THE HIGH COURT OF SWAZILAND

MONICA DLAMINI

Applicant

And

BHEKANIRAMBO MAZIYA

Respondent

Civil Case No. 1691/2005

Coram: S.B. MAPHALALA - J

For the Applicant: MR. MNGOMEZULU

For the Respondent: MR. BHEMBE

JUDGMENT

(22nd September 2005)

[1] The Applicant has filed an urgent application seeking an order interdicting and restraining the Respondent from threatening to assault and/or assaulting, harassing and/or threatening any form of violence against the person and/or property of the Applicant.

[2] The Founding affidavit of the Applicant is filed in support thereto. In the said affidavit averments are made outlining the facts of the matter and how the Applicant is being threatened by the Respondent with acts of violence. At paragraph 6 thereof she deposes that the Respondent with others entered his home where he unlocked the

door and entered and they all started insulting and assaulting her. They strangled her and hacked her with a bush knife all over the body. As a result of this she was hospitalised at the Raleigh Fitkin Memorial Hospital for a period of over a week. The Respondent was arrested and is currently out on bail and he has threatened that he shall come to her homestead and kill her with her children.

[3] The Respondent opposes the granting of this application and to this end has filed an Answering affidavit. In the said affidavit certain points of law *in limine* are raised as follows:

In limine

"2.1 Applicant has not its papers alleged and proved that there is a continuing injury against which she seeks to protect herself. Ever since I was released on bail I have not had occasion to meet and talk to Applicant and members of her family.

2.2 **There is no legal basis for Applicant to include members of her family in her prayers because there is no allegation of any nature that I have threatened any other of them. Des'ree Coleman whom I assaulted was the one who provoked me. She was insulting me to the extent that I could no longer bear such abuse. Applicant and her son S'celo Zikalala, a Police officer came and apologized on behalf of Des'ree Coleman. In any event she is old enough to bring an application by herself as I believe she has attained maturity now.**

2.3 **Applicant and I are neighbours separated by a distance of 5 metres and therefore it would be impossible for me to stay and enjoy my property without contravening the proposed prayer. When I am at home I am near to Applicant. Furthermore, Applicant draws water from my pipes and we definitely have to interact concerning this aspect. If the order were to be granted, I would suffer untold hardship.**

2.4 **Applicant has not stated why there is urgency in the matter in light of the fact that she alleges being threatened and assaulted, the criminal justice system involving the Royal Swaziland Police, the Chief, Indvuna and Community Police would fail in keeping and maintaining the peace in her case. These criminal justice system agents are more than capable to protect her against any threat or assault. As it were I am out on bail because the police arrested me therefore the police are effective. Applicant can, if assaulted claims damages.**

2.5 **When I was released on bail on the 6'" May 2005 in Case No. MP 126/05 where Applicant is one of the complainants, the Magistrate Mr. Charles Masango, warned me as a condition to my being admitted to bail that I not interfere with Crown witnesses particularly the complainants. I attached a copy of the record of proceedings and mark it RM1. In my humble submission the whole application is misconceived; a repetition, because a competent court superfluous order is in place that I should not interfere with Applicant and other Crown witnesses and pray that the application should be dismissed with costs in attorney client scale".**

[4] The above points are the subject-matter of this judgment. Two issues are raised therein, namely i) a reasonable apprehension of injury and; ii) no other satisfactory relief.

[5] I shall consider these points *ad seriatim* hereunder, thusly:

i) A reasonable apprehension of injury.

[6] In this regard *Mr. Bhembe* for the Respondent relied on what is stated by the writer *C.B. Prest, The Law and Practice of Interdicts* at page *44* to the legal proposition that the injury complained of must be a continuing one, or there should be a reasonable apprehension that it will occur. An interdict is not a remedy for past invasion of rights. A reasonable apprehension of injury is one which a reasonable man might entertain on being faced with the fact which the court finds to exist on a balance of probabilities, (see *Diepsloot Residents and Landowners Association vs Administrator, Transvaal and others 1993 (3) S.A. 49* at *60* paragraph *E).* He contended that on the facts of the present case the Applicant has failed to advance such facts. Applicant relies on hearsay evidence when she deposes that Respondent, upon his release on bail told one Derrick Coleman **"that solo abaneli"** meaning that he was still planning to subject her and other complainants to more assault. This is not confirmed by the said Derrick Coleman hence it is hearsay evidence and Applicant cannot rely on it to reasonably apprehend that injury would occur to her.

[7] In this regard I agree in *toto* with the submissions made by *Mr. Bhembe* that on the facts the Applicant has not on affidavit established a reasonable apprehension of injury as enunciated in the legal text by *Prest (supra)* at page *44* thereof. The only piece of evidence which seeks to establish this aspect of the matter is hearsay evidence, and is thus not admissible, as it has not been confirmed by the said Derrick

Coleman. Therefore for the afore-going reasons I find that this point of law *in limine* ought to succeed.

ii) No other satisfactory relief.

[8] It is trite law that the third requisite for a grant of a final interdict is proof that there is no other satisfactory remedy available to the Applicant (see *Prest (supra)* at page *45* and the cases cited thereat). In the instant case on the facts it appears to me that Applicant has other remedies opened to her. Firstly, it appears *ex facie* the affidavits that respondent was released on bail by the Senior Magistrate on certain conditions including that of not interfering with Crown witnesses in the pending criminal case. I agree with *Mr. Bhembe* that the proper cause opened to the Applicant was to bring these alleged threats of

assault to the court which imposed the conditions to take an appropriate decision regarding to the Respondent's bail.

[9] Secondly, it would appear that the Applicant's remedies also lie within the provisions of Section 341 of the Criminal Procedure and Evidence Act, for a peace binding order at the Magistrate's Court. In fact Counsel for Applicant has unwittingly conceded this point when he cited what is stated by the English authors *Clerk and Linsell, "Torts ", l^h Edition* at page *148* as follows:

"It would seem that the court has jurisdiction even to restrain the commission of assault… the proper remedy of a person who is under apprehension of an assault is to apply to justice to have the Defendant bound over to keep the peace".

[10] Again for the afore-going reasons I have come to the conclusion that this preliminary point ought to succeed.

[11] In the final analysis I would exercise my discretion against granting a final interdict in this matter. I have considered a number of factors and the hardship which would affect the contesting parties. In the present case it is common cause that Applicant and Respondent are neighbours being 5 metres of each other. It is also common cause that Applicant draws water from Respondent's pipes which are within Respondent's homestead. I agree with *Mr. Bhembe* that it would be impossible for Respondent not to come "near" Applicant or *vice versa (per* prayer 3 thereof). An order against Respondent would restrict his movements around his own premises.

[12] In the result, for the afore-going reasons the application is dismissed with costs.

S.B. MAPHALALA

JUDGE