REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ~~YES~~ / NO (2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO (3) REVISED. **.....** **.....** **SIGNATURE** **DATE**	**CASE NO: 22/1012**

In the matter between:

DIMITRIOS ZAHOS **First Applicant**

ALL STARS SPORTS BETTING TEMBISA (PTY) LTD **Second Applicant**

SHOCK PROOF INVESTMENTS 96 (PTY) LTD **Third Applicant**

and

PHILLIPA ANASTASSOPOULOS **First Respondent**

MARC PLAXTON HARRIS **Second Respondent**

I SLOTS SUPASLOTS (PTY) LTD **Third Respondent**

MASEGO MATSHITLHO JOSEPHINE ITUMELENG **Fourth Respondent**

CBA COMPANY (PTY) LTD **Fifth Respondent**

SABALI ENTERPRISE (PTY) LTD **Sixth Respondent**

PORTAPA (PTY) LTD	**Seventh Respondent**
MICHEZO GAMING (PTY) LTD	**Eighth Respondent**
INTELLIGENT GAMING (PTY) LTD	**Ninth Respondent**
INKAMBO PROJECTS & DEVELOPMENTS (PTY) LTD	**Tenth Respondent**

JUDGMENT

WINDELL J:

INTRODUCTION

[1] On 11 February 2022, this court granted an interim order against the respondents. The application was brought on an urgent ex parte basis. A rule *nisi* was issued calling upon the respondents to show cause why the order should not be made final. This is the return date of the rule *nisi*.

[2] In terms of paragraphs 3.1 and 3.2 (read with paragraph 4) of the interim order the first respondent was interdicted, until the return date, from assaulting the first applicant and from coming within 100 metres of the first applicant. The first respondent consented to the confirmation of the order in paragraph 3.2 of the rule *nisi* and had undertaken not to assault the first applicant.

[3] The first, second, seventh and ninth respondents oppose the confirmation of the interim order ("*the opposing respondents*"). It is submitted that no case whatsoever was made out for the granting of paragraph 3.3 of the order (read with paragraph 4) against any of the opposing respondents and, as a result, they seek the discharge of the rule with costs on a punitive scale.

[4] On the return date the applicants applied for a postponement of the matter and the extension of the rule *nisi.* After hearing the parties, this court refused the application for a postponement. As a result, the only issue that needs to be

considered is whether the facts as contained in the founding affidavit (and its annexures) make out a proper case for the relief that was granted on 11 February 2022.

PARAGRAPH 3.3

[5] In terms of paragraph 3.3 of the order (read with paragraph 4), the opposing respondents were interdicted, until the return date, from *"interfering*" with the first, second and third applicants' *"business operations"* that emanate "*from and in respect of the business relationships and agreements that are in place at the time of this order between those parties or any of them, amongst others...*". The ninth respondent was further restrained and interdicted from terminating the software and services it provides to the second applicant.

[6] The opposing respondents submit that the interim order in paragraph 3.3 ought not to have been granted at all because the applicants, (a) failed to make out any case for urgency in respect thereof; (b) failed to make out a case to justify the granting of such interim order in the opposing respondents' absence; and (c) failed, in any event, to make out a case as a matter of fact or as a matter of law, to support such interim order.

[7] For purposes of this judgment, I will only deal with the last point raised by the opposing respondents, as it will, in my view, dispose of the matter.

FACTS ALLEGED IN THE FOUNDING AFFIDAVIT

[8] Firstly, the first applicant alleged that his relationship with the first respondent was "in a state of disrepair" and that he feared for his life. As a result, so it is alleged, the second applicant's rights would also be infringed should the (interim) relief not be

granted. It is clear from the founding affidavit that the “disrepair” to which the first applicant refers, relates solely and exclusively to the physical abuse and assault perpetrated by the first respondent against him personally. On a closer reading of the affidavit it is nowhere disclosed how the first respondent’s threats of assault infringe any rights of the second or third applicants. In other words, no *facta probantia* were placed before the court in support of this conclusion and there is no *causa* alleged in the founding papers between the first respondent’s alleged assault (which the first applicant says occurred more than two years ago in September 2019) and the infringement of any rights of the second or third applicants.

[9] Secondly, the applicants state, under the heading “Locus Standi”, that they are parties “*engaged in business relationships with the Respondents....and additionally the First Applicant has been the subject of assault and threats of violence at the hands of the First Respondent*”. The applicants fail to explain why either the existence of these “business relationships” or the alleged assault and threats of violence by the first respondent justify the granting of an urgent *ex parte* interdict against *all* of the opposing respondents. There is, therefore, no justification in law or in fact, in linking the first respondent’s threats of assault to the relief sought in terms of paragraph 3.3 of the order.

[10] Thirdly, the interim relief granted in paragraph 3.3 of the order restrains and interdicts *all* of the opposing respondents from “*interfering*” with those “*business operations*” of the three applicants that “*emanate from and in respect of the business relationships and agreements that are in place.....between those parties or any of them, amongst others....*”. For example, it is alleged that the first respondent *“.....has the influence and the means to exact interference with the conducting of the Second*

Applicant's business as a means of punishment via the Second and Ninth Respondents." Despite this averment, there is, however, no evidence set out in the founding affidavit explaining what precisely is meant with the word "interfering".

[11] In *Quartermark Investments (Pty) Ltd v Mkhwanazi and Another*[1], the Supreme Court of Appeal emphasized the principle that affidavits in motion proceedings fulfil the dual role of pleadings and evidence and that *"they serve to define not only the issues between the parties but also to place the essential evidence before the court."* They must therefore contain the factual averments that are sufficient to support the cause of action or defence sought to be made out. In *Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others,*[2] Van Reenen J expanded on the difference between primary and secondary facts. He explained as follows:

> *"[28] .....Primary facts are those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Such further facts, in relation to primary facts, are called secondary facts. (See Willcox and Others v Commissioner for Inland Revenue 1960 (4) SA 599 (A) at 602A; Reynolds NO v Mecklenberg (Pty) Ltd 1996 (1) SA 75 (W) at 78I.) Secondary facts, in the absence of the primary facts on which they are based, are nothing more than a deponent's own conclusions (see Radebe and Others v Eastern Transvaal Development Board 1988 (2) SA 785 (A) at 793C - E) and accordingly do not constitute evidential material capable of supporting a cause of action."*

[1] 2014 (3) SA 96 (SCA).
[2] 2003 (4) SA 207 (C).

[11] The applicants baldly stated that they fear that the opposing respondents will interfere with the business operations (secondary facts), but there is no evidence (primary facts) explaining why the applicants reasonably fear such (undefined) interference by the opposing respondents. There is also no evidence as to whether the opposing respondents have in actual fact "interfered" or threatened to "interfere". If regard is had to the averments that the applicants made in their founding affidavit, there is therefore a total absence of primary facts in support of such fear. As stated in *Die Dros supra*, 'evidence' of secondary facts is *".....nothing more than a deponent's own conclusions and, accordingly, did not constitute evidential material capable of supporting a cause of action*"[3] I agree with the respondent's counsel, Adv Both SC, that the failure to place any primary facts before the court goes to the very foundation of the interdict. It renders the order unenforceable and void for vagueness. The opposing respondents are left in the dark as to what it is that they are interdicted from doing and the factual and legal basis therefor. Such an order, if left standing, would be impossible to enforce.

[12] Fourthly, the applicants intend to seek an order against the opposing respondents interdicting them pending "*the outcome of the hearing of the dispute*" described in clause 5 of each of the three nomination agreements.

[13] The "disputes" that fall within the ambit of those clauses are limited to disputes that "arise out of the provisions" of the nomination agreements. In their founding affidavit the applicants had not identified or described, a dispute or disputes that fall within the ambit of the clauses in question and in respect of which the 'expert' will

[3] At [28]. See also *President of the Republic of SA & Others v M&G Media Ltd* 2011(2) SA 1 (SCA) at [37] and *Ex parte WH & Others* 2011 (6) SA 514 (GNP) at [74].

have jurisdiction.

[14] In their founding affidavit, the applicants repeatedly state that they wish the expert to ‘dissolve’ the business relationship between them and the respondents. The ‘business relationships’ in question arise, according to the applicants, from the three nomination agreements. There are three issues with this averment: One, nowhere in their founding papers do the applicants explain how the expert is to ‘dissolve’ the business relationships. Two, nowhere do they state, even baldly, what order or award or ‘ruling’ they will require the expert to make, and three, the business relationships cannot be ‘dissolved’ without terminating those agreements. The expert will clearly not have the power or jurisdiction to terminate the agreements.

[15] The applicants were obliged to place facts before the court showing, at least *prima facie,* that the dispute falls within the ambit of the relevant clauses of the three agreements and that it is a dispute in respect of which the expert will have jurisdiction. This they failed to do. The result is that the “hearing”, foreshadowed in paragraph 3.3 of the order, is a non-event, because no “dispute” has been disclosed that can be the subject-matter of such a hearing.

[16] Fifthly, there is no cause of action against the ninth respondent. The ninth respondent, Intelligent Gaming (Pty) Ltd, is a software provider. It provides software to, *inter alia*, the second applicant.

[17] The order the applicants intend to seek on the return date in terms of paragraph 3.3 of the rule *nisi* is to operate pending the outcome of a hearing to be conducted

before an expert in terms of the three nomination agreements referred to in 3.3.1, 3.3.2 and 3.3.3 of the interim order. It is common cause that the ninth respondent was not a party to any of the nomination agreements. Neither was the second applicant. The ninth respondent is therefore not bound to the dispute resolution provisions contained in the agreements. No 'expert' appointed in terms of any of the three agreements will have jurisdiction over the ninth respondent. The ninth respondent has no right or obligation to participate in any "hearing" before such an expert. Any possible dispute between the second applicant and the ninth respondent will therefore have to be adjudicated by way of court proceedings.

[18] In addition, the interim interdict granted against the ninth respondent restrained it from '*terminating the software and services it presently provides to the Second Applicant*', pending the return date. There is no basis in fact or in law to restrain and interdict the ninth respondent from lawfully terminating its supply agreement with the second applicant. I agree with the respondents that to the extent that this was intended to apply in respect of possible acts of *unlawful* termination of services, i.e. possible acts of spoliation pending the return date, such order would in principle have been competent had such a case been made out. However, no facts whatsoever were placed before the court to justify a finding that, *prima facie*, the ninth respondent had threatened to unlawfully terminate the supply or a finding that the applicants had demonstrated, at least *prima facie*, a reasonable fear or apprehension that the ninth respondent would do so.

CONCLUSION

[19] For the reasons set out above, the rule *nisi* should be discharged (save for the relief relating to the assault on the first applicant by the first respondent) with costs.

[20] In the result the following order is made:

1. Paragraphs 3.1 and 3.2 of the interim order dated 11 February 2022 in respect of the first respondent are confirmed.
2. Paragraph 3.3 of the interim order is discharged in its entirety.
3. Costs of the unopposed urgent application, to be paid by the first respondent.
4. Costs of the opposed application, including the hearing on 12 April and 13 April 2022 to be paid by the applicants.

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L. WINDELL
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

(*Electronically submitted therefore unsigned)*

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 29 April 2022.

APPEARANCES

Counsel for the applicants:	Adv. N. Jagga
Instructed by:	Vardakos Attorneys
Counsel for the respondent:	Adv. J. Both SC

Instructed by:	Matthew Kerr-Phillips
Date of hearing:	12 and 13 April 2022
Date of judgment:	29 April 2022