

IN THE CAPE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 7634/2003

In the matter between:

MARIA DE WINTER-DE LANGE

Applicant

and

STEPHEN SATHOR SIVAN MOONSAMY

1ST

Respondent

PIETER VISSER

2ND

Respondent

JUDGMENT delivered on: 01 OCTOBER 2004

Meer, J:

[1] The applicant initiated motion proceedings against the respondents on 12 September 2003 for final interdicts against them.

As against the first respondent, the applicant seeks a final order interdicting and restraining him from:

1. Assaulting the applicant;
2. Intimidating and/or threatening the applicant;
3. Directly or indirectly communicating with the applicant, except through her attorney;
4. Telephoning her house, cell-phone and business Tyle-It (Pty) Ltd and The Crypt Restaurant & Bistro CC;
5. Contacting the applicant's auditors, suppliers, clients, employees or sub-contractors;
6. Coming within 100 metres of the business premises of the Crypt Restaurant;
7. Coming within 100 metres of the business premises of Tyle-It (Pty) Ltd;
8. Coming within 200 metres of the applicant's residential address at 16E Ravine Road, Bantry Bay; and
9. Coming within 50 metres of the applicant.

[2] As against the second respondent, the applicant seeks a final order interdicting and restraining him from:

1. Directly or indirectly communicating with the applicant, except through her attorney;
2. Intimidating and/or threatening the applicant;
3. Contacting the applicant's auditors, suppliers, clients, employees or sub-contractors.

[3] The applicant, a female Dutch citizen, is a business woman who has been residing in Cape Town for some years. She owns fixed property in South Africa and has two businesses, namely Tyle-It (Pty) Ltd ('Tyle-It') and the Crypt Restaurant & Bistro CC ('Crypt').

[4] The first respondent was employed by the applicant as factory manager at Tyle-It during January 2000 and they became romantically involved in May 2000. From its inception, the relationship between applicant and first respondent has been tempestuous and characterized by bitter and rancorous altercations interspersed with interludes of apparent peace.

[5] In the past four years the applicant has instituted and withdrawn several legal suits against the first respondent, including applications for protection orders under the Domestic Violence Act 116 of 1998. She has also caused him to be investigated for theft and other nefarious activities.

[6] This current application is yet another in a long line of acrimonious law suits between them.

[7] The second respondent is a para-legal consultant who runs a consultancy, Kita Consortium Consultancy CC, which styles itself as a provider of services in business administration and management, labour law, as well as an “immigration practitioner”. Its main business however is registered as “trade and tourism”. The second respondent has been representing first respondent in matters relating to his personal and business relationship with the applicant. In his capacity as such, he has been in contact with the applicant on various occasions and has also attempted to obtain information about her businesses from others.

[8] The relief applicant seeks appears to have been precipitated by events which occurred in about July 2003. At that stage the relationship between applicant and first respondent had become particularly hostile as, pursuant to the disappearance of her laptop computer and various other items, applicant caused first respondent to be investigated for theft. The first respondent then brought a charge against applicant at the Ravensmead Police Station for threatening him. The applicant in turn commenced proceedings on 28 August 2003 in the Cape Town Magistrate's Court for an interim protection order against first respondent. Thereafter on 10 September 2003, before the hearing of the interim protection order and whilst it was still pending at the Cape Town Magistrate's Court, applicant commenced with the present application before this Court.

[9] On 29 August 2003 an interim protection order was granted in the Cape Town Magistrate's Court with a return day of 13 September 2003. In terms thereof the first respondent was ordered not to commit the following acts of domestic violence as against the applicant:

- not to assault or threaten her;
- not to enlist the help of another person to do so;
- not to enter her residence in Bantry Bay;

- not to enter her places of employment;
- not to verbally abuse, harass, stalk or have any telephonic or other contact with her;
- not to come within 200 metres of her.

[10] The relief applicant seeks against first respondent in this application is the same as that which was granted to her in terms of the interim protection order by the Cape Town Magistrate's Court, save for that claimed at prayer 1.5 of the notice of motion, which asks that first respondent be interdicted and restrained from:

“Contacting the applicants’ Auditors, Suppliers, Clients, Employees or Sub-contractors”.

The same relief is sought against the second respondent at prayer 2.3.

[11] On 23 September 2003 a final protection order was granted in the Cape Town Magistrate's Court.

[12] In the interim, on 2 September 2003 the first respondent himself had applied for a protection order against applicant, but it would seem that this was not pursued by him.

[13] Applicant's case against the second respondent appears to have been prompted by the fact of his questioning several of her associates directly about her business affairs, despite being instructed by her to communicate only with her lawyer. In addition, according to applicant, on 17 August 2003 second respondent telephonically accused her of being "a rich foreigner who is ripping the local people off" and indicated that he would ensure that first respondent received 50% of all her possessions and money. Second respondent denies this allegation.

[14] In the current application, applicant relies on the absence of any other suitable remedy against both respondents and contends that the protection order granted against first respondent is insufficient as it does not grant the relief sought at paragraph 1.5 of the notice of motion in these proceedings against him, nor does it protect her against the second respondent.

[15] First respondent argues that the application cannot succeed as it offends against the principles of both *lis pendens* and *res judicata*. This application was launched whilst the proceedings in the interim protection order were pending in the Cape Town Magistrate's Court and therefore *lis pendens*. The final protection order was granted on 23 September 2003, and the matter is now *res judicata*.

Respondents argue further that applicant lacks the requisite *locus standi* to prohibit their contact with either Crypt and Tyle-It in that these are distinct and separate legal persona from her, which were not joined as co-applicants.

[16] In determining whether applicant is entitled to the relief she seeks, it is convenient to consider the interdict she applies for against each respondent separately.

The Interdict against the first respondent.

[17] There can be no doubt that at the time the applicant instituted proceedings against the first respondent in this Court, the matter was *lis pendens* because the confirmation of the interim interdict was pending in the Cape Town Magistrate's Court.

[18] I am similarly of the view that the matter is *res judicata*, in the light of the final protection order which was granted on 23 September 2003. The requirements of our common law for a successful defence of *res judicata* are threefold namely, that the previous judgment was given in an action or application by a competent court (1) between the same parties, (2) based on the same cause of action, and (3) with respect to the same subject matter or thing. All of these requirements are present in this application as far as first respondent is concerned.

[19] It has been accepted that requirements (2) and (3) above are not immutable requirements of *res judicata* and may be relaxed in order to ensure overall fairness.¹

¹ *Bafokeng Tribe v Impala Platinum Ltd and Others* 1999 (3) SA 517(B) at 566B - 567B

[20] Mr. Tredoux, for the applicant, urged that in the interests of overall fairness the applicant should be accorded the relief she seeks. I cannot agree. As against first respondent, applicant had already been accorded all the relief she seeks in these proceedings, save for that sought at prayer 1.5. The latter relief too, could have been obtained by way of the protection order under section 7(h) of the Domestic Violence Act, which authorizes a court to prohibit a respondent from “*committing any other act as specified in the protection order*”.

There will be no unfairness to applicant if this court does not grant her the relief she seeks, as it is still open to her to apply to the Magistrate’s Court to vary her protection order in terms of Section 10 of the Domestic Violence Act.

[21] As was succinctly stated by Thring, J in *Holtzhausen & Another v Gore & Others 2*

“A court must have regard to the object of the exceptio res judicata that it was introduced with the endeavour of putting a limit to needless litigation and in order to prevent the recapitulation of the same thing in dispute in diverse actions, with the concomitant deleterious effect of conflicting and contradictory decisions.”

[22] Applicant's current litigation against first respondent was needless and unjustified in the light of the protection order. I note in passing that litigation could have "flowed" from the Magistrate's court into this Court, if a review of the protection order were sought. This would of course hardly have been initiated by applicant, given the protection the protection order afforded her.

[23] Mr. de Vries, for the respondent, arguing against applicant's *locus standi vis-à-vis* the close corporations, submitted that she did not have *locus standi* in her personal capacity to seek the relief at paragraphs 1.5 and 2.3 of the notice of motion, interdicting the respondents from contacting the auditors, suppliers or sub-contractors of the legal entities Crypt Restaurant CC, Tyle-It (Pty) Ltd and Tyle-It (South Africa) CC. If the applicant, in her capacity as representative of these entities had wanted to interdict the respondents, these legal entities ought to have been joined as co-applicants. There is merit in this view. The close corporations are separate and distinct juristic persons with legal capacities of their own³. The inter-relatedness between these legal persona and applicant as its member and/or director does not clothe applicant with the requisite *locus standi* to seek the relief she does at paragraphs 1.5 and 2.3 of the notice of motion. This is not an instance where the need to preserve the separate corporate personality of a company gives way to a piercing of the corporate veil as can occur where there is fraud, dishonesty or other improper conduct⁴. Nor is this an instance where the relief can be granted through the application of the so-called alter ego doctrine, where the states of mind or acts of those in control of a

³ See Section 2 (4) of the Close Corporations Act 69 of 1984

⁴ See *Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others* 2003 (4) SA 207 at 215 par 23

company are attributed to the company itself for purposes of establishing liability.⁵

The Interdict against the second respondent.

[24] The proceedings against the second respondent by the applicant cannot be said to be *res judicata* as he was not a party to the protection order application and the final order offers her no protection against him.

⁵ See *Simon NO & Others v Mitsui & Co. Ltd & Others* 1997(2) SA 475(W) at 527E where the rationale for the doctrine was explained on the basis of being able to attribute *mens rea* to a company for purposes of establishing criminal liability. Further Blackman Joost & Everingham *Commentary on the Companies Act*, Juta, Lansdowne (2002) Vol. 1, at p4 -123-124.

[25] From the pleadings, it is common cause that the second respondent, in his capacity as the representative of the first respondent, has displayed a tendency to communicate directly with the applicant instead of through her legal representative and she has been harassed by this. It is clearly more appropriate that such communication should be through her attorney. It is also common cause that the second respondent has been making enquiries about her, some of which have the air of impropriety. This is unprofessional conduct. I am satisfied that these are injurious acts which infringe upon the applicant's right to privacy for which she has no other remedy. She is accordingly entitled to the relief she seeks at prayers 2.1 and 2.2 of her notice of motion against the second respondent.

Costs

[26] The respondents seek a punitive costs order on the scale as between attorney and client on the basis that proceedings in this court are vexatious and *res judicata*.

Gardiner, JP in *In re Alluvial Creek Ltd* 1929 CPD 532 at 535 stated:

“An order is asked for that he pay the costs as between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the court considers should be punished, malice, misleading the court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious.”⁶

[27] I am satisfied that the applicant’s proceedings against the first respondent are vexatious, ought not to have been brought and accordingly qualify for a punitive costs order as between attorney and client.

[28] The same cannot be said for the applicant’s proceedings against the second respondent given my finding above.

Order

[29] The following order is granted:

⁶ Extract by Gardiner, JP as quoted by Thring, J in *Friederich Kling GmbH v Continental Jewellery Manufacturers: Spiedel GmbH v Continental Jewellery Manufacturers* 1995(4) SA 966 (C) at 974B

1. The application for a final interdict against the first respondent is dismissed with costs, such costs to be on the scale as between attorney and client.
- 2 The second respondent is interdicted and restrained from:
 - 2.1 Directly or indirectly communicating with the applicant, except through her attorneys;
 - 2.2 Intimidating and/or threatening the applicant;
 - 2.3 Costs of suit are awarded in favour of applicant against the second respondent on a scale as between party and party.

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REPORTABLE

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2ND

Respondent

JUDGMENT BY : MEER, J

For the Applicant : Adv. JC TREDoux

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 GARDENS (Ref: GDJ)

Date(s) of hearing : Monday, 06 September 2004

Judgment delivered : Friday, 01 October 2004