] This is an appeal instituted against the judgment of the Regional Court which granted an interdict in favour of the respondent. For the purposes of this judgment I will refer to the respondents in the court *a quo* as "the appellants" and to the applicant in the court *a quo* as "the respondent".

A THE APPEAL

[2] The appellants raised both factual and legal grounds on appeal, namely, that the court *a quo* erred:

(i) in finding that the respondent had *locus standi* and further allowing it to establish its *locus standi* only in the replying affidavit;

(ii) in finding that the appellants had acted unlawfully and were performing such acts in the name of EFF (Economic Freedom Fighters) and its policies;

(iii) the respondent had satisfied the requirements of granting of an interdict which is a clear right (as envisaged in Setlogelo v Setlogelo 1914 AD 221);

(iv) in finding that the respondent had no other satisfactory remedy that it could have applied instead of the drastic relief it embarked on;

(v) in not weighing the probability of two mutually destructive versions (as required in Stellenbosch Farmers Winery Group Ltd v Martell and Cie 2003 (1) SA 11 SCA.

[3] It is an established principle that where an appeal is lodged against a trial court's findings of fact, the court of appeal should be alive to the fact that the trial court was in a more favourable position than itself to form a judgment. Even where inferences from proven facts are in issue the court *a quo* is also in a more favourable position than the court of appeal because it is better able to judge what is probable and improbable in light of the observations of the witnesses appearing before it. This court's powers to interfere on appeal with the findings of facts of the trial court are limited. This court can only interfere if there are material misdirections of fact[1].

[4] On appeal the court is required to determine if there is merit in the appellant's arguments and whether the court *a quo* was correct in granting final relief to the respondent.

B BACKGROUND

[5] In order to appreciate the basis upon which the grounds of appeal were raised it is necessary to understand the factual context within which the dispute between the parties arose. The salient facts are set out below.

[6] During July 2019, the respondent had approached the court *a quo* on an urgent *ex parte* basis for an interdict against the appellants. The court issued a rule nisi granting them the prayers they sought. Such order was granted on 22 July 2019 with a return date of 19 August 2019.

[7] The respondent approached the court due to events which occurred at its business premises on two respective days namely: on 16 July 2019 when the first four appellants visited the

[1] Monyane & Others 2008 (1) SACR 543 SCA at par 15

respondent's premises (known as Home Hyper City). On 17 July 2019 the first, second and fourth appellants returned to the premises together with the fifth appellant.

[8] The conclusion of the judgment read:

"The court is satisfied that the applicant has discharged its onus of proving that the conduct of the respondents were unlawful. That as a result of that conduct the employees of the applicant had a reasonable and justifiable fear that their safety was threatened and that the applicants' business was threatened and will be threatened."

[9] The final order granted was:

"The court grants the final interdict, the respondents are ordered to jointly and severally pay the costs of the applicants."

[10] The final relief granted prohibited the appellants from:

(i) loitering outside or near the respondent's business, Home Hyper City, the respondents' buildings and blocks of flats known as Elsas, Coslin and Cornelia Mansions; and

(ii) in engaging in verbal, electronic or any other communication aimed at the respondent, its employees, customers and tenants of the said buildings

C APPELLANTS' VERSION

[11] The appellants' version on its papers, in essence, was that they approached the respondent to discuss concerns they had regarding the rental premises. In their affidavit they alleged *inter alia* that:

(i) the respondent was not the registered owner of the properties in issue;

(ii) the municipal debt remained outstanding despite the fact that the tenants were paying;

(iii) the tenants were ill-treated and some tenants were required to pay more rental than others;

(iv) that they were there to address the concerns raised by at least 650 tenants and they proceeded to do so in propagating the EFF's founding principles, *inter alia*, economic emancipation[2].

D RESPONDENT'S VERSION

[12] The respondent's version was essentially that:

(i) on 16 July 2019 the appellants intimidated the employees of the respondent;

(ii) the appellants threatened to return to the premises on 17 July 2019. They all had returned except for Ms Baloyi, the third appellant;

(iii) the appellants threatened the respondent that they would be hijacking their buildings and steal their rental income;

(iv) the fifth appellant informed the respondent that they were "the dogs of Malema" and were going to close down the respondent's business in Centurion and would return to close the respondent's businesses. The fifth appellant further demanded that the respondent pay monthly contributions to the EFF which should be collected by the appellants;

(v) the conduct of the appellants affected the respondent's business, resulting in an alleged loss of R376,787,82 due to the cancellation of the transaction by a customer of the respondent;

(vi) the respondent feared that the intimidation and extortion would persist in the future. The respondent thereafter contacted the EFF and who in fact were informed that the appellants were not acting on behalf of the EFF[3].

---

[2] P4-41 of the record

[13] The appellants in their answering affidavit denied that they conducted themselves in the manner alleged by the respondent. At this juncture it is necessary to point out that the answering affidavit was filed after the interim relief, in terms of the said urgent application, was granted.

[14] The court *a* quo upon consideration of the papers acknowledged that there were two mutually destructive versions before it. It was on this basis that the matter was referred to trial. A substantial portion of the record constitutes the said oral evidence where both the appellants and the respondents testified.

[15] On our reading of the record, we noted the evidence of the following appellants, namely Ms Baloyi (the third appellant), Ms Mathebula (the fifth appellant) and Mr Mathevula (the first appellant).

[16] The appellants persist with the view that the mutually destructive versions were not dealt with appropriately by the court *a quo*. In essence, the version of the appellants is that they visited the respondent's premises in order to sort the rental issues and the version of the respondents was that the appellants were there for an unlawful purpose. The court *a quo* was required to resolve these conflicting versions, either on the probabilities or based on the credibility or based on both probabilities and credibility.

[17] It was however common cause that the parties had interacted at the business premises of the respondent. It was conceded that certain threatening remarks were made to the respondent and that a business in Centurion was closed down. The concessions were made by Ms

---

[3] P4-14 to 4-16 of the record

Mathebula in her evidence which is dealt with below. The issue for determination by the court *a quo* was whether a case for a final interdict was made.

[18] It is trite that the following must be established in order to meet the requirements for a final interdict, namely:

(i) a clear right;

(ii) an injury committed or reasonably apprehended that could result in irreparable harm or damage;

(iii) no other remedy was available[4].

(i) <u>Clear right</u>

[19] We find that the court *a quo* was correct in finding that the respondent had a clear right to have its business. The appellants' contention that ownership had to be established in order to meet the "clear right" requirement cannot be sustained. The court *a quo* stated that the respondent had in the founding and replying affidavit established that it conducts business from the one premises and that it manages the said flats. Consequently, the respondent held an interest in the respective premises. The respondent had demonstrated an extant right in the properties in issue. All that such affected party has to prove is that such party has an interest in the subject matter of the interdict.

[20] It is trite that in order to establish *locus standi*, only a "right" clearly established needs to be shown[5]. Hence party seeking to establish a clear right so as to justify a final interdict is

---

[4] Setlegelo v Setlegelo 1914 AD 221

[5] Edrei Investments 9 Ltd (in liquidation) v Dis-Chem Pharmacies Pty Ltd 2012 (2) SA 553 ECD at 556 C-D

required to establish, on a balance of probabilities, facts and evidence which prove that he/she has a definite right in terms of substantive law.

[21] It was not disputed that the respondent was running a business from the one premises and managing the rental premises in respect of the three buildings; Elsas, Coslin and Cornelia Mansions. From the evidence it was not in dispute that the interaction between the parties took place at the business premises of the respondent.

[22] The legal point that ownership is a prerequisite to establish a clear right is wrong in law. In fact, the case of Setlegelo affirmed that ownership is not a prerequisite[6]. This ground of appeal therefore has no merit.

(ii) <u>Injury committed or reasonably apprehended</u>

[23] The second requirement for a final interdict is proof of an injury actually committed or reasonably apprehended. In order to demonstrate that there was reasonable apprehension of harm, the court *a quo* considered the evidence of both Mr Shabir Omar and Mr Ahmed Mohamed. The relevant extract from the judgment reads:

"[7] It is common cause that on 16 July 2019 about 15h30 four people were at the business premises situated at 19 Pretorius Street, Pretoria.

On 17 July 2019 at about 16h00 the 5th respondent present and the 3rd respondent absent the respondents returned to the applicant's premises. The police were called.

[8] Shabir Omar testified that on 16 July 2019 respondents 1 to 4 attended his office, they wrote in the register, informed him that they were from the EFF and wanted information regarding tenancy and landlord so that they could take over the building.

[6] Setlegelo supra at page 227

[9] Ahmed Mohammed testified that on 17 July he was busy with a customer when he heard people shouting. A lady with an EFF t shirt on, shouted that they were from the EFF and were going to close the store. She would go to Centurion first to close a store there and return. Customers started leaving the store. And a R500 000.00 sale was cancelled as the customer believed their business was not safe. He felt scared and intimidated. Police was called to remove the people who were disruptive.[7]"

[24] This evidence, *inter alia*, was weighed against the version of the appellants. The court *a quo* set out the appellants' version which included the affidavits, as well as the evidence on trial of, Mr Mathevula, Ms Kekana, Ms Baloyi and Ms Mathebula. The court *a quo* found that their evidence on trial contradicted their affidavits, more particularly, Ms Mathebula who attested to the answering affidavit.

[25] At par 11 of the judgment, the court *a quo* summarized Ms Mathebula's version.

"[11] Respondent 5 Hendrietta Mathebula testified that she worked as a PR counsellor. Ms Baloyi was known to her. On 16 July she met her at Ntabeseng's place where she informed them that she had problems where she staying. She told them that an appointment must be made so she could address the problems. Baloyi's complaints were a leaking roof and that the place was breaking down. She attended the applicants premises on 17 July to discuss the issues. She had no intention of closing their premises down. In cross examination she initially refused to confirm her signature on the affidavit. She confirms having worn an EFF t-shirt and regalia. She with others went for the meeting when they were chased away. She concedes saying that they were the dogs of Malema and if not discuss they will close the business. At first denied and then agreed that they said they closed a business in Centurion. She testifies that

[7] P 7-117 of the record

went there with many concerns, Baloyi's was just one of them. She confirms speaking to their attorney who drafted the letter. She was with others as she does not visit alone. In re-examination she clarified that the Centurion shop was closed as employers did not want to discuss the issues with their employees. She does not know what economic emancipation means. Benjamin arrived after they were told to leave, so as to confirm that they had made an appointment[8].

[26] The evidence of Mr Mathevula was also summarized by the court *a quo*:

"*[12] Respondent 1, Benjamin Mathevula testified that on 16 July he received a call from Ntabeseng who ask that he assist with transport to Home Hyper. He drove Ntabeseng, Jennifer and Rea to Home Hyper. At Home Hyper they asked to speak to the person that deal with rentals. They were taken to the 2nd floor back office where they met Shabir. They explained Rea's problem, they were told that the person in charge of the property would be there on 17 July. They gave their names and telephone numbers and left. On the 17th Ntabeseng and Matevula returned. He was not initially there as he not available. At around 15h45 he received a call from Matevula who said that she at Home Hyper, that cops were present and that are refused entry as no appointment. He went to Home Hyper where he met 4 police officers whom he told that he made an appointment. He went into the building with the police officers he greeted the person who told him that not greet him that he be arrested as it was his property and that they are harassing them and his clients. He tried to explain that he spoke to Shabir. The person started filming him and made calls. He requested the police to accompany him out as he did not feel safe*[9]*."*

---

[8] P7-117 of the record, see also H Mathebula's testimony p6-103 p6-105

[9] P7-119 of the record

[27] The court *a quo* stated that it was aware that two mutually destructive versions existed regarding the events that occurred on 16 and 17 July 2019. The court *a quo* summarized its findings:

"The oral evidence of 1st, 2nd and 5th respondent contradicts the affidavits submitted. Two contradictory and mutually destructive versions exist as to the conduct of the respondents on the 16 and 17. The applicant submits that on 16th the respondents threatened Shabir to the extent that he did not feel safe to return to work. On the 17th of July the respondents disrupted their business and threatened to close the down as they were the dogs of Malema and that they were furthering the EFF policy of economic emancipation. The respondents' version in the affidavits were that they on 16 July attended the premises to make an appointment for the 17th July for the 5th respondent to meet in order to discuss tenancy issues; ownership of property, municipal debt and ill treatment of tenants. Their oral evidence they testify that the meeting was to address the issues raised by Rea Baloyi.[10]"

[28] In considering the mutually destructive versions, the court indeed noted that it was required to consider whether the respondent had discharged its onus and in so doing the court looked at the probabilities, reliability and credibility of the evidence. From the conspectus of the evidence the court made a finding.

[29] The Stellenbosch Farmers Winery matter[11] referred to is one of the leading authorities where the Supreme Court of Appeal set the approach that courts should follow when there are two irreconcilable versions.

[30] In ***S v Trainor***[12] the court adopted a similar approach, namely:

---

[10] P7-118 of the record

[11] Stellenbosch Farmers Winery Group Ltd and Another v Martell et Cie and Others 2003 (1) SA 11 (SCA) at par 6

"... A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independent verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence. Evidence of course must be evaluated against the onus of any particular issue or in respect of the case in its entirety ..."

[31] The court found that the respondent's version was reliable and found the following evidence unchallenged:

(i) Some of the appellants confirmed wearing EFF T-shirts.

(ii) In an affidavit the appellants confirmed that they approached the respondent in accordance with the policy of EFF of Economic Emancipation.

(iii) The fifth appellant conceded in her oral evidence that she had in fact uttered the words that they "were the dogs of Malema".

(iv) She further conceded that she said that they closed the business down in Centurion[13].

[32] The court *a quo* was satisfied that the onus was discharged in proving that the conduct of the appellants was unlawful and was satisfied that the respondent demonstrated "a reasonable and justifiable fear" that their own safety as well as their business were threatened.

[33] The test for apprehension is an objective one. The facts grounding the apprehension must be set out on the papers and evidence[14].

---

[12] of 2003 (1) SACR 35 SCA at par 11
[13] P7-119 of the record
[14] Free State Gold Areas Ltd v Merriespruit (OFS) Gold Mining Co Ltd 1961 (2) SA 505W at 518A

[34] A reasonable apprehension of injury was prevalent. It has been affirmed by our authorities that a reasonable apprehension injury is one which a reasonable man might entertain on being faced with certain facts. The applicant for an interdict is not required to establish that, on a balance of probabilities flowing from the undisputed facts, injury will follow. He is only required to demonstrate that it is reasonable to apprehend that injury may result. The testimony of Ms Mathebula reflects that she had threatened to close the business and indicated that the business in Centurion was closed down. It was also not in dispute that Ms Mathebula was an EFF member and had worn the EFF t-shirt when visiting the premises of the respondent. We note Ms Mathebula's testimony where she, *inter alia*, stated:

"I told them that if you do not want to calm down that we must discuss the matter, they shall come and close the shop as they did in Centurion.[15]*"*

[35] We further note the allegation made in the answering affidavit at paragraph 6:

> *"6 The reason for the first, second, fourth and fifth respondents approaching the place of business of the applicant was in order to assist with the concerns raised by some of the applicants "six hundred-and-fifty tenants"..."*

The aforesaid assistance was proceeded with the first to the fifth respondent, as well as the EFF's founding principles in mind, *inter alia*, economic emancipation[16].

[36] Having had regard to the evidence and the versions placed before the court *a quo,* we are satisfied that the court did not err in finding that there was some act actually done showing interference with the respondent's rights as a well-grounded apprehension that acts of a kind may be committed by the appellants.

---

[15] P6-106 Ms Mathebula's testimony and p6-134, p6-165
[16] P4-31 of the record

E ALTERNATIVE REMEDY

[36] An applicant for a final interdict is required to allege and establish on a balance of probabilities that he/she has no alternative remedy[17].

[37] The appellants argued that there was no other satisfactory remedy available to them. Furthermore, the appellants had not advanced any plausible alternative remedy but for the stance that the matter should have been reported to the Police and the EFF.

[38] The thrust of the appellants' case was succinctly summarized in paragraph 34 of its heads which read:

"The Applicant wants the court to interfere with the constitutionality protected right of the Respondent but does not disclose to the court whether any other remedy was looked into by the Appellant which would include to report the conduct of the Respondent it complains of to the South African Police Service, report the applicants to their employer the E.F.F."

[39] In argument, the appellants suggested that the issues between the parties could have been dealt with in a less drastic manner. Suggestions were made in argument that the respondent could have approached the Rental Tribunal. It is accepted that the existence of another remedy will only preclude the grant of an interdict where the proposed remedy gives it similar protection to an interdict against an injury that is apprehended.

[40] It was further argued that the court erred in granting the relief the respondent sought. Such relief is drastic and the respondent could have sought an alternate less drastic approach. It was also argued that the appellants' constitutional rights were affected.

---

[17] Erasmus Superior Court Practice Second Edition Vol 2, p 6-15 & 16

[41] It cannot be gainsaid that a final interdict is a drastic remedy. A court will not grant an interdict when the applicant can obtain adequate redress in some other form of ordinary relief. For a final interdict, an applicant was required to establish on a balance of probabilities that it had no alternative legal remedy.

[42] This court deliberated this issue extensively with the parties. The respondent submitted that it was directed to approach the court for relief. We were referred to an extract from the evidence. Under cross examination Mr Mohamed was asked: *"so do you still feel strongly that this is a threat which is incapable of being dealt with by the police …"*
Mr Mohamed's response was*: "the police advised me to get an interdict"*[18].

[43] Furthermore, the court *a quo* would not have granted an interdict if it was of the view that the respondent could have obtained adequate redress in such other form of ordinary relief. We are further mindful that the court was required to make findings only to the extent of the evidence it had at the time it adjudicated on the matter.

[44] We deem it necessary to emphasize that in certain cases an interdict was found to be less drastic than some other remedy available to an applicant. However, in those circumstances our courts have found that the existence of other remedies would not be a bar to the granting of an interdict[19]. This it could have been one such circumstance, where the laying of criminal charges with the Police could have been more drastic than seeking an interdict. It may have led to the arrests of the appellants.

---

[18] 5-126 of the record
[19] Peri Urban Areas Health Board v Sandhurst Gardens Pty Ltd 1965 (1) SA 683 T

[45] We are further of the view that the interdict did not infringe on the appellants' constitutional rights if one has regard to the extent and nature of the final interdict granted. The appellants' were only prohibited from:

(i) loitering outside or near the respondent's business, its buildings and blocks of flats; and

(ii) from engaging in verbal, electronic or any other communication aimed at the respondent, its customers, its employees and tenants.

The interdict did not preclude them from their tenancy rights or visiting their friends in the said flats.

[46] Moreover, the respondent was not precluded from approaching court for relief. One must be mindful of the nature and purpose of an interdict. We find the remarks of the court in ***Hotz v University of Cape Town 2017 (2) (A) 485 SCA*** of guidance where it was stated:

"This understanding of the nature and purpose of an interdict is rooted in constitutional principles. Section 34 of the Constitution guarantees access to courts or where appropriate to some other independent or impartial tribunal for the resolution of all disputes capable of being resolved by the application of law. The Constitutional Courts has described the right as being of cardinal importance and "foundational to the stability of an orderly society" as it "ensures the peaceful, regulated and institutionalized mechanisms to resolve disputes without resorting to self-help …"

[47] We were further reminded that one of the parties, or even the judge, may think that the problem would be better resolved, by extra curial means, is not a justification for refusing to grant an interdict[20].

---

[20] Par 36 of the Hotz matter

[48] In the premises we do not fault the court *a quo's* findings. This appeal can therefore not succeed.

[49] The following order is made:

The appeal is dismissed with costs.

H KOOVERJIE
JUDGE OF THE HIGH COURT

M MBONGWE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Appellants:	Adv MM Zondi
Instructed by:	CSM Attorneys c/o Galane Letsoalo Attorneys
Counsel for the First & Second Respondents:	Adv TALL Potgieter
Instructed by:	Carrim Attorneys Inc.
Date heard:	19 April 2022
Date of Judgment:	19 May 2022