hbgschindlers attorneys

A Question of Harassment or Community Scheme Pains

By **Charissa Kok** (Partner),
and **Nicholas du Toit** (Candidate Attorney)

28 June 2024

The Case of MM v Ramond Cliffed Kiewiet

INTRODUCTION

On 03 May 2024, the Pretoria High Court (Nkosi AJ presiding) handed down judgment in the case of MM v Ramond Cliffed Kiewiet[1], taken on appeal from the Magistrates' Court for the District of Tshwane (Magistrate Mfulwane presiding).

BACKGROUND

To briefly canvass the facts of the appeal, the court a quo, at the hearing of why an interim protection order in terms of section 10(2) of the Protection from Harassment Act 17 of 2011 ("the Harassment Act") should or should not be made final, ruled in favour of the Respondent's point in limine, being that the Community Schemes Ombud Service Act 9 of 2011 ("the CSOS Act") was the applicable authority and the Appellant (then the Complainant) erred in bringing an application in terms of the Harassment Act.[2] On the Respondent's version, the issue between the Appellant and Respondent fell within the domain of the CSOS Act and that the Appellant was premature in turning to the relief provided to litigants by the Harassment Act.[3]

In evaluating the merits of the parties' claims, Nkosi AJ deferred to the overarching legislative framework applicable to the dispute. This legal framework consists of the Constitution of the Republic of South Africa, the Harassment Act and the CSOS Act.

In evaluating whether or not the CSOS Act ousted the applicability of the Harassment Act, Nkosi AJ delved into the purpose of each Act insofar as they respectively seek to govern interactions and relationships between individuals.

THE HARASSMENT ACT

Nkosi AJ's assessment of the Harassment Act turned on three crucial facets: the Act's lengthy definition of the term "harassment"; the role the Harassment Act plays in safeguarding constitutional rights; and peremptory provisions of the Harassment Act which a Magistrates' Court (as a creature of statute) is not seized with the discretion to disregard.

The Harassment Act paints a broad picture of what constituted harassment. This definition is wide enough to account for direct or indirect conduct, or communication which is verbal, electronic or of any other shape or form.[4] The key feature of the Harassment Act's definition of harassment lies in whether or not harm or the reasonable belief thereof has been brought about by a Respondent's conduct.[5] Harm is further defined to include "any mental, physiological, physical or economic harm".[6] In summation, it is clear that the Harassment Act has been tailored by the legislature to serve as primary reprieve for individuals who have been led into harmful/potentially harmful interactions with other. It is important to bear in mind that the definition of "harassment" as employed by the Harassment Act has been phrased to ward against unnecessary and/or unjustified litigation. In determining whether harassment has occurred, the courts are mindful of the fact that "irritations, annoyances, even a measure of upset, arise at times in everybody's day-to-day dealings with other people."[7]

In terms of the Harassment Act's constitutional functions, Nkosi AJ drew express attention to the preamble of the Harassment Act, which pays direct reference to several rights enshrined in the Bill of Rights.[8]

As Nkosi AJ pointed out in his judgment, the Harassment Act contains provisions which are peremptory in nature. In other words, the Magistrates' Court does not have the discretion to act in a manner which runs counter to those provisions, and must be directed by the prescripts of the Harassment Act.[9] In particular, Nkosi AJ made reference to sections 3(2) and 10(5) of the Harassment Act. Section 3(2) states that a court "must issue an interim protection order" in the event that a prima facie case has been made demonstrating that harassment has occurred.[10] Section 10 (5) furthermore states that a court "may not refuse" to grant relief sought in terms of the Harassment Act "merely on the grounds that other legal remedies are available to the complainant."[11] Section 10(5) is specifically dispositive of the court a quo's ruling, which hinged its refusal to issue a protection order on the

basis that the application was brough "prematurely", which is a belief based on the flawed notion that the CSOS Act should have served as the complainant's first port of call.[12]

THE CSOS ACT

Having considered the Harassment Act, Nkosi AJ then turned to examine whether the CSOS Act contained any provisions which may support the fining of the court a quo. In doing so, Nkosi AJ steered his analysis towards the preamble of the CSOS Act, the definition of "community scheme" as contained in the CSOS Act, in addition to the Act's conceptualisation and handling of "nuisance" behaviour.

The preamble of the CSOS Act makes clear that the Act is intended to serve as legal authority in situations wherein problems rise our of a system of communal living.[13] Nkosi AJ found that this interpretation is supported by reason of the Act's definition of "community scheme".[14] A joint reading of the preamble and definition of "community scheme" gives a clear outline of the Act's intended domain of operation, namely being to assist in resolving issues which spawn from communal living situations.

In terms of governing the actual, tangible relationship between individuals who share a communal living space, the CSOS Act simply states that steps must be taken to avoid instances of behaviour which could constitute "nuisance".[15] Nkosi AJ noted that the CSOS Act does not provide a definition for the term nuisance.[16]

CONCLUSION

Nkosi AJ ultimately upheld the appeal, finding that the CSOS Act should not have factored into the court a quo's decision concerning whether or not to proceed in terms of the Harassment Act.17 In doing so, Nkosi AJ has offered valuable insight into how the courts are to interact with the procedures laid out in the Harassment Act. The Harassment Act's constitutional overtones are complimented by peremptory provisions which seek to guide the court in providing a Complainant with speedy and effective relief. This in and of itself is significant, as individuals who turn to the Harassment Act for relief necessarily do so due to circumstances which are either harmful to the Complainant or inculcate the persistent anxiety that harm may be imminent. Simply put, nobody ever wants to be in a position wherein they must employ the prescripts of the Harassment Act, and should it become necessary, then the court must be able to offer prompt and effective assistance.

In the wake of the finding in Kiewiet, the importance of determining the applicability of the correct act in inter-personal disputes cannot be overstated. HBGSchindlers Attorneys and Notaries are wellversed in all facets of neighbour law, including an understanding of both the Harassment Act and CSOS Act and when each Act is the appropriate authority to rely upon to remedy a client's dispute.

Should you find yourself party to a dispute to a neighbour dispute, or if you think you might potentially be experiencing harassment, get in touch with HBGSchindlers Attorneys and Notaries today for comprehensive legal assistance. Kindly contact the authors of this article on 011 568 8500 for more information.

Please note: this article is for general public information and use. It is not to be considered or construed as legal advice. Each matter must be dealt with on a case-by-case basis and you should consult an attorney before taking any action contemplated here.

Charissa Kok
(Partner)

Nicholas du Toit
(Candidate Attorney)

[1] *M.M v Kiewiet (A193/2023) (2024) ZAGPPHC 411 (3 May 2024) (hereafter "Kiewiet").*
[2] *Ibid at [6] to [7].*
[3] *Ibid*
[4] *Section 1 of the Harassment Act.*
[5] *Ibid*
[6] *Ibid*
[7] *Mnyandu v Padayachi 2017 (1) SA 151 (KZP) at [30].*
[8] *Kiewiet at [10] to [11].*
[9] *Ibid at [20].*
[10] *Section 3(2) of the Harassment Act.*
[11] *Section 10(5) of the Harassment Act.*
[12] *Kiewiet at [17].*
[13] Preamble to the CSOS Act.
[14] *Kiewiet at [22] to [23].*
[15] *Ibid at [25].*
[16] *Section 39(2) of the CSOS Act.*
[17] *Kiewiet at [26].*