IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 18145/2015

UNIVERSITY OF CAPE TOWN Applicant

v

CHUMANI MAXWELE Respondent

JUDGMENT DELIVERED ON THIS 14th DAY OF DECEMBER 2015

FORTUIN, J:

A. INTRODUCTION

[1] In this matter the applicant is the University of Cape Town (UCT). The respondent is Mr. Chumani Maxwele ("Maxwele"), a student at UCT, registered for a political science degree.

[2] This is an application by UCT for a final interdict, alternatively an interim interdict, to prevent Maxwele from approaching, contacting or intimidating its employee, MS Mariola Kirova ("Kirova"), who is employed by the applicant as a lecturer in the

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Department of Mathematics and Applied Mathematics, and to prohibit Maxwele from being within 5m of Kirova's office in the Mathematics Building.

[3] The Notice of Motion was subsequently amended to read as follows:

(1) Interdicting and restraining the respondent from

(1.1) Approaching or contacting Kirova in any manner;

(1.2) Entering or approaching within 5 meters of the office of Kirova in the Mathematics Building on the University's Upper Campus;

(1.3) Intimidating, harassing, assaulting or in any way interfering with Kirova; and

(1.4) In any manner inciting other persons to approach Kirova or to enter upon or be upon the Mathematics Building for the purposes of approaching or intimidating or threatening Kirova.

(2) Alternatively to paragraph (1) above, pending the finalisation of the disciplinary proceedings against the respondent in the University Disciplinary Tribunal in respect of the incident of 1 May 2015, and any disciplinary proceedings initiated in respect of the incident of 15 August 2015, interdicting and restraining the Respondent from

(2.1) Approaching or contacting in any manner Kirova;

(2.2) Entering or approaching within 5 meters of the office of Kirova in the Mathematics Building on the University's upper Campus;

(2.3) Intimidating, harassing, assaulting or, in any way, interfering with Kirova;

(2.4) In any manner inciting other persons to approach Kirova, or to enter upon, or be upon the Mathematics Building for the purposes of approaching or intimidating or threatening Kirova;

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(3) Authorising the applicant, duly assisted by the Sheriff and insofar as needs be, by the members of the South African Police Service, to give effect to the provisions of this Order by forthwith removing the applicant from the University if he found to be in breach of this order.

(4) In the event that the respondent opposes this application, ordering him to pay the costs hereof;

(5) That pending the return day hereof, paragraph 2.1 above shall operate as an interim interdict with immediate effect and the provisions of prayer (3) above shall be operative; and

(6) Further and / or alternative relief.

THE EVENTS OF 1 MAY AND THE SUBSEQUENT PROCEEDINGS

[4] I will now proceed to briefly set out the events of 1 May 2015 and subsequent proceedings. On 1 May 2015, which was a public holiday, Maxwele approached Kirova as she was leaving the Mathematics Building at the South Entrance of the building. This happened as she had closed the front door.

[5] Kirova asked Maxwele why he wanted to enter the building. She also asked him to identify himself. After ascertaining that Maxwele was indeed a student, she proceeded to escort Maxwele into the building to see that there were no open spaces available, as she had told him earlier.

[6] Kirova and Maxwele then had an argument. Kirova reported this incident on 2

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May 2015 by e-mail to Prof Anton le Roux, the Dean of the Faculty of Science. As a result of her complaint, charges were initiated in the student disciplinary tribunal against Maxwele on 6 May 2014 that he breached RCS 7.6; 7.7, 5.1, 3.1 and 1.1. of the Disciplinary Jurisdiction and Procedures.

[7] As a result of these charges, Maxwele was provisionally suspended by the Vice Chancellor's nominee, Dr Karen van Heerden. This suspension was set aside, where after Maxwele was again provisionally suspended on 16 June 2015, resulting from the same incident, and was finally suspended on 19 June 2015. On 22 July 2015, this order of suspension was varied by Dr van Heerden to permit Maxwele to attend lectures and tutorials.

[8] Soon after the May incident, in addition to suspending Maxwele and in response to Kirova's complaint, the UCT decided to station a security guard outside Ms. Kirova's office.

[9] As a result of the same incident on 1 May 2015, Maxwele, in turn, submitted a complaint against Kirova on 11 May 2015 in which he alleged that:

9.1 Kirova sought to control his right to access the resources of the University and to restrict his freedom of movement as a member of the University community;

9.2 Her use of racially offensive language and derogatory statements such as "savage" and barbaric" in describing her experience and that of a deceased professor, was intended to label black people as criminals;

9.3 Escorting him around the building was made to make him feel unwelcome and undesirable; and

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9.4 Her complaint against him was aimed at victimising and removing him from playing a further role in the transformation of the University, championed by the "Rhodes Must Fall Campaign".

[10] At the time of launching of these proceedings, this complaint was scheduled to be heard on 2 November 2015. During argument, however, no specific dates could be provided for the hearing of any of these complaints.

[11] Maxwele thereafter initiated urgent proceedings in the Equality Court and in the High Court. At the hearing of the High Court matter, Maxwele abandoned the interdict sought to prevent the University from taking disciplinary steps against him, and conceded that he would be prepared to face disciplinary charges if his suspension was uplifted. The UCT's decision to suspend Mr. Maxwele was set aside by this court on 15 September 2015.

SUBSEQUENT EVENTS

[12] On 20 August 2015, while Maxwele's suspension was still operative, Kirova reported another incident involving Maxwele, this time to Dr Price (the Vice Chancellor), Prof Le Roux (the Dean of Science), Prof Moultrie and Mr. Ganger.

[13] The essence of this complaint is that, on this day, Kirova was standing outside the Mathematics Building talking to one Prof Gilmour. Further, she heard someone saying "*You supposed to have security guards right now, a?*" and noticed that it was

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Maxwele. According to her, Prof Gilmour also heard the words uttered by Maxwele, but that he asked Maxwele to repeat what he said. Maxwele then replied: "*Nothing, I was greeting.*" She further stated that he repeated this answer. After this, Prof Gilmour called Maxwele by his name and the two of them started talking. She stated that she overheard the two men talking and could hear Maxwele say the words "*this woman …*", "*she is a racist …*", "*we will kill all evidence*". According to her, she walked away when Maxwele started talking about money, Marikana, politics, etc. The fact that Prof Gilmour spoke to Maxwele afterwards, is confirmed by Prof Gilmour, but denied by Maxwele.

[14] Prof Gilmour and Kirova's recollections of the events are not identical.

[15] Prof Gilmour's recollection of the events on 20 August 2015 is as follows:

15.1 He confirmed that he was talking to Kirova outside the Mathematics Building;

15.2 He heard a voice and the word "*security*" being said behind him;

15.3 He called out to the person, after an indication from Kirova that it was Maxwele;

15.4 Maxwele was walking past them, but stopped after Prof Gilmour called him, and introduced himself to Maxwele;

15.5 After questioning Maxwele about what he said, he told him that he was greeting;

15.6 When Prof Gilmour told him that he was not telling the truth as he distinctly heard the word "*security*" being uttered. Hereafter, Maxwele started talking about Marikana, Dr Price, etc. He was also pointing at Kirova who was standing nearby;

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15.7 Maxwele asked the Prof the question "*what is truth*" when he confronted him about the word "*security*" being used.

[16] The respondent's version in respect of the incident on 20 August 2015 is that he did walk past a man and a woman outside the Mathematics Building, but he did not pause to talk to them.

[17] From these two versions it is clear that Prof Gilmour does not corroborate Ms. Kirova with regards to respondent's behaviour being threatening or intimidating towards her on this day.

[18] On 15 September 2015, at 13h44, Kirova sent another e-mail to the Vice Chancellor, the Dean of Science, Prof le Roux and Prof Moultrie, with the subject "*Maxwele*" and the following content "*please help, he is in front of my office, talking lies about me loudly. Monola.*"

[19] On request from Mr. Ganger, the Head of the University Investigation Department, Kirova sent him a detailed account of the incident. She related how the respondent was outside her office talking loudly on his cell phone about the Rhodes Must Fall campaign, and about his victory in court earlier that morning, and that the University was not to protect the "*stupid lecturer*". She further stated that he used the words "*racist lecturers*".

[20] The respondent admits that he had a telephone discussion outside of Kirova's office with a journalist from The Citizen Newspaper. It is his version that he did not approach or talk to Kirova in any way on 15 September. Further, that he was relating to

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the journalist on his phone the history behind the judgment handed down on 15 September 2015. This history included him challenging racism at UCT and that he considered Kirova's conduct towards him on 1 May 2015 to be racist.

THE ISSUES

[21] The issue to be determined is whether the applicant complied with the requirements for a final interdict, alternatively an interim interdict.

THE LAW

[22] The law in respect of interdicts is trite. The requirements for a final interdict are:

22.1 a clear right;

22.2 an injury actually committed or reasonably apprehended; and

22.3 the absence of similar or adequate protection by any other ordinary remedy.

[23] The requirements in terms of an interim interdict are as follows:

23.1 The right sought to be protected is *prima facie* established, even though open to some doubt;

23.2 There is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in

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establishing the right;

23.3 The balance of convenience favour the granting of interim relief; and

23.4 The applicant has no other satisfactory remedy1.

Final Interdict

[24] I will briefly deal with whether the applicant complied with the requirements for a final interdict. I do so even though Mr. Jamie, during argument, so much as conceded that they are proceeding only with the application for an interim interdict.

[25] To establish a clear right requires an applicant to show that that the right exists as a matter of substantive law. In order to determine whether the right is indeed clearly established is a matter of evidence. It is therefore required that the Applicant prove on a balance of probability the existence of the right, which it seeks to protect, before a final interdict can be granted. In this regard see **CB Prest ' The law of Interdicts'2**

[26] On behalf of the respondent, the following submissions were made. The University has failed to establish the substantive right, which it seeks to protect. It alleges that the conduct of Maxwele is 'unacceptable' and that Kirova has the right not to be intimidated.

[27] It was further submitted that, in the absence of establishing a clear right, the

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1**Setlogelo v Setlogelo** 1919 (AD) 221 at 227.
2 (2012) at p43

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University is not entitled to the relief which it seeks and that the court should accordingly dismiss this application.

[28] On the other hand, the University contends that it has "*a well-grounded fear* (apprehension) *of irreparable harm*" and should the interdictory relief not be granted, "*the University has a real fear that matters may escalate*".

[29] It is trite that the test for apprehension is an objective one. The applicant must therefore show that, objectively it's apprehensions are well grounded. Mere assertions of those fears are therefore not sufficient. The facts grounding this apprehension must therefore be set out in the application so as to enable the court considering the application to judge for itself whether this apprehension is indeed well grounded. In this regard also see **CB Prest ' The Law and Practice of Interdicts'**, *supra.*

[30] It is, therefore, the respondent's submission that the assertions made by the University insofar as having a fear of irreparable harm does not justify a final interdict against the respondent. I am in agreement with submissions by the Respondent that the Applicant did not meet the requirements for a final interdict.

[31] The applicant alleges, through the statement by Kirova that the respondent was aggressive when he saw Kirova on 20 August 2015, but the statement by Prof Gilmour does not corroborate this version. The applicant also failed to show that the Respondent attempted to speak or approach Kirova when he was inside the mathematics building on 15 September 2015. On their own version, the respondent was speaking to someone else on the telephone on the day. Surely, the respondent is

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entitled to speak and express his views about the applicant's and Kirova's conduct. Should this court issue an interdict to prevent the respondent from expressing his views, it would result in a violation of his constitutional rights.

Interim Interdict

[32] I am in agreement with Mr. Jamie that the relief to be focused on is that of an interim interdict. I will now proceed to test whether the applicant succeeded in complying with the requirements for an interim interdict. I will consider the elements separately bearing in mind that they should be considered in conjunction with each other.

[33] The requirement of a *prima facie* right to be established was discussed in **Webster v Mitchell**3. It was held that the right can be *prima facie* established even if it is open to some doubt. It is now well established that the proper approach is to consider the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to decide whether, with regards to the inherent probabilities and the ultimate onus, the applicant should on these facts obtain final relief in future. The facts set up in contradiction by the respondent should then be considered and if they throw serious doubt on the applicant's case, the applicant cannot succeed.

[34] On behalf of the respondent, the decision in **Molteno Bros & Others v South African Railways & Others4** was quoted:

"... *therefore sufficient for the appellant to establish a case founded upon* 'the

3 1948 (1) SA 1186 (W) 189.
41936 AD 321 at 332 and 333

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greatest probabilities', *that is to say, to bring* prima facie *proof of right.*"

The court also found that the appellants had not produced *prima facie* proof, and that they had:

> *"... shown a possibility, but not sufficient probability to establish a* prima facie *case."*

[35] In *casu*, the applicant alleges that the respondent threatened Kirova and claims that she has a right not to be contacted, intimidated or threatened by Maxwele. The facts set out by him in respect of the incident on 15 September 2015, which Kirova cannot dispute, are the following:

35.1 that he had a right to be in the Mathematics Building;

35.2 that he was giving a telephonic interview to a journalist of The Citizen newspaper regarding the history of the "Rhodes Must Fall" campaign;

35.3 the complaints lodged by Kirova against him;

35.4 the complaint lodged by the respondent against her; and

35.5 that he obtained an order in his favour earlier that day with a cost order against the applicant.

[36] These are the facts that are undisputed. The respondent places the following allegations made by the applicant in dispute:

36.1 the fact that he threatened Kirova;

36.2 that he was actually speaking to her; and

36.3 that he was intimidating her.

[37] On behalf of the respondent, it was submitted that this is not *prima facie* proof as the applicant did not show sufficient probability as required in **Molteno Bros**, *supra*.

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[38] With regard to a well-grounded apprehension of irreparable harm, it is trite that the test of apprehension is an objective one. It is not sufficient for the applicant simply to allege irreparable harm. The facts establishing this well-grounded apprehension must be set out.

[39] From the papers before me, it is clear that the Respondent have no intention to harm Ms. Kirova. There is in addition no allegation that the Respondent at any stage breached the terms of his suspension when it was still operative. Objectively, therefore, I cannot see any well-grounded apprehension. Ms. Kirova's subjective fear is evident on the papers, but I am not convinced that it is well-grounded.

[40] With regards to the balance of convenience, it is in *casu* necessary to look at the background facts in this matter, as gleaned from the papers before me.

40.1 As a result of an incident which occurred on 1 May 2015, Ms. Kirova lodged a complaint against Maxwele on 2 May 2015. Resulting from the exact same incident, Maxwele lodged a complaint against Kirova on 11 May 2015. At the time of the hearing of this application, neither of these complaints has been dealt with.

40.2 The applicant took the following procedural steps after receiving these two complaints:

(i) Placed a security guard outside Kirova's office;

(ii) Suspended Maxwele; and

(iii) Brought this application to interdict Maxwele from performing certain actions.

40.3 Maxwele took the following procedural steps:

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(i) Successfully brought an application for review of his suspension against the Applicant; and

(ii) Opposed this application by the Applicant for an interdict.

[41] Both of these parties will be testifying against each other in proceedings in due course. An interdict in favour of the applicant, who is to be the presiding forum at such proceedings, would surely tip the scales in favour of Kirova to the disadvantage of the Respondent, as the granting of an interdict in this matter would be aimed at providing Kirova with more protection.

[42] In my view, in light of the above facts, the balance of convenience favours the Respondent.

[43] With regards to the requirement that there should be no other adequate remedy, the Applicant contends that it has no other remedy to deal with Kirova's fear. I cannot agree with this contention. It is undisputed that the applicant placed security guards in front of Kirova's office after the incident of 1 May 2015. The incident of 15 September 2015 was the first incident which occurred since a security guard was placed in front of her office for her protection. There was therefore no incident of an alleged threat to Kirova between May and September.

[44] When the facts with regards to the actual incident are evaluated to determine whether there was an actual threat to Kirova on 15 September 2015, as alleged by the Applicant, the following is evident: The security guard Hugo Ghall stated that the Respondent was talking to someone else on his cellphone and not to Kirova. He further states that, to prevent Ms. Kirova from hearing what Mr. Maxwele was saying, he

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proceeded to close her door. It was Kirova's colleague who opened the door again to record the Respondent's telephone conversation, not the Respondent. The security guard clearly understood that his role was to protect Kirova and he proceeded to do exactly that. It is his opinion that the Respondent wanted Kirova to hear what he was saying to the person on the other end of the phone. Nowhere in Ghall's statement does he say that the Respondent was talking to Kirova, nor that he was trying to make contact with her nor threatening her.

[45] In my view, the university provided a sufficient adequate remedy in order to protect Ms. Kirova by placing, on one particular day, Mr. Ghall and one Mr. Carstens in front of Ms. Kirova's door as security guards to deal with her subjective fears.

[46] The internal disciplinary proceedings of the applicant are available to all parties, including students. The applicant has at least since 1 May 2015, dedicated a massive amount of resources in protecting Kirova, an employee, even before the truth of the allegations made by her has been tested. On the other end, the Respondent, who is a registered student at the university and also entitled to some form of protection by the institution, does not enjoy the same support and protection and is instead constantly, at great personal financial cost, at the receiving end of legal attacks by the university. Kirova on the other end enjoys, in addition to the above listed protection by the Applicant, also the privilege of the Applicant litigating on her behalf at their own cost.

CONCLUSION

[47] As this is an application to interdict the Respondent from *inter alia* harassing, intimidating or assaulting Ms. Kirova, it is helpful to look at the Respondent's behaviour

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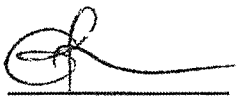
in light of recent legal challenges. In the matter decided by my brother Nuku, AJ, Respondent undertook to face disciplinary charges. In this application before me, he states, under oath, that he *"has no intention to harm Ms. Kirova as I am not a person with a violent nature ..."*

[48] In light of this, the applicant still persisted with this application. In my view, considering the submissions by both sides, the applicant did not make out a case for a final, nor an interim interdict, and I therefore make the following order:

The application is dismissed with costs.



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