IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

Date: 1 August 2006

Case no: 06/3313

In the matter between:

TAU, MAELELETJI JOHN **Applicant**

and

VAN DER WALT, JANNIE trading as MR ID **Respondent**

JUDGMENT

MALULEKE J;

INTRODUCTION

1]. The Applicant seeks interdictory relief, which is final in nature, to restrain the Respondent from interfering with and invading the rights of Applicant and his employees and from damaging the property or business of Applicant. Applicant trades as “Passport Services” and Respondent

trades as “MR. ID”. They both are in the business of taking identity photographs. The Applicant’s Founding Affidavit and Replying Affidavit consists of some 51 pages and sets out allegations of unlawful assaults, harassment, intimidation and interference by Respondent and his employees. The Respondent has filed an Answering Affidavit and Supplementary Affidavit totalling 96 pages wherein he denies the Applicant’s allegations and makes counter allegations of assaults and harassment against the Applicant and his employees.

2] Applicant seeks a final interdict, and it is trite that the following are the requirements that applicant must establish on the civil standard in order to succeed:

a) A clear right;

b) An injury actually committed or reasonably apprehended or an actual or threatened invasion of that right; and

c) The absence of similar protection by any other ordinary or suitable legal remedy. *(see Setlogelo v Setlogelo 1914 AD 221 at 227;Franci’s v Roberts, 1973 (1) SA 507 (R.AD) 511E-F and “Interdicts And Related Orders” 1993, by Johan Meyer at page 59.*

3] It is not disputable that generally every person has the right not to be unlawfully harassed, intimidated or assaulted. What is often in dispute, as in this case, is whether there is clear proof of the violation or invasion of

the right. The Applicant, therefore, bears the burden to establish on the civil standard that a clearly enforceable right has been violated or there is reasonable apprehension of such violation. This test is particularly relevant in *casu* where applicant claims *inter alia* that his proprietary right to carry on his business activity is interfered with. *(see Escherich Development (Pty) Ltd v Andrew Mentis Steel Sales (Pty) Ltd & Others 1983(3) SA 810 (WLD) at 813 and Boiler Efficiency Services CC v Coalcor (Cape) (Pty) Ltd & Others 1989(3) SA 460 (CPD) at 464F*.
Respondent contends that Applicant has failed to discharge the burden and he is accordingly not entitled to the relief sought.

Common Cause issues:

4] The following issues are common cause as appears from the admitted facts and the uncontested evidence:

a) For over 12years the Applicant and Respondent have been individually operating the business of taking identity photographs outside of or in the vicinity of the Home Affairs Department Offices in the East Rand (now Ekuruleni) at Germiston and Edenvale. They have been and continue to trade in competition with each other and also with

other operators who are in the same business in the area. Respondent also has outlets at Boksburg, Benoni, Alberton, Brakpan and Johannesburg. Applicant operates only in Germiston and Edenvale. The industry has become increasingly competitive as more operators enter the field.

b) Respondent is by far the biggest operator in the area. From the early 1990's the relationship between Applicant and Respondent became progressively, acrimonious. Applicant has lodged with the local police at Germiston complaints and criminal charges of assault against the Respondent. Pursuant to a complaint by Applicant to the Magistrate at Germiston a Peace Order in terms of *Section 384 of Act 56 of 1955* was issued against Respondent in terms whereof the Respondent was placed under obligation "to Keep the peace and to refrain from harassing the applicant." When it appeared that the criminal charges he had laid with the local police were not being prosecuted, Applicant sought the assistance of the National Minister of Safety and Security as well as National Minister of Home Affairs.

Issues in Dispute

5] In his founding papers Applicant details the incidents of assaults, harassments and intimidation on him and on his employees as well as interference in the carrying on of his business by Respondent and also by employees of Respondent. Applicant also details the various unsuccessful efforts he made to obtain the assistance of the local police, the local Magistrate, the Minister of Safety and Security and the Minister of Home Affairs to protect his rights against the violations by Respondent. An annexed Affidavit made by Dyalivani Lawrence Mzimeni ("Mzimeni") to the police shows that Mzimeni laid a charge of assault against Respondent and his colleagues, and evidently the reason for the assault was that Mzimeni was at the time employed by applicant.

The Supporting Affidavit by Yvonne Erasmus, who trades as "Public Fax", details allegations of how the Respondent also interfered with her business. The relevance of this evidence is that Respondent allegedly employed similar tactics to interfere with the business of Applicant and Yvonne Erasmus.

6] Respondent denies that he ever assaulted the Applicant and his employee Mzimeni and avers instead that it was the Applicant who assaulted him (Respondent) and when he attempted to lay charges of assault against Applicant, the Applicant falsely brought charges that the Respondent had assaulted him and the police, inexplicably, chose to accept and act on

Applicant's charges instead of Respondent's charges. Respondent avers further that over a period of some ten years Applicant has laid with the police a series of false assault charges and complaints against him and that the reason for these untrue allegations against him is because he is jealous and envious that the Respondent's business is thriving and successful whilst applicant's enterprise is failing. Respondent further contends that Applicant and Yvonne Erasmus, who operates a similar business in Boksburg as Public Fax and Phone CC are making up bald and malicious lies in accusing him of using similar strong arm tactics to bring their businesses down. He avers that they make these false allegations to defame him and to cause his business to close down. He avers further that Applicant has an agenda to bring down his successful business because it is a "white persons business."

7] Respondent's version is in many respects full of inconsistencies and improbabilities which are irreconcilable with the common cause facts.
The following instances demonstrate that there is in reality no genuine and *bona fide* factual dispute to prevent the granting of the final relief which is sought:

a) Respondent's contention that the allegations of assaults, intimidation and harassment against him are "malicious falsehoods" fabricated by Applicant because he is jealous of his successful business is not supported by the undeniable evidence.

The annexed copies of the Peace Order in terms of *Section 384 of Act 56 of 1955* issued by the Magistrate against Respondent, the annexed Affidavit by Mzimeni to the Police concerning the assault on him by Respondent, the annexed correspondence to and from the National Government Ministers regarding the complaints by Applicant about and the supporting affidavit by Yvonne Erasmus concerning the threats by Respondent to bring her business down, are facts which "although not formally admitted, cannot be denied, they must be regarded as admitted"*(Stellenbosch Farmers Winery (Pty) Ltd, 1957(4) SA. 234 (C)).* The factual averments of the Applicant on these matters are as a consequences adequately corroborated by the objective and undeniable evidence of the Peace Order, the Police Affidavit of Mzimeni, the correspondence with the Minister of Safety and Security and Minister of Home Affairs and the Affidavit of Erasmus. *(see Plascon-Evans Paints, supra at 635B).*

b) Respondent contends that Applicant should be disbelieved because all the complaints and charges made by Applicant to the police did not result in any prosecution and this must be because the police and the prosecutor did not accept these charges and complaints as credible. The merit of this argument is difficult to follow in the light of the fact that the Respondent also avers that the charges of assault laid by him

against Applicant and also against Mzimeni, similarly did not result in prosecutions. On his argument, it must therefore also mean that no prosecution followed because the police realised that the charges he made were false. No useful inference can be deducted from the failure by the police to prosecute in both instances.

(c) Respondent avers that he also laid charges of assault against Mzimeni and that Mzimeni was at the time employed by him (Respondent). The annexed documentation show that after Mzimeni had laid a charge of assault against Respondent, Respondent also laid a "counter charge" of assault against Mzimeni and consequent to Applicant deposited the bail money for Mzimeni because he was his employee at the time. Respondent makes the contradictory allegation that Mzimeni was an employee of Applicant and was also simultaneously employed by him (Respondent). The inference seems irresistible that this is but a transparent attempt to present as a factual dispute what is in fact a disingenuous stratagem of confusing the perpetrator for the victim by laying a counter charge of assault in response to an assault charge.

8] The 96 pages of Respondent's Answering Affidavit and Supplementary Answering Affidavit are mainly as already stated evidently a transparent attempt or stratagem to simulate a factual dispute.

On a consideration of the facts, the bald denials of the material averments of assaults, harassment and intimidation do not constitute a *bona fide* dispute of fact that warrants referral to *viva voce* evidence. The legal approach to deal with the situation of factual denials which lack credibility and *bona fides* is eloquently stated in the following dicta of *Price J.P, in Soffiantini v Mould , 1956 (4) S.A. 150(EDLD) AT 154 G-H:*

> *"If by a mere denial in general terms a respondent can defeat or delay an applicant who come to Court on motion, then motion proceedings are worthless, for a respondent can always defeat or delay a petitioner by such a device. It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits."*

As already stated, it is trite that a final interdict may be granted on motion proceedings only if there is no *bona fide* factual dispute. The applicable test which is often referred to as the "*Plascon-Evans test",* is succintly

stated as follows in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623(A) at 634 H-I:*

"It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact."(see also Stellenbosch Farmers Winery (Pty)Ltd v Stellenvale Winery 1957 (4)SA 234(C)). Significantly, it is Respondent's evidence that there have been on going friction between himself and Applicant. The evidence demonstrates that as a counter to Applicant's complaints of assaults, intimidation and harassment by Respondent, Respondent each time raised similar complaints against Applicant. It is common cause that there is ongoing acrimony between the parties arising from their business activities which has led to Applicant appealing to the police, magistrate and government for protection of his rights, without success. On this

central and crucial issue, there is therefore no real or *bona fide* dispute of fact to preclude the granting of the final relief sought.

9] The exercise of the discretion whether to grant a final interdict requires that a determination be made whether the rights invaded or threatened could be protected by any other ordinary remedy *(see Masuku v Minister of Justice & Others 1990 (1) SA. 832 (AD) at 840 G-J*).

The applicable legal principle is eloquently stated in the following dictum:

> *"It is also clear that the granting of an interdict is a discretionary remedy. One of the main factors which the Court is enjoined to take into account in deciding whether to exercise its discretion is whether there is any other remedy open to the applicant which can adequately protect him in his rights…." by Franklin AJ, in Johannesburg Consolidated Investment Co Ltd v Mitchmor Investment (Pty)Ltd &Another 1971(2)SA. 397WLD at 404-E.*

In this case it is common cause that over a period of some years Applicant has on numerous occasions sought the assistance of the Police

and also the assistance of the magistrate, the Minister of Safety and Security as well as the Minister of Home Affairs against the violations of his rights. It would be an unjust exercise of discretion for the Court to refuse to grant the relief where a clear right, a continuing injury or violation thereof and the unsuccessful efforts to obtain alternative remedy have been established. The fact that the injury or violation has persisted over a number of years and is in fact continuing is a further compelling reason for granting the relief. *See Phillip Morris Inc. & Another v Malboro Shirt Co. S.A. Ltd, 1991 (2) SA. 720 (A) at 735 B.* The fact that applicant explored and exhausted several other avenues to protect the rights and only approach this court after a number of years cannot be a ground for refusing the interdict (*see Law and Practice of Interdicts, 1996 by C.B. Priest page 48 and Zuurbekom Ltd v Union Corporation 1947(1)SA 514 (A) at 537).* Where the Applicant has discharged the burden to establish the three requirements for the final interdict, and has exhausted the avenues of alternative legal remedy, the relief should be granted. *"The discretion of a Court to refuse a final interdict, provided the abovementioned three requisites are present is very limited and depends exclusively upon the question whether the alternative remedy is adequate"(The Law of South Africa First Reissue , Volume II, paragraph 313).*

The applicant has, in my view successfully made a case for the interdictory relief he seeks.

In the result I grant the Order in terms of paragraphs 1, 2, 3 and 4 of the Notice of Motion hereto which reads as follows:

1. **The Respondent is interdicted from harassing, assaulting, intimidating, damaging any property of the Applicant or any of his employees;**
2. **The Respondent is interdicted from obtaining the assistance of other persons or employees to harass, assault, intimidate or damage any property of the Applicant or any of the Applicant's employees;**
3. **The Respondent is interdicted from harassing or intimidating potential clients of the Applicant;**
4. **Costs hereof to be borne by Respondent.**

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G.S.S. MALULEKE

JUDGE OF THE HIGH COURT

Adv. I Strydom for Applicant

Adv. C Georgiades for Respondent