Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CIRCUIT LOCAL DIVISION)

REPORTABLE

CASE No: 8270/09

In the matter between:

JAN VAN RENSBURG	**First Applicant**
BLOMMEKLOOF ONTWIKKELINGS (PTY) LTD	**Second Applicant**

and

DR ADEO CLOETE	**First Respondent**
VIRA CHRISTENSEN	**Second Respondent**

JUDGMENT DELIVERED IN CAPE TOWN : 28 JANUARY 2010

MOOSA, J:

The Scope of the Interdict

[1] This is an application for an interdict in terms of which the Applicants seek an order prohibiting the Respondents from:

(a) defaming the Applicants, more particularly by making oral or written complaints concerning firstly, the zoning rights pertaining to the Applicants' farm "Bulida", ("the property"); secondly, Applicants' entitlement to conduct a business from the property; thirdly, Respondents' dealings with municipal

and other officials and lastly, the effect of their activities on the environment ("the defamation complaint");

(b) entering upon the Applicants' property without the consent of First Applicant ("the trespass complaint") and

(c) infringing the Applicants' right to privacy and *dignitas* by keeping watch or observing their activities on the property ("the privacy complaint").

The Defences

[2] The application is opposed. The Respondents deny that they have defamed the Applicants; in the alternative they aver that should the court find that the complaints were defamatory, they are protected by the right to freedom of expression, which includes the right to receive or impart information or ideas; in the further alternative, to the extent that the complaints may be regarded as defamatory and not protected by freedom of expression, they rely on the doctrine of qualified privilege for protection, and in any event, they aver further that the Applicants have an alternative remedy.

[3] The Respondents further deny that they have intentionally trespassed on Applicants' property; in the alternative if it is found that they have trespassed on the property in the past, they aver that they have given the Applicants an unequivocal undertaking that they will not trespass on the property in the future; and in any event, they aver further that the Applicants have an alternative remedy.

[4] The Respondents deny that they have invaded or violated the privacy and *dignitas* of the Applicants or that the Applicants have any reasonable apprehension of future infringement or, in any event, they aver further that they have an alternative remedy.

The Application for Striking Out

[5] The Respondents have applied for the striking out of various allegations contained in the Applicants' replying affidavit and, in one instance, in the founding affidavit, on the basis that such allegations constitute hearsay evidence and are accordingly inadmissible. In order to cure this defect, the Applicants filed, what purported to be supplementary replying affidavits without the leave of the Court. They have failed to apply for condonation for the filing of such affidavits. They have also not provided any explanation for such failure to enable the Court to decide whether or not to admit such supplementary replying affidavits. The court agreed to hear argument in respect of these issues, as well as the merits, and undertook to give a decision on the preliminary issues when it delivers judgment in this matter.

The Relief Sought

[6] It appears that the Applicants seek a final interdict in respect of each of the reliefs that they are seeking. The requirements for a final interdict are well established. They are firstly, a clear right; secondly, that such clear right has been infringed by the Respondents to the prejudice of the Applicants or that there is a reasonable apprehension that such right will be infringed, causing resultant injury and harm and thirdly, the absence of any other satisfactory remedy.

[7] It is a trite principle of our law that in the case of a final interdict, any disputes of fact must be resolved on the basis of the test set out in **Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634E-G. In this matter, the disputes of fact on the material issues can be determined on the facts that are common cause and are undisputed, together with those facts which do not raise a *bona fide* and genuine dispute of fact and where disputes of facts are raised on the papers, on the averments of the

Respondents on the basis of the principles set out in the case of **Plascon-Evans** *(supra)*.

The Wrongfulness

[8] The crucial enquiry in the quest for a final interdict in respect of the "defamation complaint" is whether the complaints lodged and concerns expressed by the Respondents are wrongful. To determine whether the conduct is wrongful in the delictual sense, the court applies the general criterion of reasonableness in accordance with the legal convictions of the community. This involves policy considerations in terms of which it has to evaluate and balance the conflicting interests of the parties. The test is an objective one and the court shall apply the standard of a reasonable person. Policy considerations are primarily determined by the values enshrined in the Constitution.

[9] In **Barkhuizen v Napier** 2007 (5) SA 323 (CC) para (28) **Ngcobo J** (as he then was) says the following:

> *". . .Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it. Indeed, the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law. And the Bill of Rights, as the Constitution proclaims, 'is a cornerstone' of that democracy; 'it enshrines the rights of all people in our country and affirms the democratic [founding] values of human dignity, equality and freedom'."*

[10] These rights are not absolute. Where the constitutional rights have the potential of

being mutually limiting, they need to be balanced against each other and to be reconciled either by limiting the exercise of the one right to the extent necessary to accommodate the exercise of the other right, or by limiting the exercise of both rights as required by the particular circumstances of the case and within the constraints imposed by section 36 of the Constitution (**Midi Television t/a E-tv v Director of Public Prosecutions (Western Cape)** 2007 (5) SA 540 (SCA) paras (9)-(11)).

[11] The limitations envisaged in section 36, on the exercise and enjoyment of the constitutional rights can only be imposed by the law of general application, which can either be statutory law or common law. The courts, however, can perform such function to a limited extent when developing the common law under section 8(3) of the Constitution. In the present case, it will entail an enquiry into the nature and scope of "the defamation complaints" to determine whether they constitute an infringement in terms of the common law of general application relating to defamation and whether such law reasonably and justifiably limits the application of the constitutional right of freedom of expression.

[12] Section 36 postulates a two stage enquiry. The first stage of the enquiry is to determine whether the right has been infringed. This entails a two phased approach. The first is to determine the boundary of the right, that is, the nature, scope and extent of the right. The second is to ascertain whether the action or conduct has crossed the threshold of that boundary, that is, whether there has been an infringement of the right. Should it be found that there has been an infringement, the second stage of the enquiry kicks in, namely, whether the infringement can be justified as a reasonable limitation of the right. In such enquiry, the court has to do a balancing exercise in respect of the respective rights and apply the proportionality test. It would not be necessary to embark on the second stage of the enquiry if it is found that there has been no infringement of the right. If it is

found that the defamatory complaints are not protected by the right to freedom of expression, the usual defences in connection with defamatory claims, such as truth of the complaints and public interests and qualified privilege, can be raised to escape liability.

[13] The relief sought by the Applicants is an extraordinary and exceptional remedy and unprecedented in our legal history. It is rooted essentially in complaints made by the Respondent firstly, to various authorities such as the Municipality, the Department of Water Affairs and Forestry, Department of Environmental Affairs and the Public Protector and secondly, the communication of these complaints to neighbours and the media. These complaints, among others, included the zoning of the property, the validity of the licence to conduct an abattoir, and the pollution of rivers and the atmosphere.

[14] With that prelude, I am proceeding to evaluate the evidence to determine whether the Applicants have made out a case for an interdict. I will first deal with the "defamation complaint"; secondly, I will deal with the "trespass complaint" and lastly, I will deal with the "invasion of privacy" complaint.

The Defamation Complaint

[15] The parties in this matter own and/or occupy neighbouring farms. The First Applicant carries on farming operations on the farm known as "Bulida" and, more particularly, stock-farming. He also operates an abattoir and a compost factory from the farm. The Respondents complained about the bad, noxious and offensive smells emanating from the property, the unhygienic conditions which prevailed at the farm, and the severe fly breeding problem which was created by the compost factory. These conditions are exacerbated by the two sewage dams which are situated on the marshy area near the confluence of the rivers which proximate their farm and from which the first Applicant flood-

irrigates portions of the farm which creates the overpowering stench.

[16] A further complaint is that reject material from the abattoir such as blood, intestines and offal is not handled properly. It is transported in a small tanker trailer to the municipal dumping site. The trailer is frequently overloaded resulting in spillage from the tanker onto the public road. They are also subjected to the squealing of the pigs 24 hours a day. The Respondents complained that these conditions constituted a health hazard and a nuisance that affected the well-being and quality of life of the Respondents.

[17] The authorities and instances instituted an investigation arising from these complaints and prepared reports. From these reports it appears that at least six of the complaints made by the Respondents were well-founded:

(a) In February 2006, it was found that waste water and sawdust in a dirt canal was creating pollution and certain remedial measures were directed;

(b) In January 2008 it was reported that there was a slight smell emanating from the southern shed and fly problems could exist in the compost storing area;

(c) In February 2008 it was recommended that grass in and around the waste dump be sprayed with weed-killer;

(d) In June 2008 the George Municipality informed the First Respondent that it is not in possession of approved building plans in respect of the structural improvements at “Bulida”;

(e) In August 2008 a municipal official, Ms Fernold, detected a sharp manure smell (“skerp misreuk”) coming from the direction of the abattoir and

(f) In December 2008 it was found the first applicant was slaughtering more animals than permitted in terms of the Meat Safety Act, 2000 and the

regulations promulgated thereunder.

[18] Due to the persistent complaints spanning over periods of time, certain authorities took self-regulatory measures to avoid investigating any further complaints from the Respondents. The following is the case in point;

(a) Dr M.J. Wolhuter, the Deputy-Director in the Department of Agriculture, said that *"in the light of the thorough investigation done by this office into the complaints and the fact that no substantiation could be found, I gave instruction that the Department no longer reacts on his letters, since responding to them constitutes misapplication of official time and resources";*

(b) The Minister of Environmental Affairs and Development, after responding to the complaints of the Respondents, informed them that should there be any further problems, they should approach the court for necessary relief;

(c) The various government departments decided not to handle any further complaints from the Respondents as they had put into place mechanisms to monitor the situation at the abattoir and

(d) According to the Applicants, as a result of the fact that the Respondents received no further assistance or reaction from the various departments concerning the complaints, they approached *Die Burger* with the complaints, but after it received the version of the Applicants, the report was not published.

[19] The Applicants effectively seek an injunction to "gag" the Respondents from lodging any complaints to the relevant authorities or the media as they are meant to defame the Applicants. Such order would have a serious impact on the Respondents' right to freedom of expression. It would also impose on the Respondents the onerous task of

self-censorship. In a democracy, citizens, who are aggrieved, are entitled to raise their issues with the relevant authorities in the form of complaints and seek redress of such issues, whether in their own interest or the broader interest of society. They are likewise entitled to raise such issues for publication and public discourse in the media.

[20] Since our new constitutional dispensation, public participation has been an integral part of the democratic process. The drafting of the Constitution itself was accompanied by robust public participation. The legislature encourages public participation in the law making process. Certain laws and regulations promulgated in pursuance thereto, make public participation in the decision making process *sine qua non.* Interaction with institutions of governance by the citizenry, whether in the form of making representations, making complaints, obtaining information or sharing information or holding such institutions accountable, forms an important element of a robust and participatory democracy. Any restriction placed on such interaction will make our democracy the poorer for it.

[21] Counsel for the Applicants submitted that the conduct of the Respondents can be equated to that of a vexatious litigant and that the Applicants are entitled to protection against such conduct. The protection afforded to a victim of vexatious litigation, is governed by the Vexatious Proceedings Act 3 of 1956, with certain built in safeguards for the vexatious litigant. The Act, however, does not take away the right of the party to litigate, but places the institution of litigation of a party who has been declared as a vexatious litigant under the supervision of the court. Similar statutory provisions do not exist in the case of a person who complains in a vexatious, persistent or querulous manner. The Respondents deny that their conduct is vexatious, *contra bono mores* or actionable.

[22] As a matter of public policy based on the legal convictions of the community, and

applying the general criterion of reasonableness, I must determine whether "the defamation complaint" is wrongful. In such process, I must evaluate and balance the conflicting interests of the Applicants and the Respondents in accordance with the values enshrined in the Constitution. Although the holder of the right has the burden of proving that the law infringes the right, the enquiry into infringement will always be a question of the interpretation of the law in order to determine its reach and ambit.

[23] On the one hand we have "the defamation complaint" of the Respondents, some of which were well-founded and others were found to be without merit. It appears that at least six complaints made by the Respondents were found to have had merit and remedial and corrective steps were recommended to address them. The Respondents contend that section 24 of the Constitution guarantees them the right to an environment that is not harmful to their health and well-being and section 16 of the Constitution guarantees them the right to freedom of expression, which includes the freedom to receive and or impart information and ideas. They maintain that they are constitutionally entitled to complain about the conduct and activities that are illegal and harmful to the environment or inimical to their health and well-being and engage the media and the public in the discourse of such complaints. They state that they have a *bona fide* belief in the truth of the allegations making up the various complaints and accordingly deny the wrongfulness of their complaints.

[24] On the other hand, the Applicants regard these complaints as injuring them in their good name, reputation, trade and business and are designed to expose them to enmity, ridicule and contempt. Many of the complaints have been found by the authorities to be without any merit, but the Respondents have refused to accept such findings and persist with such complaints. Because of the complaints spanning over a period of time, certain

authorities, as mentioned earlier, took self-regulatory measures to avoid investigating any further complaints from the Respondents concerning the Applicants. The Minister of Environmental Affairs and Development, after responding to certain complaints of the Respondents, advised them that should they have any further complaints, they should approach the court for the necessary relief.

[25] In **Dikoko v Mokhatla** 2007 (1) BCLR 1 CC, the Constitutional Court held that the purpose of limiting the right to dignity by the immunity of civil liability for defamation of members of the legislatures, is to advance democracy through open and free expression. However, it is said that such privileged statements may ***not contain personal attacks***. The court held (at para 40) that a defamatory statement by a municipal councillor that *"a chief executive officer of the municipality changed procedures to get the councillor so indebted"*, was not covered by the privilege, because it was a personal attack which did not qualify as something said in conducting the real and legitimate business of the council.

[26] In my view the principal set out in the case of **Dikoko v Mokihatla** (*supra*), also applies to the complaints in this case. They do not infringe on the Applicants right to dignity as this does not contain any personal attacks upon the Applicants, but, in fact, relates to the nature of the farming operations, the nuisance and potential environmental damage. The persistent complaints, some of which were found to have merit to them, were made out of a legitimate concern and are not of a personal nature.

[27] I do not think that the persistent complaints warrant the curtailment of the Applicants' constitutional right to freedom of expression. Insofar as such right may overlap with the rights to dignity and privacy, the latter two rights must, in the interest of democracy, give way to the former right. The effective and reasonable way to deal with persistent

complaints, that may be unjustified, is for the relevant authorities to refuse to investigate them and inform the Respondents accordingly. Should the Respondents feel aggrieved by such decision, they would be entitled to approach the court for the necessary relief. That would obviate a blanket prohibition which would be secured by a final interdict. Such ban would have serious and unintended consequences for the Respondents and adversely affect and compromise their constitutional right to freedom of expression.

[28] Taking into account policy considerations according to the legal convictions of the community on the basis of the criterion of reasonableness, I find that the right to freedom of expression and the right to an environment which is not harmful to the health and well-being of a person outweigh the nature, scope and extent of "the defamation complaint". I accordingly conclude that "the defamation complaint" of the Respondents does not constitute an infringement of the right of the Applicants not to be defamed in terms of the common law and are accordingly not unlawful. That disposes of the first stage of the two stage enquiry mentioned above. As a result of my findings, it is unnecessary to embark on the second stage of the enquiry i.e. the section 36 limitation inquiry. It is also unnecessary to deal with the possible defences raised in connection with the claim of defamation.

[29] My findings also impact on the first requirement of a final interdict, namely, a clear right. By virtue of my finding on the question of wrongfulness, the Applicants have failed to establish a clear right as a prerequisite to the granting of a final interdict in respect of the defamatory complaint. In **Midi Television t/a E-tv v Director of Public Prosecutions** *(supra)* para 26 the court stated that::

> "…In the absence of a law obliging E-tv to furnish the documentary film to the Director of Public Prosecutions before it was broadcast, the first requirement for the grant of a final interdict - a clear right - was not met

and the interdict ought to have been refused…"

The Trespass Complaint

[30] The Respondents deny that they have intentionally trespassed on the Applicants' property. They aver that they gave a reasonable explanation for their or their employee's presence on the property on the occasions complained of. Alternatively, if it found that the Respondents had trespassed on the property in the past, the Respondents maintain that they have given the Applicants an unequivocal undertaking that they will not trespass on the property in future. Moreover, the Respondents contend that the Applicants have an alternative remedy, namely, that of laying criminal charges against the Respondents for trespass.

[31] It does not appear that the Applicants have pursued this claim, or for that matter, the trespass claim with any degree of conviction. An interdict is not a proper remedy for the past invasion of rights. An interdict will only be granted, when a wrongful act has already occurred and the wrongful act is of a continuing nature or there is a reasonable apprehension that it will be repeated. (**Philip Morris Inc. v Marlboro Shirt Company SA Ltd** 1991 (2) SA 720 (A) at 735B and **Minister of Law and Order v Nordien** 1987 (2) SA 894 (A) at 897E-898J.)

[32] In this matter there is no evidence that the trespass is of a continuing nature or that there is a reasonable apprehension that the trespass will be repeated. Any such contingency is countenanced by an unequivocal written undertaking given by the Respondents to the Applicants that they will not trespass on Applicants' property in future. In this regard the following undertaking was given:

"In the hope that this will set your clients' mind to rest, to the extent that

they have genuine apprehension in this regard, our clients undertake that they will not enter your clients' property without your clients' permission. We trust that this will dispose of this aspect of the matter."

[33] There is no evidence that the undertaking was not accepted or that it was not believed or that it was inadequate. There is also no allegation or indication that the Respondents will not comply with the undertaking. In any event, the Applicants have an alternative remedy either to lay criminal charges for trespass or claim damages should the Respondents breach their undertaking in future. I am not convinced that the Applicants have made out a case for an interdict arising from the trespass complaint.

The Privacy Complaint

[34] The Respondents deny that they have invaded or violated the privacy and *dignitas* of the Applicants or that the Applicants have any reasonable apprehension of future infringements or that they do not have an alternative remedy. It is difficult to understand the nature and scope of this complaint. There is nothing unlawful in a member of the public walking or travelling on a public road, to look at or into the properties abutting such road.

[35] There is also nothing to show that the Respondents' conduct in this regard amounts to an intrusion of the rights of the Applicants or is vexatious or *mala fide.* If the Applicants feel aggrieved by the Respondents or members of the public watching or looking into the Applicants' property, they are entitled to wall the property to protect their privacy. An interdict, in my view, would not be an appropriate remedy as it would have far reaching unintended consequences and would be difficult to police. In any case, I am not persuaded that the Applicants have made out a case for an interdict arising from the privacy complaint.

Conclusion

[36] In the circumstance, I conclude that the Applicants have failed to discharge the burden resting on them to show:

(a) that, as far as "the defamation complaint" is concerned, the Respondents' conduct constitute an unlawful infringement of the Applicants' rights;

(b) that, as far as "the trespass complaint" is concerned, the Respondents have trespassed on the property of Applicants or have a reasonable apprehension of future infringement and

(c) that, as far as the privacy complaint is concerned, any such rights have been infringed or that they have a reasonable apprehension of future infringements.

[37] Even if I am wrong in those conclusions, I am of the view that the Applicants have failed to satisfy the third requirement of an interdict, namely, that they do not have a satisfactory alternative remedy. The applicants have admitted that they have an alternative remedy:

> *"Ek het reeds aan applikante se regsverteenwoordigers opdrag gegee om 'n aksie vir skadevergoeding teen die respondente in te stel."* (RA 341:84)

[38] In view of my finding, it is unnecessary to deal with the application to strike out based on the allegations that they constitute hearsay evidence and are accordingly inadmissible.

Order

[39] In the result the application is dismissed with costs, including the costs consequent upon the employment of two counsel.

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