THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 773/23

In the matter between:

GERDA RUTH PRINGLE **APPELLANT**

and

JOSEPH MATOME MAILULA **RESPONDENT**

Neutral citation: *Pringle v Mailula* (773/2023) [2024] ZASCA 146 (25 October 2024)

Coram: MOKGOHLOA, MABINDLA-BOQWANA and KEIGHTLEY JJA and BAARTMAN and MASIPA AJJA

Heard: 19 September 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 25 October 2024.

Summary: Protection from Harassment Act 17 of 2011 (the Act) – whether the magistrates' court had powers to consider new evidence in terms of ss 9(2) and (3) of the Act – whether in accepting further evidence the magistrates' court compromised the respondent's right to a fair trial – whether associating someone with 'Verwoerd' amounts to racial slur – did racial slur and electronic correspondence amount to harassment.

ORDER

On appeal from; Limpopo Division of the High Court, Polokwane (Naude-Odendaal J and Mdhluli AJ, sitting as a court of appeal):

1 The appeal is upheld with no order as to costs.

2 The order of the high court is set aside and replaced with the following:

'The appeal is dismissed with no order as to costs.'

JUDGMENT

Baartman AJA (Mokgohloa, Mabindla-Boqwana, Keightley JJA and Masipa AJA concurring):

[1] The Limpopo Division of the High Court, Polokwane (the high court) set aside a harassment order, granted in terms of the Protection from Harassment Act 17 of 2011 (the Act) by the magistrate at Modimolle (the magistrates' court). In setting aside the order, the high court held that the magistrates' court had accepted further evidence in circumstances that violated the respondent's right to a fair hearing. The appeal is against that order with the special leave of this Court.

[2] At the times relevant to this judgment, the appellant, Ms Gerda Ruth Pringle, was the principal of Eenheid Primary School (the school) in Modimolle and the respondent, Mr Joseph Matome Mailula's minor child was a pupil at the school. Both parties were members of the school's governing body (the SGB), the appellant *ex lege*, and the respondent, as an elected parent. Soon after he became a member of the SGB, the respondent addressed email correspondences to the appellant seeking information regarding the operations of the SGB. The appellant answered some of the emails and referred others to the chairperson of the SGB. In the answering affidavit, the respondent annexed, among others, email

correspondence AA11, dated 31 May 2021 at 07h26, addressed to the appellant in which he stated:

> ‘I have asked you on numerous occasions to give me access to school information and you have either given me the run around or deferred the matter to the SGB. . . I will be launching a formal complaint with your employer regarding your unprofessional conduct as the principal of the school.’

[3] Matters came to head at the SGB meeting on 1 June 2021 (the June meeting) where the majority of the members resolved to suspend the respondent. He did not take kindly to his suspension and went into a rage pointing his finger at Mr Chisi calling him a joke; he referred to three white SGB members, including the appellant, still finger pointing, ‘I will deal with Verwoerd’s kids’ and, pointing at the remainder of the SGB members, threatened to deal with them as well.

[4] The appellant considered the remark ‘I will deal with Verwoerd’s kids’ defamatory, racist and a threat. She removed the respondent from the SGB’s WhatsApp group and blocked his cellular telephone number on her personal cellular telephone. Undeterred, the respondent used an alternate cellular telephone number to contact the appellant. Thereafter, and on 3 June 2021, the appellant approached the magistrates’ court and applied for an order in terms of the Act. In her application, on the prescribed form, the appellant gave the following as grounds for the order she sought:

(a) despite a request from the SGB, the respondent continued to contact her, even using an alternate number after she had blocked him on her personal phone,

(b) on 1 June 2021, the respondent had threatened, pointing in her direction, that he ‘…will deal with Verwoerd’s kids’.

(c) he made false accusations against her to the Department of Education and thereby brought her into disrepute with her employer.

(d) the appellant further alleged that she had felt threatened by the repetitive electronic communications and threats. Being in the respondent's presence was also threatening to her.

(e) she had laid criminal charges against the respondent and annexed her affidavit in those proceedings in which she alleged among others that, 'The suspect is a very dangerous individual and will attack without provocation'.

In the magistrates' court

[5] On 3 June 2021, the magistrate granted an interim order in the appellant's favour, with the return date set for 14 June 2021, in the following terms:

'3.1 The respondent is prohibited by this court from –

. . .

(b) enlisting the help of another person to engage in the harassment of the complainant and/or above related person/s; and/or

(c) committing any of the following act/s:

(i) Not to communicate with or contact the applicant/applicant's children directly or indirectly neither via social media nor electronically.

(ii) Not to be in the vicinity of the applicant's house and or person.

(iii) Not to threaten the applicant directly or indirectly. Not to attend any SGB meetings at school.

. . .

3.2 (a) The respondent can contact the chairperson of the SGB regarding his child's academic [performance].'

[6] On the return date, the respondent appeared in person and the magistrate reconsidered the order prohibiting the respondent from attending SGB meetings and removed that prohibition. Thereafter, the matter was postponed to afford the respondent an opportunity to seek legal representation. The respondent deposed to his answering affidavit on 21 July 2021 but filed it on 16 August 2021.

[7] In his answering affidavit, he alleged that the June 2021 meeting had not been called to 'specifically address problems arising from emails and letters sent by [him]', instead, it was to deal with his complaints against members of the SGB, as well as complaints against him from members of the SGB. He confirmed his temporary suspension from the SGB pending referral to a tribunal consisting of independent specialists. He denied that his communications with the appellant had been either 'oppressive or unreasonable', instead, it was 'to enable [the respondent] to discharge [his] duties as a duly elected member of the SGB, and the parent of a pupil of Eenheid Primary school'. The respondent further annexed AA3-AA15 comprising email correspondence with the appellant. He described the conduct complained of as being at best, 'unattractive' and denied that the appellant had met the test for an interdict.

[8] On 16 August 2021, the appellant filed a comprehensive replying affidavit that included a recording of the June 2021 meeting which the respondent had attached to email correspondence to her. She alleged that the recording had been edited and challenged the respondent to place the full recording before the court. He did not. The appellant had, in her replying affidavit, set out the time frame and subject matter of AA7 to AA15, emails that the respondent had annexed to his answering affidavit. The following appears from the summary:

(a) On 28 May 2021, the respondent emailed her at 07:21 'requesting demographic records'. At 07:54 another email was sent, seeking further information. At 08:39 the respondent sent an email '…again demanding records'. At 09:01 he sent an email 'requesting the school's PAIA manual', and at 09:05 another one 'enquiring about lawyers appointed by the SGB'. On the same day, the appellant forwarded 'all emails' from the respondent to the SGB members seeking advice on how to respond.

(b) On 31 May 2021 at 06:15, the respondent started with an email to the appellant 'regarding [his son's] report'. The appellant responded at 06:53. At 07:02 the appellant referred 'the respondent's enquiry to the SGB members and requested members to address all matters concerning the SGB to the SGB'. At 07:26, the respondent sent an email accusing the appellant 'of a corrupt relationship with certain SGB members and threating [her] with formal complaints'. At 12:39 'Email from the respondent to SGB members questioning the proposed SGB meeting requesting answers from [her]'. At 12:42 the appellant responded to the respondent's mail. At 17:11 'Email from the respondent to SGB members – respondent does not accept the school's code of conduct for SGB members'.

(c) On 1 June 2021 at 08:23 in another email, the respondent accused the appellant of 'denying [him] access to the school and access to information'. On 2 June 2021 at 06:05 the respondent sent an email to the appellant enquiring into the appellant's 'position as a board member of FEDSAS'. At 06:19 another email from the respondent was sent to the appellant insinuating 'election tampering'. At 06:23, in another email, the respondent enquired about 'an alleged incident concerning his child'. Later the same day at 10:51 the respondent requested 'the school's code of conduct for learners and the school's language policy' from the appellant. At 12:26 and 12:35 the respondent sent emails 'to the Department questioning his suspension from the SGB'.

[9] Annexed to the replying affidavit was also a victim impact statement compiled by Rhoda van Niekerk, a clinical social worker and criminologist in private practice. She described the impact the respondent's conduct had on the appellant as follows:

'The impact of the victimisation events:

As victim of the incidents, [the appellant] encountered that [the respondent] disregarded the law and the basic human rights of people. She experienced emotional distress during and after

this traumatic events. She was confronted with fear, anxiety, nervousness, frustration, and powerlessness. As victim she experienced the following psychological reactions:

- Increase in the realisation of personal vulnerability.
- The perception of the world as unfair and incomprehensible.

The experience of victimisation resulted in an increasing fear on the part of the victim, and the spread of fear within the school system.'

[10] At the magistrates' court hearing, of 18 August 2021, both parties were legally represented, and the respondent raised the following points *in limine*:

(a) the appellant failed to prove repetitive behaviour on his part and therefore she was not entitled to the relief sought;

(b) the appellant impermissibly introduced new facts in reply seeking to introduce a new cause of action;

(c) the appellant should have sought the court's permission to amplify her case in reply; and

(d) he would be prejudiced if the new facts were allowed as he has had no opportunity to respond thereto.

[11] After hearing argument, the magistrate dismissed the points *in limine*, allowed the replying affidavit and gave the respondent an opportunity to apply for a postponement if he needed time to deal with 'new or further evidence' in the appellant's replying affidavit. The respondent's attorney, after an adjournment to consult, indicated that the respondent was ready to proceed and would not seek a postponement due to possible costs implications.

[12] The matter proceeded with the appellant leading the evidence of the chairperson of the SGB (Mr Chisi) who confirmed that the respondent had been suspended at the June 2021 meeting whereupon the respondent had reacted by calling him a 'joke' and pointing fingers at him saying, 'I am going to deal with you and after dealing with you I am going to deal with these children of

Verwoerd'. As he made those remarks, the respondent pointed at the white colleagues that were present at the meeting. The appellant was one of three white colleagues. The respondent was very aggressive. The recording of the June 2021 meeting was played in court, and Mr Chisi identified the respondent as the person referring to him as a joke in the recording.

[13] In cross-examination, Mr Chisi maintained that the respondent's suspension had been necessary to protect members of the SGB. He insisted that the respondent had bombarded them with email correspondence. The appellant closed her case after leading Mr Chisi's evidence. The respondent closed his case without leading any evidence. The magistrate confirmed the interim order as follows:

'In terms of the protection order, the respondent is prohibited by this court from engaging or attempting to engage in the harassment of number one, the complainant.

B. Enlisting the help of another person to engage in the harassment of the complainant.

C number 3. Committing any of the following acts:

1. Not to engage in electronic communication aimed at the applicant including communication through social media.

2. Not to send electronic mail or causing the delivery of electronic mail to the applicant.

3. Not to threaten the applicant with phycological, mental or physical harm; and

4. The court impose the following additional condition that I am of the view is necessary to protect and to provide for safety and wellbeing of the complainant, to wit, not to enter the house where the applicant resides.

5. No order as to costs.'

In the high court

[14] On appeal, the high court did not deal with the merits of the application, instead, it criticised the magistrates' court's handling of the points *in limine*. The high court upheld the appeal and set aside the order holding that the respondent's right to a fair trial had been violated as follows:

'It is not an issue for this court that further evidence was tendered, but the manner in which same was considered to the detriment of the [respondent]. By dismissing the points *in limine* when they should have been upheld, the court misdirected itself and violated the [respondent's] rights to a fair hearing and the benefit of application of the *audi alteram partem* principle.

…

Upholding the points *in limine* by the [respondent], would not necessarily have disposed of the matter, it would have enabled the principles of natural justice to be applied. Given the above misdirection, I am of the view that the court can interfere with the finding of the court *a quo* and further persuaded that the [respondent] has made out a case for the relief sought.'

Despite this finding the high court did not remit the matter for fresh consideration in the magistrates' court.

In this Court

[15] The issues on appeal are:

(a) whether the respondent's right to a fair trial was compromised by the admission of further evidence contained in the replying affidavit;

(b) whether, on the merits, the appellant met the requirements for a final protection order.

[16] The appellant submitted that the magistrates' court was entitled to receive the further evidence and that the respondent had ample opportunity to respond to it but chose not to. In the circumstances, so the submission went, the respondent's right to a fair trial was not compromised and the appellant met the requirements for a final order. Conversely, the appellant submitted that the evidence was admitted in circumstances that compromised his right to a fair trial and that the appellant, in any event, did not meet the requirements for a final protection order.

[17] Section 9 of the Act, in relevant parts, provides as follows:

'9 Issuing of protection order

. . .

(2) If the respondent appears on the return date and opposes the issuing of a protection order, the court must proceed to hear the matter and –

(a) consider any evidence previously received in terms of section 3 (1); and

(b) consider any further affidavits or oral evidence as it may direct, which must form part of the record of the proceedings.

. . .

(4) Subject to subsection (5), the court must, after a hearing as provided for in subsection (2), issue a protection order in the prescribed manner if it finds, on a balance of probabilities, that the respondent has engaged or is engaging in harassment.'

[18] The section is mandatory in that the court must consider further affidavits or oral evidence presented. It is obvious that the court hearing the application has a discretion to allow further affidavits and, in the exercise of that discretion, must ensure that the rights of all parties to the proceedings are protected. The reason for this being that the Protection from Harassment Act, like the Domestic Violence Act 116 of 1998, seeks to grant access to court for an unrepresented person who is confronted with a perceived threat to safety or dignity to obtain protection. Therefore, the clerk of the court is mandated to assist a person seeking protection under the Act.[1] The prescribed form on which the application is made, further directs the applicant to annex available affidavits and to preserve any documents, photographs, and recordings, among others, to which reference is made in the application for a subsequent hearing. It is anticipated that a full hearing will follow the initial application and therefore the presiding officer must deal with the application as follows:

'3 Consideration of application and issuing of interim protection order

[1] Section 2 of the Act provides as follows:
'Application for protection order.
(1) A complainant may in the prescribed manner apply to the court for a protection order against harassment.
(2) If the complainant or a person referred to in subsection (3) is not represented by a legal representative, the cleck of the court must inform the complainant or person, in the prescribed manner, of-
(a) the relief available in terms of this Act; and
(b) the right to also lodge a criminal complaint. . . .'

(1) The court must as soon as is reasonably possible consider an application submitted to it in terms of section 2(7) and may, for that purpose, consider *any additional evidence* it deems fit, *including oral evidence* or evidence by affidavit, which must form part of the record of the proceedings.

(2) If the court is satisfied that there is *prima facie* evidence that -

(a) the respondent is engaging or has engaged in harassment;

(b) harm is being or may be suffered by the complainant or a related person as a result of that conduct if a protection order is not issued immediately; and

(c) the protection to be accorded by the interim protection order is likely not to be achieved if prior notice of the application is given to the respondent,

the court must, notwithstanding the fact that the respondent has not been given notice of the proceedings referred to in subsection (1), issue an interim protection order against the respondent, in the prescribed manner.' (Emphasis added)

[19] It is self-evident that on the return date, the respondent must be able to challenge the evidence adduced in his absence. The interim order is clearly designed to avert imminent threats of harm of which the court on *prima facie* evidence is satisfied exists. Given the brutal society in which we live, the legislature was compelled to allow for this *sui generis* procedure with greater latitude given to the presiding officer to receive further evidence.[2] There is nothing to suggest that the procedure envisaged is limited to the ordinary civil standard of three sets of affidavits of which the replying affidavit is ordinarily the shortest. This is so, as the court, on granting the order, also authorises a warrant for the respondent's arrest.[3] Insistence on the ordinary civil process would frustrate the purpose of the Act. The preamble of the Act envisages that its purpose is to protect victims of harassment by:

'. . .

(a) afford(ing) victims of harassment an effective remedy against behaviour; and

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[2] *Omar v The Government of The Republic of South Africa and Others* [2005] ZACC 17; 2006 (2) BCLR 253 (CC); 2006 (2) SA 289 (CC); 2006 (1) SACR 359 (CC) paras 12-19.

[3] Section 11 of Act.

(b) introduce(ing) measures which seek to enable the relevant organs of state to give full effect to the provisions of the Act.'

[20] Those victims are usually unrepresented and must navigate the process with the assistance of a clerk who is not legally trained. Section 9(2)(*a*) and (*b*) of the Act further envisage a hearing on the return date, at which the court must consider any further evidence submitted.[4] This is not problematic as the evidence is received with appreciation of the rights of both parties to respond thereto. The complaint that the admission of the evidence should have been preceded by an application to file same misconstrues the purpose of the Act which is specifically designed to address urgent relief and gives the court inquisitorial powers to receive evidence that it may so direct.

[21] The complaint that the appellant had the opportunity to supplement her founding affidavit prior to the respondent filing his answering affidavit does not take the matter any further. The respondent had the replying affidavit before the hearing. At that stage he was legally represented and could have sought agreement from his opponent to postpone the matter if he needed an opportunity to respond to it. These were factors the magistrates' court was entitled to take into consideration in the exercise of its discretion. The magistrate, after argument, exercised a discretion to allow the evidence as it was relevant to the determination of the matter. This was in compliance with s 9 of the Act.

[22] Thereafter, the magistrate allowed the respondent ample opportunity to consider how he wanted to deal with the 'further evidence'. The respondent

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[4] Sections 9(2)*(a)* and *(b)* provide as follows:
'(2) If the respondent appears on the return date and opposes the issuing of a protection order, the court must proceed to hear the matter and—
(a) consider any evidence previously received in terms of section 3(1); and
(b) consider any further affidavits or oral evidence as it may direct, which must form part of the record of proceedings.'

elected to proceed with the hearing and closed his case without leading any evidence despite his answering affidavit consisting, in the main, of bare denials. His choice has consequences. In those circumstances, it is opportunistic for the respondent to complain that his right to a fair hearing was compromised.

[23] I am unable to agree with the finding of the high court that the respondent was denied a fair trial. It follows that the high court's order stands to be set aside. Both parties require finality to the matter and have requested this Court to deal with the merits. I turn to that enquiry.

[24] The terms 'harassment' and 'harm' are defined in s 1 of the Act as follows:

'[H]arassment means directly or indirectly engaging in conduct that the respondent knows or ought to know-

(a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably-

(i) following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;

(ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or

(iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to, or brought to the attention of, the complainant or related person;

. . .

"harm" means any mental, psychological, physical or economic harm.'

[25] It is common cause that the respondent sent the emails summarised above. The respondent's zeal went far beyond what could reasonably be expected of the appellant to tolerate from a concerned parent and SGB member. His personal attacks on the appellant are a cause for concern. He followed through with his

threat and reported the appellant to the local Head of the Department of Education. An informal hearing absolved her as the local Head of the Department agreed that the SGB was the custodian of the relevant documents, and that the respondent should request it from the SGB. The flurry of emails sent outside normal business hours indicate complete disregard for the recipient.

[26] The respondent has downplayed his behaviour at the meeting following his suspension and denied that he referred to the appellant and two other white members of the SGB as 'Verwoerd's kids'. The evidence to the contrary is overwhelming. Mr Chisi gave a credible account of the events at the meeting and the appellant reported the incident to the police shortly after the meeting. The magistrates' court accepted that the respondent uttered those words. The record bears out the correctness of the finding.

[27] In argument before this Court, the respondent, while denying that he made the Verwoerd comment, submitted that, in any event, referring to three white SGB members as 'Verwoerd's kids' could not be construed negatively as there are streets and a town bearing the name. In the South African context, reference to Verwoerd's kids carries a racial connotation associated with the late former South African Prime Minister Dr Hendrick Verwoerd and what he stood for. The streets and town named after Verwoerd is merely an incident of our past and, if anything, should serve as a warning from history against what he stood for. In *City of Cape Town v Freddie and Others*,[5] the Court held as follows:

'Concerning the Verwoerd racist slur email: The former South African Prime Minister Dr Hendrik Frederik Verwoerd is notoriously known. . .

. . . one should expect to see all right-minded and peace-loving people not to dare to be even perceived as associating themselves with anything to do with Verwoerd and his lieutenants, as well as his similar-minded successors.'

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[5] *City of Cape Town v Freddie and Others* [2016] ZALAC 8; [2016] 6 BLLR 568 (LAC); (2016) 37 ILJ 1364 (LAC) para 54-55.

[28] Those remarks still reflect the current position in society. It follows that the respondent used a racial slur while threatening to deal with the appellant. The incident was not isolated as it was preceded by the unacceptable bombardment of email correspondence. The question is whether cumulatively these acts by the responded constituted harassment.

[29] In her initial application, the appellant stated, 'I feel intimidated and threatened by his presence as well as when we communicate electronically'. She further referred to the June meeting incident and that the respondent had reported her to her employer which had brought her into disrepute. She annexed the affidavit she had made to the police in support of a complaint of *crimen injuria*, from which the following appears:

> 'At 17:13 the members at the meeting came to unanimous decision to suspend Mr Mailula. . .[he] jumped up in a very aggressive manner. . .I will deal with Verwoerd's kids. . .At this time I was very emotional and felt threatened and afraid and racially attacked and offended and my dignity was severely attacked and damaged.
>
> I am emotionally damaged and felt that he permanently damages my reputation in front of the whole meeting. At this moment with the body language Mr Mailula displayed I feared for my own safety. . .
>
> . . .
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> I am devasted emotionally, physically, and psychologically. . . The suspect is a very dangerous individual and will attack without provocation.'

[30] Mr Chisi confirmed that the respondent was aggressive at the June meeting following his suspension. He also referred to the email bombardment, as he was also copied in a number of these emails. The summary referred to above bears out the correctness of that statement. It is further apparent that the appellant consulted Mrs van Niekerk on 4 June 2021, shortly after the June meeting. As Ms van Niekerk did not testify or qualify herself as an expert the magistrates' court did not have the opportunity to consider the basis for her expert opinion, the

probative value of which is therefore minimal. However, it does confirm that at relevant times, the appellant felt emotional as she described in the initial affidavit. The reason for such emotion is obvious. The respondent imposed on her impermissibly at unreasonable hours and seemed to have focused his frustrations on her. The circumstances of this matter are such that, at the June meeting, the appellant was already vulnerable and worn down from the persistent electronic harassment.

[31] The manner, tone and times, together with requests to desist from the correspondence leave no doubt that the respondent ought to have known that his conduct was harmful to the appellant. He compounded the deliberate obstructive behaviour when he reported her to the Department and, after his suspension, found creative means to contact her in flagrant continued harassment. The racial slur coupled with the threat caused further emotional trauma. This added to his already outrageous behaviour and was no doubt intended to cause harm.

[32] In the circumstances of this matter, the cumulative effect of the electronic communications, the aggressive stance the respondent took in his dealings with the appellant culminating in racial slur and threat, brings his behaviour within the definition of harassment. It follows that the magistrates' court was correct in holding that the appellant met the requirements for a final order. I further agree with the magistrates' court that given the nature of the matter a costs order would be inappropriate.[6]

Order

[33] In the result the following order is issued:

1 The appeal is upheld with no order as to costs.

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[6] Section 16 of the Act.

2 The order of the high court is set aside and replaced with the following:
'The appeal is dismissed with no order as to costs.'

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E D BAARTMAN

ACTING JUDGE OF APPEAL

Appearances

For the appellant:	M Barnard
Instructed by:	Breytenbach Keulder Inc, Modimolle
	Hendre Conradie Inc, Bloemfontein
For the respondent:	J M Mailula in person
Instructed by:	In person.