REPORTABLE

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

Case No: 2611/2022

In the matter between:

OMRI YEDID LEVI	**First Applicant**
BIANCA MAUREEN ARNSMEYER	**Second Applicant**
versus	
ZVI BANKITNY	**First Respondent**
ASAF BLANKITNY	**Second Respondent**

JUDGMENT DELIVERED ELECTRONICALLY ON 13 JUNE 2023

ADHIKARI, AJ

[1] The first applicant ('Levi') and the second respondent ('Asaf') have known each other since they were 16 years of age, and were close childhood friends.

[2] During 2015 Levi and the first respondent ('Zvi'), Asaf's father, started a company known as Byl Diamonds (Pty) Ltd ('Byl Diamonds'), based in Cape Town, which traded in polished diamonds and sold manufactured jewellery.

[3] By 2019 the business relationship between Zvi and Levi started to deteriorate. The onset of the Covid-19 pandemic appears to have been the proverbial straw that broke the camel's back and by August 2020 their business relationship had completely broken down.

[4] Consequently, Zvi and Levi sought to terminate their business relationship by entering into a settlement agreement during April 2021. However, the settlement agreement did not resolve all of the disputes between Zvi and Levi, and it is the ongoing conflict between the parties that resulted in the incidents which gave rise to these proceedings.

[5] The applicants contend that the respondents attended at the business premises of Byl Diamonds, and at an unnamed coffee shop in Greenpoint during April 2021 and engaged in verbal and physical altercations with Levi as well as with certain staff members of Byl Diamonds. The respondents dispute these allegations.

[6] In addition, the applicants contend that in the period between April 2021 and August 2021, the respondents engaged in a campaign of harassment and intimidation by sending threatening and abusive communications via email and WhatsApp to Levi, the second applicant ('Arnsmeyer'),[1] Levi's family in Israel, and to the accountants of Byl Diamonds. The applicants further contend that Asaf posted a message on the Property24 website, addressed to Arnsmeyer who works in the property industry, identifying Levi as Arnsmeyer's husband and accusing Arnsmeyer of wearing jewellery stolen by Levi.

[7] The respondents do not dispute sending and publishing the offending communications, nor is the content of the offending communications in dispute. The respondents, however, state that the communications were sent and published because they (the respondents) were angry at having been, in their view, defrauded by Levi.

[8] It is not in dispute that in the offending communications the respondents, *inter alia*, wished ill on Arnsmeyer's pregnancy, referred to Levi, Arnsmeyer and their children in crude and derogatory terms, threatened Levi and Arnsmeyer, and accused Levi and Arnsmeyer of theft and dishonesty. The respondents further threatened to contact Levi's clients (presumably to convey their allegations of dishonesty and theft to Levi's clients).

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[1] Arnsmeyer is Levi's wife.

[9] The communications published by the respondents accusing Levi and his family of dishonesty and theft are *prima facie* defamatory in that such communications are likely to injure the good esteem in which Levi is held by the reasonable or average person to whom the communications had been published.[2] The remaining communications sent by the respondents to Levi and his family are abusive and clearly constitute harassment.

[10] The respondents admit to having been extremely upset by what they regarded as the dishonest conduct of Levi, however, the manner in which they chose to express their anger is inappropriate in any society that respects human dignity.

[11] Unsurprisingly, on 26 August 2021 the applicants' attorneys, Friedrich Incorporated ('Friedrich Inc.') addressed correspondence to the respondents in which they demanded on behalf of the applicants, a written undertaking that the respondents would refrain from engaging in further abusive and defamatory conduct directed at the applicants ('the cease-and-desist letter').

[12] There was no response to the cease-and-desist letter. Consequently, the applicants on 14 February 2022 applied to this court, as a matter of urgency, for a rule nisi operating as an interim interdict restraining the respondents from:

> [11.1] Committing any act which may be prejudicial to the applicants, including, *inter alia*, harassment, intimidation, threatening, and making derogatory comments;
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> [11.2] Sending any communications including text messages, WhatsApp messages, and emails, which may be prejudicial to the applicants, including *inter alia*, harassment, intimidation, threatening, and making derogatory comments;
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> [11.3] Posting on any public domain and/or social media platform, any statements which may be prejudicial to the applicants, including i*nter alia*, harassment, intimidation, threatening, and making derogatory comments;

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[2] *Le Roux* at para [91].

[11.4] Instructing any other person/s to harass, intimidate, threaten, and make derogatory comments in respect of the applicants;

[11.5] Entering the applicants' place of employment;

[11.6] Writing to or communicating with the applicants in any manner whatsoever save through an attorney; and

[11.7] Writing to or communicating with any other person about or in connection with the applicants, save through an attorney.

[13] As the respondents are resident in Israel, the applicants sought the leave of the court to sue the respondents by way of edictal citation for interdictory relief.

[14] This court, on 13 June 2022, granted the applicants leave to sue the respondents by way of edictal citation and to serve the application by electronic mail on Zvi at his personal email address, and on the respondents' care of their attorneys in Israel, Altshuler Law Firm and Notary ('Altshuler').

[15] The application and the order of 13 June 2022 ('the edictal citation order') were served on Altshuler, who on 19 June 2022 directed correspondence to Friedrich Inc. advising that Altshuler was not '*authorized to accept any documents in this case on behalf of* [the respondents]'.

[16] The application and the edictal citation order were served on Zvi at his personal email address on 20 September 2022.

[17] The application came before the unopposed motion court on 13 October 2022 and a rule nisi, returnable on 30 November 2022, coupled with an interim interdict, was issued.

[18] The application again came before the unopposed motion court on 30 November 2022. On that date the respondents' legal representatives appeared and indicated that the respondents sought to oppose the confirmation of the rule nisi.

Consequently, the matter was postponed by agreement between the parties to the semi-urgent roll for hearing on 11 May 2023, and the parties agreed to a timetable regulating the further conduct of the matter.

[19] Zvi's answering affidavit was served on 2 February 2023, together with Asaf's confirmatory affidavit. The applicants filed their replying affidavit on 6 March 2023.

[20] The respondents oppose the confirmation of the rule nisi and raise the following points *in limine*:

[18.1] The edictal citation order ought not to have been granted;

[18.2] The application and interim order were not served on the respondents; and

[18.3] The court lacks the jurisdiction to grant an interdict against the respondents as they are *perigrini*.

[21] On the merits, the respondents raise the following defences:

[19.1] The applicants delayed unreasonably in instituting proceedings against the respondents;

[19.2] The order sought by the applicants is too wide;

[19.3] The applicants have failed to prove that they are suffering harm (whether imminent or ongoing); and

[19.4] The applicants have alternative remedies, in the form of the Protection from Harassment Act 17 of 2011 ('the Protection from Harassment Act') and the laying of criminal charges.

[22] I turn now to deal with the preliminary points raised by the respondents.

The edictal citation order:

[23] The respondents contend that the edictal citation order ought not to have been granted because:

> [21.1] The applicants were aware of the respondents' address in Israel;
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> [21.2] The applicants failed to disclose to the court that Altshuler had advised Friedrich Inc. that they did not hold instructions to accept service of the application on behalf of the respondents;
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> [21.3] Although the application for leave to sue by edictal citation referenced service in terms of Article 5 of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ('the Hague Convention'), service on the respondents did not comply with the provisions of The Hague Convention; and
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> [21.4] The edictal citation order does not accord with the notice of motion in the application for leave to sue by way of edictal citation.

[24] Rule 5(1) of the Uniform Rules of Court provides that '[s]*ave by leave of the court no process or document whereby proceedings are instituted shall be served outside the Republic.'* It is trite that edictal citation is ordered when a respondent is outside of the country. Further, the court has a wide discretion to order that service takes place in any manner that is likely to bring the proceedings concerned to the notice of the party to be served.

[25] As the application for edictal citation is not before me, it is not open to me to pronounce on the appropriateness of that order. I am constrained to accept that the court was satisfied that it was appropriate to grant the applicants leave to institute these proceedings by edictal citation, and that the manner of service that the court ultimately ordered would likely bring the proceedings to the respondents' notice. That ought to be the end of the matter.

[26] However, one further aspect bears mention.

[27] The respondents' contention that the applicants failed to draw the attention of the court hearing the edictal citation application to the fact that Altshuler had advised that they did not hold instructions to accept service on behalf of the respondents is misplaced. The edictal citation order was granted on 13 June 2022, whereas the letter from Altshuler indicating that they did not hold instructions to accept service was sent on 19 June 2022, after service had been effected on them via email in terms of the edictal citation order.

[28] Mr Nowitz for the respondents correctly accepted in argument that it is not open to this court to revisit the edictal citation order, however, he urged the court to take the respondents' contention that the edictal citation order ought not to have been granted in the first place, into account in determining whether to grant a final interdict.

[29] This submission too is misplaced. It is not open to me to pronounce on whether the edictal citation order ought to have been granted in circumstances where that application is not before me, even for the narrow purpose postulated by Mr Nowitz. Further, the issue that is before me is whether the applicants have made out a case for the granting of a final interdict. The manner in which the application was served on the respondents has no bearing on that question, as the respondents are before this court and have delivered comprehensive answering papers opposing the relief sought. Consequently, little purpose would be served in reconsidering the edictal citation proceedings, even if it were open to me to do so.

Service on the Respondents:

[30] The respondents' contention that the application and the rule nisi were not served on them is difficult to comprehend.

[31] The respondents' legal representatives appeared before the court on 30 November 2022, being the return date of the rule nisi granted on 13 October 2022. Further, a notice of opposition was delivered on behalf of both

respondents and the respondents filed comprehensive answering affidavits responding to the allegations in the founding papers. Mr Nowitz confirmed at the hearing that he appeared on behalf of both respondents. In addition, the applicants' service affidavit confirms that the application and the rule nisi were served on the respondents.

[32] Given that the respondents were in a position to instruct their legal representatives to oppose the relief sought and to prepare answering affidavits responding in detail to the merits of the application, there can be no question that the substance of the application came to the attention of the respondents and that they were able to mount a defence. Quite how this would have been possible if the respondents were not served with the application remains unexplained.

[33] In the circumstances there is no merit to the contention that the application and the rule nisi were not served on the respondents.

Jurisdiction

[34] The respondents contend that this court lacks the requisite jurisdiction to grant the interdict sought by the applicants because the respondents are *perigrini* of this court, and the applicants have not attached the respondents' assets to confirm and/or found jurisdiction.

[35] It is trite that jurisdiction is the power of a court to adjudicate upon, determine and dispose of a matter. A court has jurisdiction when, within its territory, it has sufficient authority over a defendant to be able to enforce its orders. Put differently, the court must have the power not only to take cognisance of a suit, but also to give effect to its judgment.[3]

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[3] *Barrows v Benning* (67/11) [2012] ZASCA 10 (2012) at para [3].

[36] The law on jurisdiction in regard to interdicts may be summarised as follows:

[33.1] First, if the respondent is an *incola,* the court may assume jurisdiction to grant an interdict irrespective of whether the act in question is to be performed or restrained outside the court's area of jurisdiction.

[33.2] Second, if the respondent is a *peregrine*, it is essential for reasons of effectiveness, that the act to be performed or restrained be within the court's area of jurisdiction.

[37] In addition to the aforementioned principles, regard must be had to import of s 21(1) of the Superior Courts Act 10 of 2013 ('the Superior Courts Act'), which provides that a Division of the High Court has jurisdiction over *'all persons residing or being in, and in relation to all causes arising … within its area of jurisdiction.'*

[38] In *Cordient Trading CC v Daimler Chrysler Financial Services (Pty) Ltd,*[4] the SCA confirmed that the phrase *'causes arising within its area of jurisdiction'* in s 19(1) of the now repealed Supreme Court Act 59 of 1959 ('the Supreme Court Act') meant an action or legal proceeding which had duly originated within the court's area of jurisdiction.

[39] The SCA in *Cordient Trading* stated as follows:

> *'For present purposes the jurisdiction of the Court a quo must be determined with regard to the requirement of 'causes arising'. In the past, these words were construed to mean proceedings over which a High Court has jurisdiction under the common law …*
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> *Plainly, what is meant in the above interpretation is that 'causes arising' does not refer to causes of action but to all factors giving rise to jurisdiction under the common law.'*

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[4] *Cordient Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) at para [11].

[40] The interpretation given by the courts to s 19(1)[5] of the Supreme Court Act remains of relevance in that the section was substantially identical in wording to s 21(1) of the Superior Courts Act.

[41] In *Zokufa v Compuscan (Credit Bureau)* [6] the court concluded, with reference to *Kibe v Mphoko and Another*,[7] *Mtshali v Mtambo and Another*[8] and *Ex parte Hay Management Consultants (Pty) Ltd*,[9] that on the accepted interpretation of s 19(1) and on general principle, a court will have jurisdiction to grant an interdict if the jurisdictional connecting facts[10] supporting the requirements for the interdict are present within the court's area of jurisdiction.[11]

[42] Consequently, the next enquiry that this court is called upon to undertake is to establish the facts arising in this application supporting the three requirements for a final interdict (being a clear right; a threat to or a breach of such right; and the absence of an adequate alternative remedy)[12] and whether such facts originated or exist within the territorial area of jurisdiction of this court.

[43] The Constitution provides that our democratic state is founded on, *inter alia*, human dignity, the advancement of human rights and freedoms and the supremacy of the Constitution and the rule of law. Section 10 of the Constitution provides that everybody has inherent dignity and the right to have their dignity respected and protected. The infringement of another's dignity not a trivial matter.[13] It is trite that

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5 Section 19(1) of the Supreme Court Act provided in relevant part that a local or provincial Division of the High Court had jurisdiction over *'all persons residing or being in and in relation to all causes arising…within its area of jurisdiction'.*

6 *Zokufa v Compuscan (Credit Bureau)* 2011 (1) SA 272 (ECM). The applicants and the respondents both relied on *Zokufa* in substantiation of their respective submissions on jurisdiction.

7 *Kibe v Mphoko and Another* 1958 (1) SA 364 (O).

8 *Mtshali v Mtambo and Another* 1962 (3) SA 469 (GW).

9 *Ex parte Hay Management Consultants (Pty) Ltd* [2000] 2 All SA 592 (W).

10 Legal proceedings are based on facts from which legal inferences may be drawn. These facts are often referred to as the *'jurisdictional connecting factors'*.

11 *Zokufa* at para [62] – [63].

12 *Setlogelo v Setlogelo* 1914 AD 221 at 227.

13 *Isaacs v Kearns and Another* (10280/10) [2010] ZAWCHC 578 (26 November 2010) at para [8]; *Matiwane v Cecil Nathan, Beattie & Co* 1972 (1) SA 222 (N) at 229C-E.

the right to dignity, which includes the right to a good reputation, is a fundamental human right and any infringement thereon is unlawful, in the absence of an appropriate justification.

[44] As I have alluded to earlier in this judgment, the content of the communications and publications directed at the applicants is not denied by the respondents, nor do they deny sending the offending communications to the applicants or publishing the offending statements in the public domain. Further, the respondents did not seek to justify their conduct, save to state that they acted in anger.

[45] The applicants have a constitutional right to live free from the conduct complained of. I am persuaded that the applicants have established a clear right not to be subjected to harassment, verbal abuse, insults, and defamatory statements.

[46] The applicants live and work within the jurisdiction of this court. They seek, in these proceedings, to enforce their constitutionally guaranteed rights to dignity (which includes reputation), privacy, freedom and security of person (including the right to live free from harassment). These rights vest in the applicants where they reside, being within the jurisdiction of this court.

[47] The respondents contend that the offending communications were all sent from Israel, and that consequently Israel is where the breach of the applicants' rights took place and only an Israeli court has jurisdiction to grant the relief sought by the applicants. These contentions do not withstand scrutiny.

[48] Generally, a breach of a right occurs at the place where the right vests. The act of setting the breach in motion may occur somewhere else, but the breach takes place where the right vests.[14] Mr Nowitz correctly accepted in argument that this is indeed the position.

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[14] *Zokufa* at para [44].

[49] In this regard s 23 of the Electronic Communications and Transactions Act, 25 of 2002 is instructive, providing as it does that a data message must be regarded as having been received from the addressee's usual place of business or residence.

[50] Further, in *Kibe* it was held that where the respondent is a *peregrinus*, the court has jurisdiction *'...in the case of a prohibitory interdict, if the act against which an interdict is claimed is about to be done in such area'*.[15] It is abundantly clear that the applicants seek to interdict the infringement of their rights which infringement takes place where they reside, being within the jurisdiction of this court.

[51] Thus, the breach of the applicants' rights took place in Cape Town where where the applicants rights vest and where the offending communications were received and published.

[52] Mr Nowitz contended that the court nonetheless lacked the requisite jurisdiction to grant the relief sought because the doctrine of effectiveness is not satisfied in this matter. In particular, it was contended on behalf of the respondents that any order that this court grants could not effectively be enforced by this court given that the respondents reside outside its territorial jurisdiction.

[53] While this court may lack the jurisdiction to entertain contempt proceedings in the event that the respondents were to breach an interdict granted by the court, the respondents' argument loses sight of the fact that the Isaeli Foreign Judgments Enforcement Law, 1958 provides, *inter alia*, that a foreign judgment which has been declared enforceable by an Israeli court has the effect of a judgment validly given in Israel.

[54] It is beyond the scope of this judgment to determine conclusively whether any orders granted by this court will in fact be declared enforceable in Israel in terms of the Foreign Judgments Enforcement Law, 1958. It is sufficient for present purposes that Israeli courts recognise and enforce judgments rendered in civil proceedings, including interim and final injunctions (interdicts), provided that the judgment meets

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[15] *Kibe* at 367A-B.

the legal requirements, including that it is no longer appealable. Mr Nowitz accepted in argument that there it was notionally possible that an order of this court could be declared enforceable in Israel. Consequently, there is nothing, in principle, to prevent the enforcement in Israel of a final interdict granted by this court.

[55] Finally, insofar as the issue of jurisdiction and effectiveness is concerned, the respondents contend that the applicants cannot obtain relief in the absence of having attached the respondents' assets to found or confirm jurisdiction. This contention is misplaced in that attachment found or confirm jurisdiction is not permissible if the claim is not a claim sounding in money or an action *in rem* for movables.[16]

[56] Thus, the principle of effectiveness does not take the respondents' jurisdictional challenge any further.

[57] The lack of attachment does, however, have consequences in respect of the court's jurisdiction to make a costs order. I return to this aspect below.

[58] In the result I find that all the jurisdictional connecting facts pertaining to the grant of a final interdict in this matter arose within the area of jurisdiction of this court. For these reasons, I find that the jurisdictional challenge lacks merit.

[59] I turn now to deal with the merits of the application.

Entitlement to final relief:

[60] It is trite that the three requirements for a final interdict are, a clear right; a threat to breach such right (in the case of a prohibitory interdict) or a refusal to act in fulfilment of such right (in the case of a mandatory interdict) and no other remedy.

[61] To determine whether an applicant has a clear right is a matter of substantive law.[17] Whether that right is clear is a matter of evidence. In order therefore to

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[16] ***Federation Internationale de Football Association v Kgopotso Leslie Sedibe & Another*** [2021] 4 All SA 321 (SCA).

establish a clear right, the applicants have to prove on a balance of probability, facts which in terms of substantive law establish the right relied on.[18]

[62] In *NCSPCA v Openshaw*[19]*,* the SCA reiterated that an interdict is not a remedy for a past invasion of rights but is concerned with present or future infringements. According to the SCA, an interdict is appropriate only when future injury is feared. Where a wrongful act giving rise to the injury has already occurred, it must be of a continuing nature or there must be a reasonable apprehension that it will be repeated.

[63] The granting of an interdict is discretionary[20] and the remedy of the interdict itself has been described as unusual.[21] The remedy of an interdict is termed discretionary in the sense that a court may not grant an interdict in circumstances where there is an alternative remedy available to an applicant for an interdict and which may satisfactorily safeguard the right sought to be protected. Put differently, the discretion of the court is bound up with the question whether the rights of the party complaining can be protected by an alternative and ordinary remedy.[22]

[64] In *Hotz v UCT* [23] the SCA held, in relation to the lack of an alternative remedy requisite, that the existence of another remedy will only preclude the grant of an interdict where the proposed alternative will afford the injured party a remedy that gives similar protection to an interdict against the injury that is occurring or is apprehended. The fact that one of the parties, or even the judge, may think that the problem would be better resolved, or can ultimately only be resolved, by extra-curial means, is not a justification for refusing to grant an interdict.

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17 *Minister of Law & Order*, *Bophuthatswana v Committee of the Church Summit of Bophuthatswana* 1994 3 SA 89 (BG) at 97–98.

18 LAWSA Vol. 11, 2nd Ed. 397.

19 *NCSPCA v Openshaw* 2008 (5) SA 339 (SCA) at para [20].

20 *United Technical Equipment Co (Pty) Ltd v Johannesburg City Council* 1987 (4) SA 343 (T); *Burger v Rautenbach* 1980 (4) SA 650 (C) and *Grundling v Beyers* 1967 (2) SA 131 (W).

21 *Transvaal Property Investment Co v SA Townships Mining and Finance Corp* 1938 TPD 521.

22 *Transvaal Property Investment Co* at 351.

23 *Hotz v UCT* 2017 (2) SA 485 (SCA) at para [36].

[65] Once an applicant has established the three requisite elements for the grant of an interdict, the scope, if any, for refusing relief is limited. There is no general discretion to refuse relief.[24]

Clear right

[66] As discussed earlier in the judgment, the applicants have established a clear right not to be subjected to harassment, verbal abuse, insults, and defamatory statements.

Breach of the applicants' rights:

[67] The respondents do not dispute sending the offending communications to the applicants or publishing the offending statements in the public domain. Consequently, I am persuaded that the applicants have established a breach of their rights.

[68] The respondents do, however, dispute the applicants' contentions as regards the alleged verbal and physical altercations with Levi at various meetings that took place in Cape Town during April 2021. None of the disputes of fact raised by the respondents insofar as these events are concerned, can be considered to be bald, fictitious, implausible, lacking in genuineness, or so clearly untenable that I am justified in rejecting the respondents' version on the papers.[25] No request was made for a referral of these factual disputes to oral evidence. Thus, insofar as the disputed facts are concerned, this matter falls to be determined on the basis of what is stated in the respondents' answering affidavits.

[69] In light of the factual disputes relating to the alleged verbal and physical altercations with Levi at the business premises of Byl Diamonds, the applicants have not established a breach or threatened breach of their rights so as to justify interdicting the respondents from entering the applicants' place of employment,

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[24] *Hotz* at para [20].

[25] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I-635D.

being the business premises of Byl Diamonds (as sought in paragraph 2.5 of the notice of motion).

[70] However, on the undisputed facts the applicants have established breaches of their rights sufficient to establish a basis for interdicting the respondents from harassing, threatening, intimidating the applicants, sending defamatory communications to the applicants and publishing defamatory statements about the applicants.

Delay and ongoing/imminent harm

[71] The respondents contend that the applicants delayed unreasonably in instituting proceedings against them and in particular that the last incident of harassment took place in August 2021, whereas these proceedings were instituted only some six months later, in February 2022. Allied to this point is the respondents' contention that since August 2021 the respondents have directed no further communication to the applicants and thus there is no evidence of ongoing or imminent harm.

[72] As set out above, on 26 August 2021 the applicants addressed the cease-and-desist letter to the respondents, seeking an undertaking from the respondents that the offending conduct would not continue. The respondents' answer to these contentions is telling.

[73] In the answering affidavit the respondents state that they did not receive the cease-and-desist letter or the email to which it was attached. However, given that the cease-and-desist letter is attached to the founding affidavit as an annexure, there can be no doubt that by the time the answering affidavit was deposed to, the respondents had the opportunity to consider the content of the cease-and-desist letter. Yet, to date the respondents have failed and/or refused to provide the requested undertaking.

[74] The respondents could have obviated the need for the applicants to institute these proceedings by the simple expedient of providing the requested undertaking.

If, as the respondents contend, they did not receive the request for an undertaking when it was sent in August 2021, nothing prevented them from giving the requested undertaking in the answering affidavit. The respondents' protestations that the relief sought is unnecessary and that there is no threat of imminent or ongoing harm rings hollow in light of their continued failure and/or refusal to provide the requested undertaking.

[75] On a balance of probabilities, the most probable inference to be drawn[26] from the respondents' failure and/or refusal to provide the requested undertaking is that there is, as the applicants contend, a continuing threat that the respondents will persist with their offending conduct in the absence of an interdict.

[76] The issue of the delay in the institution of proceedings in circumstances where there is an ongoing threat of harm does not detract from the applicants' cause of complaint. The issue of delay may have had relevance to the question of urgency, however, as Mr Khoza for the applicants correctly submitted, urgency is no longer in issue in this matter having been overtaken by events.

Alternative remedies

[77] The respondents contend that the Protection from Harassment Act and the laying of criminal charges constitutes an effective alternative remedy available to the applicants.

[78] It is not in dispute that the applicants sought to obtain a protection order against the respondents and were informed by the South African Police Services ('SAPS') that they would not be able to do so as the respondents are no longer in South Africa. Given that the respondents reside in Israel and have stated that they do not intend to return to South Africa, the Protection from Harassment Act could not, on any reasonable interpretation, provide the applicants with similar protection to the interdictory relief sought.

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[26] *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) at para [7]. See also *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159B-D.

[79] It is further not in dispute that the applicants were advised by the SAPS that they were entitled to lay criminal charges against the respondents and that they have done so. The respondents contend that this constitutes a suitable alternative remedy, and that as a consequence the court ought to dismiss the application.

[80] *Food and Allied Worker's Union v Scandia Delicatessen* CC[27] is authority for the view that criminal prosecution may be a suitable alternative remedy in appropriate cases. But, as this court in *Berg River Municipality v Zelphi* [28] noted, that this will not always be the case. The court in *Berg River*[29] stated:

> *'One would not usually regard a criminal remedy as one which is available to the harmed individual. It is a public remedy at the discretion of the prosecuting authorities. Only if the directorate of public prosecutions declines to prosecute can the individual launch a private prosecution, and I would hesitate to call a private prosecution an 'ordinary remedy' (they are very rare in this country). A criminal conviction also does not, in a case like this, provide 'similar protection': the protection afforded by an interdict is the cessation of the unlawful activity; a criminal prosecution does not achieve anything similar — it punishes past conduct … .'*

[81] In present matter, the criminal sanctions available to the applicants would involve prosecution for *crimen injuria* and intimidation.[30] Given that the respondents are outside of South Africa and state in terms that they do not intend to return, there is little, if any, likelihood of the respondents being prosecuted in a South African court and facing criminal penalties if convicted.

[82] Further, the applicants are attempting to restrain the respondents from sending abusive, threatening and defamatory communications to them and from publishing defamatory statements about them in the public domain. Criminal

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27 *Food and Allied Worker's Union v Scandia Delicatessen* CC [2001] 3 All SA 342 (A).

28 *Berg River Municipality v Zelphi* **2065 (Pty) Ltd** 2013 (4) SA 154 at para [47].

29 *Berg River* at para [47].

30 It is not disputed that the applicants laid criminal charges of *crimen injuria* and intimidation against both respondents and that these charges are presently being investigated by the SAPS.

prosecution is at the discretion of the State and serves to punish past misconduct – it does nothing to prevent the ongoing threat of harm faced by the applicants.

[83] Consequently, I find that the Protection from Harassment Act and the ability to lay criminal charges against the respondents do not constitute alternative and ordinary remedies in the circumstances of this matter.

[84] In the result, the applicants have established the requirements for the grant of a final interdict. All that remains is the question as to whether the relief sought by the applicants is too widely framed.

The scope of the relief sought

[85] The respondents contend that the manner in which the relief sought by the applicants is formulated would prevent them from instituting and pursuing the envisaged arbitration proceedings against the applicants arising from the fraught business relationship between Zvi and Levi, or from laying criminal charges against the applicants.

[86] The respondents concerns regarding the manner in which the relief is formulated are not entirely without merit. In particular, the relief sought in respect of any acts, communications, or statements *'which may be prejudicial to the applicants'*, if granted, is likely to render the relief over broad and impermissibly vague. That being said, the applicants have made out a case for a final interdict and are thus entitled to effective relief. The manner in which the relief is framed in the notice of motion, is not sufficient basis to deny the applicants any relief. As Mr Khoza correctly submitted, it is within the discretion of this court to tailor the relief granted to respond appropriately to the case made out by the applicants.

[87] As regards the issue of costs, it was submitted on behalf of the applicants that it would be appropriate for no costs order to be made in that the respondents are resident outside of the court's jurisdiction and the enforcement of any costs order made would not be effective or appropriate in the absence of an attachment of the

respondents' assets. This submission accords with the settled authorities on the issue of costs.[31]

In the result I make the following order:

1. The first and second respondents are interdicted and restrained from harassing, threatening, or intimidating the applicants, in any manner whatsoever including but not limited to:

    1.1. Directing harassing, threatening, intimidating or defamatory communications to the applicants, by means of text messages, WhatsApp messages, emails or any other form of communication;

    1.2. Instructing any other party to direct, harassing, threatening, intimidating or defamatory communications to the applicants, by means of text messages, WhatsApp messages, emails or any other form of communication;

    1.3. Publishing defamatory statements about the applicants in the public domain, including on any social media platforms; and

    1.4. Instructing any other party to publish defamatory statements about the applicants in the public domain, including on any social media platforms.

2. The first and second respondents are interdicted and restrained from communicating with the applicants save through a legal representative.

3. There shall be no order as to costs.

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[31] *Mali v Mali* 1982 (4) SA 569 (SE). See also *Kibe* at 367B-C.

ADHIKARI, AJ

APPEARANCES:

Applicant's/Plaintiff's Counsel:	**Adv. S Khoza**
Applicant's Attorney:	**Friedrich Incorporated**
Respondent's Counsel:	**Adv. M Nowitz**
Respondent's Attorney:	**Dirk Kotze Inc.**