IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: A121/22

In the matter between

BERTO DU TOIT FIRST APPELLANT
SONJA DU TOIT SECOND APPELLANT

AND

KENNETH JACOBS RESPONDENT

CORAM: GOLIATH DJP; THULARE J

Date of Hearing: **26 August 2022**
Date of Judgment: **28 November 2022** (to be delivered via email to the respective counsel)

JUDGMENT

THULARE J:

[1] This is an opposed appeal against the decision of the magistrate, Wellington. The parties were counter complainants and respondents in applications lodged in terms of the Protection from Harassment Act, 2011 (Act No. 17 of 2011) (the Act). The magistrate dismissed the second appellant's complaint

and granted the respondent relief on his complaint. The applications were consolidated and heard simultaneously by the magistrate.

[2] The appellants' case was that the conduct complained of does not constitute harassment as defined in the Act, that the court erred in its factual findings and that the court erred in dismissing the second appellant's complaint.

[3] The parties are neighbours in Lady Lock Road Wellington. Their boundaries were separated by a narrow servitude road. The respondent testified that he had spoken to the first appellant before but only met the second respondent at court. The respondent had lived at his property for over twenty-eight years and the appellants had just moved in during April 2019. In the first week of May 2019 he went to introduce himself to the first appellant. Amongst others he enquired from the appellant if they were establishing a truck depot at their property since he had observed the constant movement of trucks to and from the appellants' property. Furthermore, he had been provided with photographs by another neighbor about what was happening in the neighbourhood as a result of the appellants' activities.

[4] Respondent stated that the appellants' trucks transported cattle manure, and the trucks were cleaned at their property which caused the effluent from the trucks to flow down the property past other properties into the river. This caused a very bad odour in the neighbourhood. The first appellant told him that they were not establishing a depot, but some trucks were coming to the property whilst they were in the process of moving. Some trucks had horses on them and the vicinity was smelling badly. The appellants had open fires and braais at the property. The respondent's family was beginning to experience headaches and feeling sick because of the terrible smell in the air. The nuisance caused by flies, which were not a problem in the area before, were such that they could not even enjoy a party. Respondent explained that the first appellant was using the Berg River irrigation water to wash his trucks. The agricultural irrigation pump was at the Berg river. He was concerned about the water resource in the light of the drought and its consequences. The first appellant told him that he was conducting his business in

Malmesbury and was just conveying the trucks for safekeeping as people stole batteries.

[5] Respondent averred that the situation did not improve but got worse. There was grinding, panel beating, working late into the night, trucks moving day and night and the fly infestation increased. He went to see the first appellant again in July and took photographs of the surrounding area. He also took photographs of the trucks full of manure. He went to see first appellant again in August, September and in October. He observed that the 350 millimeter concrete pipe in their road was packed with cattle manure. Consequently, he decided to call the health department of the municipality. He was aware that the municipality issued two notices to the appellants which were ignored, and thereafter the municipality issued them with a notice to appear in court.

[6] Respondent subsequently applied to court for an order because of the nature of the transport and storing business which included body, engine and tyre repairs which were conducted on the property. There was a compressor on the bakkie which was driven around in the yard and utilized to fix tyres. There was also a diesel storage tank which was in contravention of the municipal laws. The other problem was the extraction and use of water from his facility, his water pump and underground pipes, including the other infrastructure which he had paid for. He had made audio visual recording and took photographs of all these activities. The bakkies on the property are marked Berto transport whilst the trucks are marked Berto Lewende Hawe Vervoer. Respondent stated that there was cattle and sheep manure stench was intolerable. Furthermore, there was constant noise emanating from the grinding, panel beating and other activities conducted by the appellants, which disturbed the quiet agricultural atmosphere of the area. He and his wife are being treated for depression and anxiety. His meetings, as a parliamentarian, are disturbed. He had to buy ultraviolet lights for the flies and the lights have their side effects on his family's eyes.

[7] According to respondent there are also problems with rats and mice which are known to carry diseases which started when the appellants moved in. They now have to break down furniture to look for the dead rats and remove the foul smell. He also complained of the dogs barking every morning and at night. He has an academic family with his three sons still studying and the dog is a disturbance. Her daughter does not want to come home because of the noise. The appellants' employees were also urinating on the servitude road. The appellants allow their trucks to use the bridge which is only for 12 tons or less, and also delay traffic on Lock Road. Many people are doing business illegally according to the respondent, in those small holdings.

[8] The Respondent conceded that the first appellant has never followed, watched, pursued or accosted him. The first appellant has never loitered outside his premises or any of his buildings. The first appellant did not engage in any verbal, electronic or any other communication aimed at the respondent or any related person. The first appellant never followed him. The first appellant did not send or deliver any letters or telegrams or any other object to the respondent which made him believe that he was trying to intimidate him. He was not aware that the first appellant had an agreement with Mr Louw to use some of Mr Louw's water to irrigate his property. There was a temporary arrangement for farmers who had rights to sell water to other farmers who were drought stricken in order to maintain the crops and food supply. Mr Louw did not have his own pump but shared the pump with him and another.

[9] Respondent testified that the first appellant was asked repeatedly to refrain from using the water which the first appellant did not have a right to. Apparently, the unauthorized use of water influenced the valves and the eventual pressure that was generated to the person at the furthest end, which influenced his valves which were not properly controlled along the way. The continued wrongful and illegal use of the water by the first appellant, constituted harassment according to the respondent. There was already a tank on the property when the first appellant moved in and he knew it was a water tank. He was not aware that the appellants

had applied to the municipality to keep a fuel tank and was not aware that they had appointed an architect to work on the alterations at the instance of the municipality. Respondent indicated that he had taken photos at least 500 times.

[10] The respondent's wife confirmed the averments relating to the bad odour, the smell from manure and urine, the fly infestation, rats and mice, the trucks, the panelbeating, spraypainting from the compressor, grinder and the unauthorized use of the water since May 2019 after the appellants moved in as their neighbours. She stated that she could not sleep peacefully. She also cannot go to bed early and is woken up early because of the noise from the trucks. The flies disturb her cooking and she has to keep the windows closed because of them. She observed that it is as if they are being evicted from their home. They had planned to retire there but she did not feel like living there anymore. The children no longer enjoy being home. They cannot sit by the pool and braai. The trucks and the smell are affecting their son who is a student badly. She was suffering anxiety, depression and headaches. Her family did not get any help from the authorities and they decided to collect evidence themselves. She was aware that her husband complained to the municipality and he is a complainant against the appellants in the municipal court, and the matter is pending.

[11] She agreed that they were on farmland and that it could be expected that there would be flies and rodents running around, but not to the extent that they are experiencing. She had never seen that the other neighbours were manufacturing compost and never experienced any bad smell from them. She explained that the properties use septic tank. There are vineyards around so there is not a big problem with flies. She had never seen cattle or sheep. It was always a quiet secluded small holding neighbourhood. He knew of a neighbor who had a digger loader. She together with her son propagated house plants and orchards. Currently her family is not happy with the business being conducted by the appellants.

[12] The appellants are directors of Bertho du Toit Vervoer (Pty) Ltd since 2012 and they bought the property in 2019 for R5 million. There is a gravel road between

them and the respondent. The previous owner of the property conducted business from there, having had tippers and excavators with which he loaded stones which he transported. The previous owner also had heavy machinery which he let out. The tippers and machinery were kept on the property. The first appellant contended that they cleaned the property and spent above R1 million to clean it. He had to create the lawn, prepare the garden and had to remove a lot of scrap. They also had to put five fly catchers in the area because of the fly problem in the area. He also had to use pesticide which he got from a chicken farm.

[13] First appellant contended that there is someone in the neighbourhood who repairs tractors, and another who buys trucks that were involved in accidents, dismantle them up and sell the parts. He bought the property specifically for his trucking business, especially the safety of his trucks and the seller as well as the estate agent assured him that he would not have problems as that specific property had trucks on it for the past 35 years since Herman Bauer's time. They had property in Klapmuts where they cleaned the trucks. They could not park the trucks in Klapmuts because of theft of accessories such as theft of batteries, lights, wiring etc. First appellant submitted that after the respondent complained to him, he took the trucks away and parked them in an open space outside town. There was burning of trucks and the insurance advised him that he would not be able to claim if the trucks were burned where they were not secured. He decided to take them back to the property for safekeeping. Initially he used to wash his trucks at the property. The respondent came to speak to him about it. He realized it was wrong and stopped it. The municipality came to do an inspection a few times and they did not find anything untoward about it. They came twice a week and inspected the whole property and there was no manure found. The trucks are cleaned at Renier's farm, at Klapmuts or at the abbatoirs.

[14] First appellant explained that his business included buying and selling livestock. He did not house the cattle or sheep on the property. There is also no offloading of livestock on the property. Because of the respondent, the municipality confronted him about his trucks parking on the property. He was charged with the

contravention of some municipal by-laws. Although there was an admission of guilt fine fixed, he made representations to the Director of Public Prosecutions. He did not follow, watch, pursue, accost or threaten the appellants. He did not engage in any verbal, electronic or other communication aimed at them or sending or delivering or causing the delivery of letters or telegrams or packages to them. He first met the respondent when he came to welcome him and asked what was the nature of his business. He told respondent that he was in the transport business and that he bought the property to park his trucks.

[15] First appellant stated that the respondent came again and asked him not to work from the storeroom. He apologized and moved his work station. The last time they spoke, the respondent opened his gate, drove in without permission and said to him: “You must take your trucks and fuck off. You do not belong here.” He responded and said he had respect but the respondent was not going to insult him. The respondent then told him that if he did not take away his trucks, the respondent was going to get 10 gangsters and cause them to kill him and his family. He then told the respondent that he not going to allow respondent to continue insulting and threating him. There were three witness who heard this. That was their last conversation. He did not think of taking action against the respondent, as it was his neighbor and they could sort things out according to him. Before that date, he had treated the respondent with respect, listened to him and did what the respondent asked of him and never went against him.

[16] The previous owner had promised that he had water rights but it turned out that was not the case. He then approached one of the neighbours who arranged for his use until he had his own water usage sorted out. Schalk Louw was the person who allowed him use of the water. He has attorneys working on the water issue. First appellant conceded that two of his drivers used a bridge which they were not supposed to use. He disciplined them when he came to know about it. He also followed up on the urination allegations and disciplined the person as they have toilet facilities in the property. There was also a French drain which the previous owner had installed which he was not aware of. When the respondent

complained about it he fixed it. The municipality came to inspect and were satisfied with what he did. He had observed that there were flies on the property. It is possible that there could have been a rat problem because of the state that he found the property in, but he cleaned the property now. He removed 8 large truckloads of refuse when he moved in. He uses rat poison and has flycatchers and uses insecticides. He stated that it is possible that his dogs bark during the day, but at night he keeps his four dogs in the house. He used to know that the respondent was outside taking videos through the barking dogs. He has the dogs and burglar proofing and installed security lights and cameras as security system after the respondent threatened him with gangsters.

[17] The two nurseries in the neighbourhood get deliveries of compost from Reliance and he took photos of those deliveries. The nurseries are direct neighbours of the respondent. After a discussion with the respondent and the respondent had said that he did not have problems with the truck but his problem was with the trailers, he removed the trailers from the property until there was unrest and trucks were burned. He intends keeping the trucks and trailers on the property until the issue between him and the municipality is sorted out around the parking of the trucks there. He proposed to have the trucks move only between six in the morning and ten at night in recognition of the noise that the trucks made. He did not have problems with any of the neighbours. He was not aware of any harm caused by his activities on his property. He constructed a 60 square meter cover, built a braai area and welded a broken gate, and he spray paints his trailers once a year. He did this work between seven in the morning and six in the evening, during working hours.

[18] First appellant indicated that the drivers know that they may not bring a dirty truck or trailer to the property. The drivers used to bring the dirty trucks and trailers to the property in the past, before there were complaints from the respondent and those complaints were addressed and they do not bring them anymore. He admitted to the respondent that it was wrong to bring the dirty trucks and trailers there and to cleanse them at the property, and corrected it. His correction included

an agreement to buy disinfectants. He also resides at the property and he would not reside in a stinking place. He specifically bought a pressure gun for the truck and trailer cleansing. The municipality is doing inspections to check on the cleanliness of the property and amongst others check on flies and not once did they raise the issue of flies or bad odours. He had noticed that for one or other reason, there is a lot of flies in the area during the month of April. However, the flies were everywhere including in town.

[19] The second appellant testified that the property was in a poor state when it was purchased. It was infested with rats and flies and there was a lot of refuse. It took them days to clean the place. She had to get the services of Rentokil to put up systems and some, like the flytraps were still standing on the property. They got rid of flies and the smell was now gone. This was after the cleaning and also reacting to complaints. The complaints came around the time when they used to clean the trailers on the property. They were from the respondent. After they stopped the cleaning of the trailers on the property, the smell came from Trinco which did composts next to the respondent and also from the nursery which used compost for their flowers. After the respondent complained, they sometimes cleaned the trucks, but never the trailers, on the property.

[20] Second appellant stated that when they bought the property, they told Pam Golding that they wanted a place where they could park their trucks. The previous owner used the property for heavy duty parking. They now only parked clean trailers if at all, on the property. They did all they could to attend to the flies and they did not experience any problems at the property. They have fly traps and the ash is regularly changed and Rentokil also uses products for that. These measures are not close to the house. There is no rat infestation on the property. There was a diesel tank which the previous owner removed and they replaced it after they got an architect to work on it following a complaint from the respondent's wife that theirs was not up to standard. None of her family got sick from the situation or the activities on the property.

[21] Second appellant testified that she laid a harassment complaint herself against the respondent after he drove into their property and told the first appellant that he must make a plan to fuck off and if he did not do it the respondent would get someone to kill them. Her husband came to report this to her and it upset her. Her own father was killed in 2000. Her uncle who was her father's brother was killed and her father's nephew was also killed, and her own husband was nearly killed. This is what caused her to be upset by such threats. She could no longer sleep after the threat. She had to see a psychologist and was placed on anti-depressants. She had to see a nephrologist because her muscles also started deteriorating. She called the respondent's wife to ask her to tell the respondent not to threaten them with death. The respondent's wife apologized and promised to talk to him about it. She received no feedback and later called the respondent himself and asked that they sit around the table and resolve their issues. She suggested that they meet at either of their homes. He suggested Wimpy and when she said it would not be an appropriate place he dropped the phone on her. They improved their security in reaction to the threat. She stated that the respondent always made videos around their property. The municipality is also regularly doing inspections. At one of the court days the respondent was looking at them when he mentioned "bliksems are here", and she got the impression that he was referring to them. This shocked her.

[22] According to her many of the owners of properties in their area are doing work similar to their work although the area is zoned as agricultural land. The appellants were not aware that they were doing what is prohibited by the zoning of their land and were under the impression that their work was allowed on the land. This is why they lodged representations with the municipality and if needs be, will sue the seller and the estate agent for misleading them on the use of the property. She could not use the swimming pool because of the respondent taking videos. She is no longer young and she is not comfortable to allow another man to take her pictures in her swimming attire. She felt that she did not have privacy anymore. On one occasion she found the respondent in her trees and asked him what he was doing, and he walked away.

[23] The preamble to the Protection of Harassment Act, 17 of 2011 reads as follows:

> "Preamble
>
> SINCE the Bill of Rights in the Constitution of the Republic of South Africa, 1996, enshrines the rights of all people in the Republic of South Africa, including the right to equality, the right to privacy, the right to dignity, the right to freedom and security of the person, which incorporates the right to be free from all forms of violence from either public or private sources, and the rights of children to have their best interests considered to be of paramount importance;
>
> AND IN ORDER to-
>
> (a) afford victims of harassment an effective remedy against such behaviour; and
>
> (b) introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act,"

The relevant provisions of section 1 read as follows:

> "1 Definitions and application of Act
>
> (1) In this Act, unless the context indicates otherwise-
>
> 'complainant' means any person who alleges that he or she is being subjected to harassment;
>
> 'harassment' means directly or indirectly engaging in conduct that the respondent knows or ought to know-
>
> (a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably-
>
> (i) following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;
>
> (ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or
>
> (iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to, or brought to the attention of, the complainant or a related person; or

…

'harm' means any mental, psychological, physical or economic harm;"

[24] A careful reading of the preamble and the definitions reveals that the Act is intended to afford protection to the person of the complainant against the behaviour of another. The Concise Oxford English Dictionary, Oxford University press, 2002, tenth edition, revised, edited by Judy Pearsall (the dictionary) defines behaviour as the way in which a person responds to a situation or stimulus. The dictionary defines respond as to say or do something in reply or as a reaction. Reaction is defined as a person's ability to respond physically and mentally to external stimuli. Situation is a set of circumstances in which one finds oneself whilst stimulus is a thing that evokes a specific functional reaction or something that promotes activity, interest or enthusiasm. It seems to me that the Act is intended to protect a complainant against the way in which another person responds to the complainant.

[25] The order of the magistrate is couched in the following terms:

"19. Accordingly, an order is made in the following terms:

Respondents are prohibited by this court from:

a. Engaging in or attempting to engage in harassment of the applicant and his family and/or his employees.
b. Enlisting the help of another person to engage in the harassment of the complainant and his family.
c. Committing any of the following acts:
    i. Harassing applicant, his wife and children through their business activities.
    ii. Having any contact with the applicant and/or his family.
    iii. Conducting any business or activity on Uitspanplaas, lady Loch Road, Wellington, that causes the offending conduct determined by this court, including but not limited to: repairing or conducting work on trucks or vehicles, grinding and welding.
    iv. Using respondent's premises to store trucks and trailers, offloading of any livestock.

v. Interfering with the flow of general traffic on Lady Loch Road.

d. The counter-claim by Mrs Du Toit is dismissed.

e. The protection order expires after 18 months of service on respondents.

f. The court is of the view that respondents did not act vexatiously or unreasonably and consequently no order of cost should follow."

[26] It is difficult for the court, let alone for a lay person, to understand what the magistrate had in mind, as regards the prohibited behaviour envisaged in paragraphs a, b and c (i) of the order. A court order made for the prevention from harassment should leave the person against whom it is made, including the person in whose favour it is made, in no doubt about the behaviour that is ruled against. In my view, these terms, a, b and c (i) should be set aside for lack of clarity. It seems to me impractical to order no contact between neighbours in circumstances where the evidence showed, share a necessity like a water pump and system in agricultural holdings and in fact may be indirectly severally and jointly liable for such costs to a Water Board. I find term c (ii) particularly problematic.

[27] Terms c (iii) to c (v) present a different problem. They are not addressing a response of the appellants to the person of the respondent. They do not sound in or related to the behaviour of the appellants to the respondent. They are not terms intended to afford protection to the respondent against the behaviour of the appellants. The rights set out in the preamble to the Act, read in context, are intended for the protection of the person of the complainant against the behaviour of the person of the perpetrator. The protected adverse effect or injury inflicted should directly emanate from the engagement of the person of the perpetrator. The protection should be intended for the material damage suffered as a result of the direct participation and involvement of the person of the perpetrator.

[28] The terms under discussion are far removed from the behaviour of the appellants to qualify as harassment as intended in the Act. Moreover, in *DS v AP & Two Others* [unreported, WCHC, Case No A177/21 (24 March 2022)], I agreed then with Henny J when he said at para 60:

> "[60] In my view, the conduct constituting the act of harassment requires some form of positive or willful element. It cannot be as a result of inadvertent conduct, which the purported perpetrator did not desire or was not aware of. One cannot inadvertently harass someone else. Such a conclusion would be illogical, not consistent with common sense, and does not fit in with the ordinary meaning of harassment."

Under the circumstances, I am unable to conclude that the appellants conducting their business at their property, was intentionally directed to cause fly infestation, rat infestation, bad smell or noise, amongst other offending conduct, directed at the respondent and was intended to cause the respondent detriment. It seems to me that the mischief cannot be traced within what the Act targeted. The conduct of a business is far removed from abusive behaviour that induces fear or harm or behaviour intentionally directed at another to cause detriment to that other. [*Mnyandu v Padayachi* 2017 (1) SA 151 (KZP) at para 65 to 68].

[29] If one contextualizes the conduct of the two neighbours, the respondent was eager to have the appellants to stop their business which according to him, was not being operated on a properly zoned area whilst the appellants became aware after their purchase of the property that the land was not zoned for what they bought it for. Against that background, it sounds silly for the second appellant to seek to stop the respondent from pursuing his case through collection of relevant evidence and involvement of the municipality, by using the Act against him. The rest of the complaints must fail.

[30] The only complaint that does not lack common sense is the alleged threat to kill. It is strange that the person to whom it was made is not complaining, and the complainant is the person to whom it was reported. The health challenges of the second appellant were not triggered by what she heard from the respondent, for the threats were not made to her. Secondly, the respondent and the first appellant are single witnesses to what was said. Each had witnesses with them, who did not depose to any affidavits and were not called to testify at the hearing. The versions are mutually destructive. At their last meeting, it is clear that hard

words were exchanged between them. The respondent had at all times pursued legal means to resolve the issues. He engaged the appellants, and when it did not yield his desired effect, he approached the municipality and the Director of Public Prosecutions for intervention. In my view the probabilities are evenly balanced. I am unable to find that any of their versions is false, and the second appellant's complaint must fail.

[31] For these reasons I would make the following order:

1. The order granted by the Magistrate under case number H98/2020 in respect of the application by the appellants is set aside and replaced with the following order:
   The application is dismissed.
2. The appeal against the whole of the order and judgment of the Magistrate in respect of the protection order brought against the respondent under case number H97/2020 is dismissed.
3. There shall be no order as to costs.

DM THULARE
JUDGE OF THE HIGH COURT

I agree and it is so ordered.

PL GOLIATH
DEPUTY JUDGE PRESIDENT