THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Not Reportable
CASE NO: 241/2007

In the matter between:

GRAHAM DICK **APPELLANT**

versus

ANGELA CHRISTINE DICK & FIVE OTHERS **RESPONDENTS**

CORAM: **MPATI DP, MTHIYANE, VAN HEERDEN, PONNAN JJA and KGOMO AJA**

Date of hearing: **06 MARCH 2008**

Date of delivery: **31 MARCH 2008**

Summary: **Final interdict – Requirements for – no injury committed or reasonably apprehended. Dispute of fact not soluble on papers.**

Neutral citation: **Graham Dick v Angela Dick (241/2007) [2008] ZASCA 49 (31 March 2008)**

JUDGMENT

KGOMO AJA

[1] This appeal emanates from the Johannesburg High Court (Epstein AJ) who denied the appellant a final interdict. The order sought was couched in the following terms:

1.1 That the second respondent (Transman (Pty) Limited) is interdicted and restrained from interfering with the appellant's peaceful and undisturbed occupation of the properties situated at:

- 15 Grandhaven, Mount Edgecombe.
- Stand 262 Tawny Close, Pecanwood.
- 6 Peregrine Close, Somerset West.

The remaining relief sought by the appellant is not before us on appeal and need not detain us. The present appeal is with the leave of the court below.

[2] The appellant (Mr Dick) and the first respondent (Ms Dick) are husband and wife who are in the process of getting divorced. There are clear signs of acrimony in the marriage. They were married by antenuptial contract in 1974. Over the years they have pooled their resources and built a substantial estate which comprises a conglomerate of trading companies, several fixed properties, and an assortment of movable assets.

[3] The interdict concerns three properties which are dwelling houses but which were essentially used by Mr and Ms Dick and their two children as vacation homes and also infrequently by some senior personnel employed by their company Transman (Pty) Limited.

3.1 The property situated in Mount Edgecombe is registered in the name of a company called 15 Grandhaven (Pty) Ltd (third respondent).

3.2 The dwelling located in Pecanwood is owned by a company named 262 Tawny Close (Pty) Ltd (fourth respondent).

3.3 The third property is in Somerset West, (Erinvale) and is owned by yet another company called 6 Peregrine Close (Pty) Ltd (fifth respondent).

[4] The group structure of the companies – the second to sixth respondents – is fairly convoluted. It suffices for present purposes to record that the majority shareholding in each of these corporate entities is held by Mr and Ms Dick. For present purposes it is not necessary to examine their structure in any detail. Suffice it to state that 15 Grandhaven (Pty) Ltd, 6 Peregrine Close (Pty) Ltd and 262 Tawny Close are all subsidiary companies of Clan Property Holdings (Pty) Ltd (sixth respondent). A confusing trail of leases and sub-leases has been concluded between the various corporate entities in respect of the properties in question. Once again it is not necessary that they be detailed.

[5] The application for an interdict was precipitated by the appellant arriving at the Mount Edgecombe Property for a vacation on 16 June 2006 only to be met by two security guards who stayed in a guest suite in a separate house, detached from the main house, who handed him a letter from Transman (Pty) Ltd's lawyers. The letter authorised the security guards to look after the property and to ensure that no furniture or household effects were removed from the house by the appellant, pending the outcome of the divorce. It is common cause that appellant had removed some property from the house on a previous occasion, which he claimed he was entitled to do.

[6] The letter further stated that:

6.1 Appellant's employment with Transman (Pty) Ltd had been terminated on 27 March 2006;

6.2 Lease agreements were entered into between Clan Property Holdings and, amongst others, 15 Grandhaven (Pty) Ltd and 6 Peregrine Close (Pty) Ltd as owners of the Mount Edgecombe and Erinvale properties. In addition sub-lease agreements were concluded between Clan Property Holdings (Pty) Ltd and Transman (Pty) Ltd. Consequently that made Transman (Pty) Ltd a tenant

of these holiday homes and appellant was required to conclude a sub-lease agreement with Transman (Pty) Ltd in respect of the Pecanwood property;

6.3 As far as the other two properties were concerned it was proposed that appellant would have to pay what was termed a reasonable tariff in the amount of R2000,00 per night for his vacations.

6.4 Appellant was requested to give a firm undertaking that no further articles would be removed from the properties and that the guards would be allowed access to the properties to ensure compliance.

[7] Appellant's attorneys responded along these lines:

7.1 The appellant denied that Transman (Pty) Ltd was a tenant of any of the holiday homes. That an agreement existed between appellant and Ms Dick and the companies in question that the properties were purchased, furnished and equipped, for the exclusive occupation by them and their children, that such use would continue for as long as either of them desired and that the cost of purchasing and maintaining the properties and their contents would be carried by the Transman (Pty) Ltd and Clan Property Holdings group of companies.

7.2 That the said agreement was amended in the light of the breakdown of the marriage of the couple to provide that appellant would have the exclusive use of the Pecanwood property and that whichever party desired to use either the Grandhaven or Peregrine Close property from time to time would give the other reasonable notice of his/her intention so to do. That in return Ms Dick would remain in occupation of the former matrimonial home, which is jointly owned by them, pending the outcome of the divorce proceedings.

7.3 That the rights which Transman (Pty) Ltd might claim, whether by virtue of any sub-lease or otherwise would impact adversely on appellant's right to use the properties and their contents and that Transman (Pty) Ltd had in fact never been given occupation of the properties.

7.4 That insofar as it was alleged that any of the properties were used for occupation by clients of Transman (Pty) Ltd the appellant denied the allegation. That it had occurred on occasion that properties were used by an employee of Transman (Pty) Ltd but this had happened only in exceptional circumstances and that had nothing to do with any lease.

[8] To succeed in his quest for a final interdict, the appellant had to establish:

(a) the existence of a clear right;

(b) that an injury had actually been committed or was reasonably apprehended; and

(c) the absence of any other satisfactory remedy.

(See *Setlogelo v Setlogelo* 1914 AD 221 at 227.)

Before us counsel for the respondent devoted much time in argument endeavouring to persuade us that the appellant had failed to prove the existence of a clear right. On the view that I take of the matter it is not necessary that that issue be resolved. I shall assume in the appellant's favour, without deciding, that he has satisfied the first requirement. For, it seems to be that in any event, it is at the second leg, to which I now turn, that the appellant fails dismally.

[9] In his founding affidavit the appellant asserted:

'I spent a week at Mount Edgecombe. For the entire period of time the two security guards were looming over me watching my every move. They advised me that they were obliged to do this as this was their instructions from the First Respondent.

Since I returned to Johannesburg from Mount Edgecombe I have been receiving invoices demanding payment of rental for my use of Mount Edgecombe, Pecanwood and the Somerset West properties …

The conduct of the Second Respondent has interfered with my peaceful and undisturbed possession of the Mount Edgecombe property.'

[10] That elicited the following response from the respondent in her answering affidavit:

'*The applicant arrived at Mt Edgcombe…on the evening of 15 June 2006…*

The next morning at approximately 06h00 Cousins and Patrick Hellicaer ("Hellicaer") met the applicant and introduced themselves to him.

Cousins advised the applicant that he had been sent to Mt Edgecombe property on behalf of the second respondent to protect its interests and to attend to some work on the property for the second respondent.

Cousins denies that he in any way prevented the applicant from using the entertainment area. The entertainment area is in fact situated on the bottom floor of the house occupied by Mr and Mrs Yates. Cousins occupied the separate guest room as has already been dealt with herein above ...

It is denied that Cousins in any way denied the applicant access or that he advised the applicant that he had no authority to enter the house in which he was staying at 17 Grandhaven. He merely handed him the letter, the contents of which speak for themselves ...

It is denied that Cousins and Hellicaer loomed over the applicant. The applicant spent three nights there, leaving on Sunday 18 June 2006.

Cousins and Hellicaer confirm that they spent most of their time sitting on the front veranda of Mr and Mrs Yates' home.

Such home as indicated above is approximately half a stand away from the property in which the applicant was staying.

Furthermore, there is a gazebo and thick shrubbery separating the two homes. One can barely see the home the applicant was staying in from Mr and Mrs Yates home. Photographs depicting same are annexed …'.

The respondent furthermore filed a supporting affidavit by Cousins in which he confirmed the correctness of the allegations relating to him.

[11] The appellant replied thus:

'The use by Cousins of the entertainment area and the guest bedroom at the bottom of the house deprived me of the use thereof.

Cousins and Hellicaer spent time on the veranda facing the main house. They had an unobstructed view of the main house. I persist with my allegations that they loomed over me.

There is a clear view between the houses despite the existence of shrubbery. It should also be kept in mind that there are two veranda's.'

[12] When one compares the allegations levelled by the appellant in his founding affidavit to those in his replying affidavit, it is plain that his complaint has been substantially watered down. Moreover, as the matter had not been referred for the hearing of oral evidence and as a stark dispute of fact existed on the papers, the appellant had to fail (*Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty)* Ltd 1984 (3) SA 623 (A) at 634E-635C).

[13] It remains to say something about the two remaining properties. In so far as the Pecanwood Property is concerned, the appellant has changed the locks and continues by agreement with his wife to live there pending the outcome of the divorce. There is no evidence to support his claim that there has been any unlawful interference with his 'use and enjoyment of the property' or there is any threat of interference. As to the Erinvale Property, it was conceded before us that there has not been any interference or for that matter even any threatened interference with

the Erinvale property. In my view relief in respect of this property ought not to have been sought at all, much less initially persisted with before this court.

[14] In the result the appeal must fail and the following order is made:

> The appeal is dismissed with costs, including the costs consequent upon the employment of two counsel where applicable.

F D KGOMO
ACTING JUDGE OF APPEAL

CONCUR:) MPATI DP
) MTHIYANE JA
) VAN HEERDEN JA
) PONNAN JA