



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO:

A216/2021

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 21 OCTOBER 2022
SIGNATURE

In the matter between:

SANDILE ZWANE

Appellant

and

VUKA NKOSI

First Respondent

MATTHEWS MOGAFFE

Second Respondent

JACOB MOGAFFE

Third Respondent

Summary: *Appeal against refusal of a final interdict – requirements not met – insufficient particularity of facts pleaded in the founding affidavit which survived the “Plascon-Evans test” – appeal refused with costs.*

ORDER

The appeal is refused, with costs.

J U D G M E N T

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] This is an appeal against a judgment of Fourie J whereby an application for a final interdict had been refused. The appeal is with leave from the Supreme Court of Appeal.

[2] The appellant as applicant claimed a final interdict restraining the respondents from “*threatening the applicant with physical violence to himself and his family ... interdicting the respondents from harassing and threatening the applicant with criminal or civil litigation, demanding from him payment of money which is not owed to any of them ...*”.

[3] Fourie J found that the appellant had made sketchy allegations of threats in the founding affidavit which had been sufficiently met in the answering affidavit. Fourie J then applied the “Plascon-Evans test”¹ and found that the appellant was not entitled to cure these defects in his replying affidavit and

¹ *Plascon-Evans paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H – 635B

refused his application with costs. It is this decision which the appellant now seeks to have reversed on appeal.

[4] At the hearing of the appeal the necessary condonation was granted in respect of the prosecution of the appeal.

The applicant's case in the court a quo

[5] Having regard to allegations made in the founding affidavit, Fourie J correctly found that the appellant and the respondents had entered into a business transaction with each other on 14 April 2020 and that this transaction “*did not materialize as the parties had anticipated*”.

[6] The appellant claimed that his cause of action arose after the business relationship had soured. He formulated the basis upon which he claimed the final interdicts as follows:

- “16. *This is when threats of physical violence against my person and that of my family were made to me if I did not pay that amount to the respondents.*
17. *Consequently, I instructed my attorneys of record in this matter to make a formal and written settlement proposal to the respondents ...*
18. *As reflected in the letter, I made a settlement offer of R1 096 102,00 after factoring in all the deductions applicable to the R4 million which had been paid to me by the respondents for the transaction, including the exchange rate, clearance fees and 6% commission payable to me.*

19. *Accordingly I submit I don't owe the respondents any money other than the amount of R1 096 102.00 offered to them as settlement referred to above.*
20. *Despite all the efforts I have made to have the issues between us resolved amicably, the respondents have continued unlawfully, without valid and reasonable cause, to haunt and threaten me and my family with physical violence. Hence, I have now come to the point where I don't have an alternative but to approach this Honourable Court for protection and relief in terms of the prayers set out in the notice of motion.*
- ...
25. *The threats levelled against me and my family has been a cause for a family mishap, fear and tension as a result of which we, as a family, decided from the time of the threats were first made by the respondents to exercise extra caution both at home and in our movements.*
- ...
27. *Consequently I have reasonable apprehension that these threats could be turned into reality resulting in irreparable harm to my physical being as well as that of my family ..."*

[7] These allegations were repeated in equal generalised terms when, apart from the issue of a clear right, the appellant dealt with the further requirements for a final interdict, namely an act of interference and absence of any other remedy².

² Prest, *The Law and Practice of Interdicts*, Chapter 4 – The Final Interdict

The respondents' response in the court a quo

[8] As a point *in limine* the respondents had argued that, in order to be successful in an application for a final interdict, the appellant had been required to demonstrate that he has actually suffered an injury or that he had a reasonable apprehension of imminent injury. This point was expanded on with the allegation that the application was materially flawed as “... *the founding affidavit does not set out any allegations or details justifying the conclusion that any of the respondents have in any way threatened or harassed the applicant or any member of his family*”.

[9] After having dealt with the fact that, as part of the business relationship between the parties, 500 000 PPE surgical masks have been imported from China at a cost of R4 million which the first and third respondents had transferred to the appellant's alleged corporate alter ego Fly Brother SA (Pty) Ltd and that the appellant had subsequently procured the masks from an alternate supplier at an estimated R1.5 million discounted price, the respondents denied the allegations of harassment and threats and made the following express statement: “*Neither of the respondents at any stage levelled threats against the person or dignity of the applicant or any member of his family*”

[10] The denial was repeated in response to the appellant's allegations dealing with his “*clear right*” in the following terms: “*Save to admit that the applicant has a right to human dignity, life and security, the respondents deny that either of them in any way threatened or harassed the applicant or family members.*”

[11] The denials were repeated in response to the appellant's averment made under the rubrics of acts of interference or absence of alternate remedies.

The replying affidavit

[12] In an attempt to meet and remedy the deficiencies in the founding affidavit, the appellant in his replying affidavit referred to two telephone calls, made on 5 and 10 June to his wife and himself respectively. These were made by an unknown person and a person who identified himself as a Mr Mkize. The transcripts indicate that threats were made that, should the appellant not make a refund of the amount owed, he would be killed.

[13] Had these allegations been made in the founding affidavit, they would have enabled the respondents to deal with them. Apart from this, the replying affidavit created more disputes than solving them. The correspondence annexed thereto indicated that the first respondent had, in his letter of demand to the appellant, only threatened with litigation and nothing else, should the appellant not make payment and satisfy the expressed wish that he would uphold his Christian values. Furthermore, the correspondence indicated that a settlement might have been reached in respect of an amount which the appellant had offered. The fact that the settlement might not have been finally concluded on a proposed date thereof of 1 July 2020 and the fact that the respondents have laid criminal charges against the appellant on 15 July 2020, created yet even more disputes.

Evaluation

[14] The requirements of what must be contained in a founding affidavit are trite. In it, an applicant must set out the facts in as complete away as the circumstances demand, which facts must be sufficient so that a Court may find in his/her favour³.

³ *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (TPD) at 848 H - J referring inter alia to the inadequacy of founding affidavits as illustrated by *Radebe & Others v Eastern Transvaal Development Board* 1988 (2) SA 785 A at 793 D - F

[15] In the present instance the bare minimum of allegations had been pleaded by the appellant. Whilst, for purposes of a pleading in an action matter, that might have been sufficient to avoid an exception⁴, it gives rise to difficulties illustrated by this case when met with denials in an answering affidavit.

[16] The principles applicable to the determination of a factual dispute when final relief is sought on motion had been set out almost 40 years ago in *Plascon-Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd* (supra) to which Fourie J had referred. The test set out in this case has been consistently followed in a long line of cases and it is simply this, namely that an applicant in an application for a final interdict may only be granted relief “... *if those facts averred in the applicant’s affidavits which have been admitted by the respondent together with the facts by the respondent justify such an order*”⁵.

[17] In the present instance, the allegations of threats made in the founding affidavit have been fully and unequivocally met by the respondents. Although their denials are somewhat cursory, Fourie J has in my view, correctly found that that cursoriness is justified by the lack of particularity in the founding affidavit. The appellant had not even set out the facts (which he clearly must have possessed) which later featured in the replying affidavit. Had he done so, one could have properly evaluated whether the denials in the answering affidavit created “*real or genuine*” disputes of fact⁶.

[18] Whilst it is permissible for an applicant to deliver in reply an affidavit containing “*corroborating facts*”⁷, the facts which the appellant sought to introduce went beyond mere corroboration. They actually contained evidence of the actual threats on which the appellant had wanted to rely, with

⁴ *Valentino Globe BV v Phillips* 1998 (3) SA 775 SCA at 779 - 780

⁵ At 634E - 635D

⁶ *Soffiantini v Mould* 1956 (4) SA 150 E at 154 E - H

⁷ *eBotswana (Pty) Ltd v Sentech (Pty) Ltd & Others* 2013 (6) SA 327 GSJ

particularity of dates, by whom it had been made, to whom it had been made and what it actually contained. These are the facts and evidence upon which the appellant might have succeeded. These facts clearly needed to have been in the founding affidavit so that the respondents could have been afforded an opportunity to deal therewith. This was not the case and, as already pointed out, the presentation of detailed evidence only in reply, gave rise to even more questions and foreseeable disputes of fact. In my view Fourie J had then been correct in finding that the appellant had failed to make out his case in his founding affidavit and, insofar as he had attempted to do so, the application of the *Plascon-Evans-test* had the result that he could not succeed.

[19] In the judgement, Fourie J treated the appellant's application as if the appellant also sought an interdict preventing the respondents from prosecuting a case, either in the criminal courts or in the High Court. He then referred to the Court's inherent jurisdiction to prevent an abuse of process. This reasoning is, with respect to the learned Judge, incorrect. The appellants did not seek to prevent the prosecution of cases but merely the continued harassment of threats to institute such cases. Prayer 2 of the notice of motion actually included a claim for a direction to the respondents "*... to institute such proceedings in order to have any of the allegations claimed adjudicated by the court instead ...*". Having reached the conclusions set out earlier and now that proceedings have in any event been instituted, nothing further turns on this.

Conclusion

[20] The position in this case is simply as set out by the Constitutional Court in *MEC of Education v Governing Body of the Rivonia Primary School*⁸ that the "*... basic rule in application proceedings is that the facts necessary to prove a claim must appear in the founding affidavit and its supporting documents.*

⁸ 2013 (12) BCLR 1365 CC at par. 94

Hence the proposition that an applicant must stand or fall by its petition and the facts alleged in it". The conclusion is then that Fourie J had been correct in refusing the applicant's application.

Order

[21] There are no cogent reasons why the customary order pertaining to the incidence of costs should not follow. In the premises the order is as follows:

The appeal is refused with costs.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

I agree

S KUNY
Judge of the High Court
Gauteng Division, Pretoria

I agree and it is so ordered.

L M MOLOPA-SETHUSA
Judge of the High Court

Gauteng Division, Pretoria

Date of Hearing: 01 June 2022

Judgment delivered: October 2022

APPEARANCES:

For Appellant:

Adv M Mlisana

Attorney for Appellant:

Sijako Attorney Inc, Pretoria

For the Respondents:

Adv K Mahlase

Attorneys for the Respondents:

Bokwa Incorporated, Pretoria