

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

11/11/2016

DATE

Siwanda

SIGNATURE

CASE NO: A3008/2016

In the matter between -

ROBBERTZE GERT QUINTON

Appellant

and

ROBBERTZE ROULIEN

Respondent

JUDGEMENT

INTRODUCTION

[1] The appellant appeals against the decision of the Magistrates' Court (the court *a quo*) sitting in Roodeport.

[2] On 28 May 2015, the court *a quo* granted an IPO against the appellant in terms of Section 5(2)¹ of the Domestic Violence Act, No 116 of 1998 ("**the Act**"). The interim protection order (colloquially known as "the IPO") was confirmed and made final on 25 August 2015. The judgment in respect of the final order bears the date 25 July 2015 even though the court informed parties of the judgment on 25 August 2015.

[3] At the hearing of the appeal, the appellant applied for condonation as a result of his failure to prosecute the appeal timeously as required by Rule 50(1)² of the Uniform Rules of Court. He alleged that his attorneys were not able to procure the appeal record timeously, and that he had not been in wilful default. The condonation application was not vehemently opposed. Given the importance of the questions raised in the matter, and, the need to restate the law in respect of the procedure to be followed by the lower courts in adjudicating domestic violence interdicts, condonation was granted.

¹ If a court is satisfied that there is *prima facie* evidence that –

- (a) the respondent is committing an act of domestic violence; and
- (b) undue hardship may be suffered by the complainant as a result of such domestic violence if a protection order is not issued immediately, the court must, notwithstanding the fact that the respondent has not been given notice of the proceedings contemplated in subsection (1), issue an interim protection order against the respondent in the prescribed manner.

² Where an appeal lies to a magistrates' court it may be noted by delivery if notice within ten days after the date of the judgment appealed against.

Rule 50(3): The party noting an appeal shall prosecute same within twenty days after noting the appeal.

[4] The issue for determination in this appeal is whether or not the presiding magistrates were correct in granting the IPO and the final protection orders respectively. In addition, the court is required to determine whether the correct procedure was applied in granting the final protection order.

BACKGROUND FACTS

[5] The appellant and the respondent were married to one another. Two children, aged four (4) years old and eleven (11) months respectively were born of the marriage at the time of the granting of the final protection order. On 28 May 2015, the respondent applied for an IPO in terms of Section 4(1)³ of the Act. The magistrate granted the IPO in terms of Section 5(2)⁴ of the Act with a return date, and ordered the appellant not to -

- 5.1 assault, threaten, emotionally or verbally abuse the respondent;
- 5.2 enlist the help of another person to commit the acts of domestic violence specified in 5.1 above;
- 5.3 have contact with the respondent by email, *Facebook*, SMS or *What's Up* except only in matters affecting the minor children.

[6] The appellant was ordered to only have contact with the minor children under the supervision of the respondent. The order prohibited the appellant from fetching the children from school.

³ Section 4(1): Any complainant may in the prescribed manner apply to the court for a protection order.

⁴ See p 1 *supra*.

[7] The appellant anticipated the return date by filing an opposing affidavit on 19 June 2015. At the time of filing his opposing affidavit, the respondent had in the interim instituted divorce proceedings with the Roodepoort Regional Court. The respondent had prepared a replying affidavit. However, this could not be provided to the appellant as her attorney of record had not as yet reviewed it. The respondent's attorney had not been available for the hearing that day. Accordingly, the Court postponed the matter to the 29 June 2015.

[8] On 29 June 2015, when the matter resumed before a different magistrate, the appellant had objected to what he referred to as a "*bulky replying affidavit*". A further objection was that the affidavit introduced surprisingly new allegations of domestic violence. The fresh allegations were not in the initial application.⁵ The appellant had contended for the new facts to be struck out. In the alternative, he submitted that an opportunity to submit a further affidavit in reply should be afforded to him. The Court was also informed that, notwithstanding the restriction imposed on the appellant's right of contact with the minor children in terms of the IPO, he had not been able to exercise his right of contact with the minor children fully.

[9] The appellant had submitted that there was nothing in the founding affidavit to support a conclusion that the children were in danger.⁶ He sought an amendment of the order to allow for unrestricted contact with the minor children. There had been acrimony between the appellant and the respondent. The magistrate expressed the

⁵ Record of proceedings, p 77 // 18-20

⁶ Record of the proceedings, p 81 // 14 and 15

view that the dispute in respect of the contact could be referred to the Children's Court, alternatively, the Family Advocate for resolution⁷ given the pending divorce.

[10] The return date was extended to 27 July 2015. The appellant submits that on the return date, the parties were merely asked by the presiding magistrate whether or not they relied on the papers filed on record. Neither evidence was heard, nor arguments presented to the Court. The Certificate of Veracity by the transcribers states that there was no recording. The rendering of the judgment was postponed to 25 August 2016.

[11] In confirming the interim order on the return date, the magistrate dismissed the appellant's opposition. The magistrate had placed reliance on the decision in **Fakie NO v CCII Systems (Pty) Ltd**⁸ and held that -

“[Y]et motion proceedings are quicker and cheaper than trial proceedings, and in the interest of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago this Court determined that a judge should not allow a respondent to raise ‘fictitious’ disputes of facts to delay the hearing of the matter or to deny the applicants order.”⁹

[12] It merits observing that the order in respect of the judgment confirming the final protection order refers to the court as having “*read the papers filed on record and*

⁷ Record of the proceedings, p 80 // 25

⁸ 2006 (4) SA 326 (SCA) at para 35.

⁹ Judgment of the court *a quo* on p 95 of the Application Papers.

argument by the parties heard". The relevance of this is with regard to granting the final protection order; a matter dealt with later in the judgment.¹⁰

GROUND S FOR APPEAL

[13] The appellant submitted on appeal that -

- 13.1 by relying on the decision in ***Fakie No v CCII Systems***, and finding that the appellant had raised a "fictitious" dispute of facts, the magistrate had erroneously shifted the onus which rested on the respondent to the appellant;
- 13.2 the onus in domestic violence matters is fixed by the presumption of law and rested on the respondent. This onus was not satisfied. There was no factual basis for granting the final protection order. The order was competent only if the Court was satisfied on a balance of probabilities that the appellant had committed an act of domestic violence contemplated in the Act;
- 13.3 the Court had incorrectly disregarded the affidavit filed by the domestic worker in support of the appellant, while the replying affidavit which contained new allegations and evidence, on the other hand, found favour with the Court, despite the objection raised in respect of its admission;
- 13.4 the issue was taken in the appeal with regards to the procedure followed by the magistrate. The argument was that, given the *sui generis* nature of

¹⁰ Judgment of the court *a quo* para 8 p 95.

the Act, which cannot be equated for normal motion proceedings, the Court had failed to direct the proceeding by calling for oral evidence of the allegations and hear arguments;

13.5 it was submitted that the Court had erred in finding that the appellant had to exercise contact with the minor children under the supervision of the respondent. There had been no allegations that the appellant had abused the children. The appellant's assertion that he had been the primary caregiver of the minor children had been ignored;

13.6 the appellant also submitted that the application for the protection order had been an abuse of the court process as it had been procured to gain the upper hand in the divorce proceedings.

[14] The respondent opposed the appeal because it had been agreed to adjudicate the matter on the papers filed on record. She submitted that there had been affidavits filed by five (5) witnesses who had witnessed the abuse. This formed part of her replying affidavit. The appellant had been invited to consider a referral of the matter to the Children's Court. The respondent disputed the allegations of abuse of the court process. The respondent submitted that a parenting plan had resolved the exercise of contact with the minor children. It was argued at the hearing of the appeal that the matter had henceforth become moot as a result.

[15] I have had regard to the allegations of abuse of the court process raised by the appellant. The perception of abuse of the domestic violence proceedings is not a novel one. They have been observed by the South African Law Reform Commission

(SALRC) in various discussion papers.^{11 12 13} Significantly, the Constitutional Court, in *Omar v The Government of the Republic of South Africa and Others* (CCT/04); [2005] ZACC 17 at para 18) decision, stated that -

“[I]t is crucially important for lawyers as officers of the court with a responsibility to uphold the Constitution and the law not to exploit or manipulate the Act to gain a tactical advantage in divorce litigation and custody battles, because this could well be at the cost of the effectiveness of the Act. As stated by this Court in *Baloyi*, legislation of this kind does not purport to oust existing family and criminal law remedies and penalties, but to supplement and reinforce them.”

[16] I make no direct finding in respect of this allegation. I am nevertheless duty bound to observe that such manipulation where it occurs, will undermine the very protections afforded to real victims of domestic violence. The cost of adjudication will become unaffordable. An undue burden and strain on the court system which will

¹¹ Domestic Violence Report by SALRC (Review of the Child Care Act, SALRC Project 110 Discussion Paper 2001 at 649): In its investigating report and discussion papers has reported on instances of a deliberate escalation of the acrimony between divorcing and separating parents through encouraging clients to make false claims of abuse, or through encouraging women to invoke violence as a way to ensure an advantage in parenting and property disputes. It is reported that this is followed by an application for protection orders in terms of the Domestic Violence Act to frustrate the attempts of the other parent to see or care for his or her child. The false allegations continue to enter divorce proceedings by a way of lawyers who place allegations of criminal behaviour in affidavit, material, without substantiation from child welfare or police authorities.

¹² See discussion in Heaton (ed) 2014 at 489 of *B v B* 2008 (4) SA 535 (W) and *Norodien v Andrews* 2002 (3) SA 500 (C) as examples of parents abusing the provisions of Domestic Violence Act to obtain the advantages in relation to care of and contact with their children.

¹³ Domestic Violence reported by SALRC

impede the fair administration of justice will result. There is a duty of *utmost* good faith expected of the applicant in such proceedings.¹⁴

[17] Before delving into the merits of the appeal, it is imperative to provide details of the allegations informing the granting of the IPO. After that, factors which had to be considered as well as the procedure to be followed before granting the IPO are addressed. This approach is also adopted in respect of the assessment of whether the final order was correctly granted. I outline the applicable legal principles, the considerations that ought to have been taken into account as well as the procedure which ought to have been followed before granting both protection orders.

THE INTERIM PROTECTION ORDER (“IPO”) PROCEEDINGS

[18] The respondent had applied for an IPO on 28 May 2015 by completing the prescribed application form (“**Form 2**”). In Section 5 of the form, she was asked to provide full details of all the incidents of domestic violence that had occurred. She stated as follows:

“Emotional abuse: continues (daily);

Swearing at us;

Threatening to take away my kids;

Slander of myself towards friends, family, and even strangers;

Contradicts every instruction I give my child;

Withholds milk from baby;

No compassion for my medical condition or migraines / endometriosis;

¹⁴ *National Director of Public Prosecutions v Basson* 2000 (1) SA 419 (SCA)

Scares me;
 Has locked me out of the house;
 Threatening to take me off medical aid.”

[19] Where the respondent was required to provide reasons why the application was urgent, and to state why undue hardship will result if the application is not dealt with immediately, she had stated as follows:

“Threatening to take my children away from me
 I am under continuous stress
 He has already taken my daughter away against my wishes
 These circumstances are not healthy for my children
 Please regard as very urgent.”

[20] The procedure to be followed before the granting of an IPO must be understood against the backdrop of the overall duty of the Court to assist an applicant. This duty is inherent from the context of the Act and the provisions of s 4(2) of the Act.¹⁵ It is accepted that notwithstanding the form the domestic violence may present in, when

¹⁵ Section 4(2) states that –

“[I]f the complainant is not represented by the legal representative, the clerk of the court must inform the complainant in the prescribed manner –
 (a) of the relief available in terms of this Act; and
 (b) of the right to also lodge a criminal complaint against the respondent if a criminal offence has been committed by the respondent.”

domestic violence is in the form of emotional abuse as claimed in this case, it must relate to a pattern of conduct by a respondent.¹⁶

[21] The plain reading of the allegations before the court *a quo* shows that the respondent had referred to aspects the appellant's alleged conduct as constituting emotional abuse. She had, however, not provided the Court with details of nature and form of the emotional abuse alleged. The Court had nevertheless granted the interim application even though it lacked in detail. I am of the view that the granting of the IPO which was lacking in detail precipitated the dispute of facts as well as the procedural dilemma which the Court faced when the IPO became opposed to the return date.

[22] When a court is seized with an application for an IPO in terms of s 5(1) of the Act, -¹⁷

22.1 the Act requires that the application is considered without delay;

22.2 section 4(6) of the Act affords an applicant the opportunity to file supporting affidavits in support of the application early in the proceedings;¹⁸

¹⁶ Section 1 of the Act defines 'emotional, verbal and psychological abuse' as a pattern of degrading or humiliating conduct towards a complainant, including –

- a) repeated insults, ridicule, name calling;
- b) repeated threats to cause emotional pain; or
- c) repeated exhibition of obsessive possessiveness or jealousy, which is such as to constitute a serious invasion of the complainant's privacy, liberty, integrity or security.

¹⁷ Section 5(1) of the Act states that –

"[T]he court must as soon as is reasonably possible consider an application submitted to it in terms of s 4(7) and may, for that purpose, consider such additional evidence as it deems fit including oral evidence or evidence by affidavit, which shall form part of the record of the proceedings."

- 22.3 subject to the circumstance of each case, if it appears to the Court that there is insufficient information upon which to determine the nature of the domestic violence or grant an IPO, then, the Court must exercise the wide powers provided in s 5(1) to seek additional evidence it deems fit. This may entail calling for oral evidence or evidence by affidavit;
- 22.4 it may adopt an inquisitorial approach to ascertain any relevant matter including but not limited to the pattern and nature of the domestic violence alleged. If necessary, the Court must provide an applicant an opportunity to clarify and supplement the affidavit relied upon before granting the interim order;
- 22.5 the court may not grant an IPO unless it is satisfied a well-grounded act of domestic violence was committed and that a *prima facie* case has been made out in the prescribed form;
- 22.6 it must consider whether or not undue hardship may be suffered as a result of the act(s) of domestic violence if the IPO is not granted immediately. In this regard, the social context of the applicant, as well as the risk of harm if an immediate remedy is not provided must be considered.

[23] I am of the view that the sparse and vague factual allegations in Form 2 filed by the respondent were inadequate grounds for the Court to conclude that a *prima facie* case had been made out. The Court ought to have adopted the inquisitorial approach referred to above, and assisted the respondent supplement her application papers

¹⁸ Section 4(6) states that supporting affidavits by any persons who have knowledge of the matter concerned may accompany the application.

before granting the IPO. It was required to satisfy itself that *prima facie*, a well-grounded act of domestic violence was committed. This was not done.

[24] A review of the application papers also reveals that no reasons for urgency and apprehension of harm were apparent. Allegations for the apprehension of harm must be made and substantiated. Before granting the interim order, the Court is required to weigh the apprehension of harm alleged as well as the potential consequence of not granting a protection order. It can only do so if adequate facts are before it. The respondent had not provided the information required on which to base urgency for granting of the IPO.

[25] The benefit of an inquisitorial approach at an early stage in the proceedings is that the respondent would have been assisted to place all the necessary facts before the Court. This would obviate a need to amend the application, or file a replying affidavit, and limit a proliferation of new facts which, as in this case, would lead to procedural objections and delays if the IPO is opposed.

OPPOSING APPLICATION BEFORE THE MAGISTRATE

[26] In the opposing papers filed before the court *a quo*, the appellant had disputed the allegations of emotional abuse and opposed the order restricting the contact with the minor children. He stated that he had been the primary caregiver of the children and that the application was frivolous and without merit. He alleged that the respondent was abusing the court process to justify a denial of the appellant's rights

of access to the minor children and to gain the upper hand in the divorce proceedings.¹⁹

[27] The appellant's opposing affidavit also outlines a strain in the marriage relationship as well as a change in the behaviour of the respondent following the birth of each of the minor children. He nevertheless admitted to an incident of an altercation with the respondent. He states that this occurred when the respondent came to the matrimonial home in the company of work colleagues and moved out of the home with household items and contents.

[28] The appellant's opposing affidavit was supported by an affidavit from Elizabeth Mecuur, a domestic worker who was employed by the parties since 2009. The affidavit confirms that the appellant had been the primary caregiver of the children and undertook additional household chores.

[29] In her replying affidavit, the respondent confirms her fear of losing her children, provided details of marital strife and discord as well as allegations of verbal abuse and belittling by the appellant.

THE FINAL PROTECTION ORDER PROCEEDINGS

[30] I now deal with the above facts before the magistrate and the procedure followed on the return date in respect of the granting of the final protection order.

[31] The record of the proceedings reveals that on the return date, 29 June 2015, there was confusion on the procedure to be followed in respect of objection raised to

¹⁹ Appellant's Opposing Affidavit in the court *a quo* para 12 p 13.

respondent's replying affidavit. The Court did not provide a ruling on the day. The Court also appears not to have provided direction to the parties in respect of how the dispute of facts alleged was to be resolved. The respondent submits that parties had agreed to resolve the matter on the papers, a matter disputed by the appellant. There appears to have also been confusion on the appropriate forum to deal with the appellant's rights of contact with the minor children.

[32] The judgment of the court *a quo* does not shed light on how the matters raised on 27 July 2015 were dealt with. As stated earlier, the order in the judgment seems to have been granted on the basis that argument had been presented and heard. This is contrary to the appellant's submissions during the appeal. The absence of the record of the proceedings following the further postponement on 27 July 2015 does not assist me.

[33] Over and above the evidential and procedural issues in paragraphs 32 and 33 above, in my view, the affidavit filed in support of the application demonstrates little correlation between the facts disclosed and the order limiting contact with the minor children. The judgment rendered by the court *a quo* does not provide insight into reasons for the limitation of the contact. Even when account is taken of the replying affidavit, it does not disclose reasons to conclude that the minor children were at risk of domestic violence.

[34] Significantly, the order requiring supervised access by the respondent stands in contradistinction with the allegations that the respondent was in fear of the appellant. Having regard to the content of the appellant's opposition and his assertion that he had been the primary caregiver of the children, there was a material dispute requiring

that the veracity of the allegations which required that this is established and determined before granting the final protection order.

[35] The dismissal of the appellant's opposing affidavit as "fictitious" without having tested the claim was incorrect.

[36] Based on the facts of this matter and the shortcomings referred to above, it has become necessary to restate the law and the procedure to be followed by a court granting a final protection order in terms of the Act.

APPLICABLE LEGAL PRINCIPLES

[37] The primary guiding principle in the conduct of the proceedings instituted in terms of the Act must be to give content to the aim of the legislature as well the rights contained in the Act. The Act seeks to provide for an accessible, affordable, speedy remedy that affords maximum protection to victims in addition to other remedies available in law.²⁰

[38] In this regard, the scheme of the Act is to simultaneously provide for a civil remedy as well as a criminal remedy in the form of a suspended warrant of arrest issued in terms of s 8 of the Act²¹ which can be executed at any time if the protection order is breached. Dealing with the *sui generis* nature of the remedy provided for in

²⁰ *Kruger v Smith* (2006) JOL 18555 (W).

²¹ (1) Whenever a court issues a protection order, the court must make an order –
 a) authorising the issues of a warrant for the arrest of the respondent in the prescribed form; and
 b) suspending the execution of such warrants subject to compliance with any prohibition condition.
 (2) The warrant referred to in subsection (1) (a) remains in force unless the protection order is set aside, or it is cancelled after execution.

the Act, the Constitutional Court, in *Omar v The Government of the Republic of South Africa and Others*²² noted that the intention of the legislature was to address a need to combine a civil and criminal remedy to protect victims, utilising an *ex parte* procedure.²³ The legislature also saw it fit to introduce a different standard of proof (namely *prima facie* case) in respect of the interim proceedings, and a different standard of proof (namely on a balance of probabilities) in respect of granting a final protection order. In my view, the *sui generis* intent of the legislature extends further to the adjudication procedure to be followed. The proceedings envisaged do not lend to be categorised into the usual motion proceedings. As a result, on a return date, an IPO can only be decided and confirmed on the application papers only if there is no opposition to the application.

[39] Unlike in other *ex parte* proceedings, which have no bearing on the rights of another, domestic violence proceedings are intended to be a departure from the rule against granting an order in the absence of a party to protect vulnerable persons. The departure **only** applies to the application for an IPO. While in my view it is a justifiable limitation of the rights of a respondent in circumstances of domestic violence, it, however, demands that the final order must not be granted lightly or on spurious grounds. It demands of a court to be alert to the interests of both parties.

²² *Omar v The Government of the Republic of South Africa and Others* (CCT/04) [2005] ZACC 17 at para 18.

²³ “the need to combine civil and criminal remedies to address it have been recognised by this Court in *Baloyi*. Victims are ambivalent about their fate and reluctant to go through with criminal prosecution. It is understandable for the legislature to enact measures that differ from those generally applicable to criminal arrests and prosecutions. It is clear that the Act serves a very important social and legal purpose”

[40] It is not the aim of the Act or the intention of the legislature to disregard the fundamental rights to a fair hearing.²⁴ When as in this case, an application is opposed, the procedure to be followed on the return date is stipulated in Section 6(2)(a) and (b) of the Act.²⁵ The Court is obliged to **hear** the matter. The use of “**must**” is indicative that the provisions of this section were intended to be peremptory. As a consequence, when a matter is opposed, it cannot be decided purely on the papers if there is a dispute of fact, as was done in this case. The Court is given wide powers to proactively direct the proceedings so as to come to a fair decision.

[41] The decision in *P S H v PH and Another*²⁶ at para 17 has a relevance where the court held that –

“[T]he Act can and should only effectively serve its purpose by the holding of a proper, fair hearing when the interim order is opposed, as envisaged in s 6(2) of the Act. The power of the court to direct further evidence (presumably one of the ‘wide **procedural** favours’ the second respondent had in mind) can in no way be interpreted to include a refusal to consider evidence from the person against whom a drastic order may be made.”

[42] I have considered the wide powers in s 6 regulating the proceedings on the return date. They were designed to enable the Court to deal with the factual dispute at hand proactively. They are also designed to strike the right balance between the

²⁴ *Omar, supra*

²⁵ Section 6(2):

“If a respondent appears on the return date in order to oppose the issuing of a protection order, the court must proceed to hear the matter; and –

(a) consider any evidence previously received in terms of s 5(1); and

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

²⁶ *PSH v PSH and another Case No 2138/2012*

need to afford protection to the respondent on the one hand, and the appellant's right to be heard through a fair procedure on the other. Providing a fair hearing cannot be equated with chilling the protections afforded by the Act. The proactive direction by a court as well as the inquisition on the facts at hand will have the effect of ensuring that proliferation of issues, as well as unnecessary delays or postponement, are only limited to procuring essential evidence from third parties / bodies like professionals or institutions and only where necessary.

[43] Where, as in this case, there was a clear dispute of fact, the Court was required to call for oral evidence in the matter. It is not open to the parties to override the provisions of the Act. The Court was required to -

- 43.1 adjudicate the matter on an expedited basis to avoid unnecessary delays;
- 43.2 consider any evidence previously received, as well as further affidavits or call for oral evidence;²⁷.
- 43.3 after the hearing, confirm a protection order if it finds, on a balance of probabilities, that the respondent has committed or is committing an act of domestic violence;²⁸
- 43.4 when a postponement is sought, it must have regard to the seriousness of the offence when exercising the judicial discretion of whether to grant a postponement. Unless necessary to procure further evidence or reports from relevant professionals or institutions, the Court must avoid a postponement.

²⁷ *Omar, supra.*

²⁸ *Omar, supra.*

[44] On the facts of this case, the failure to hear oral evidence was a departure from the procedure called for before a confirmation of the IPO. There was no justifiable reason to limit the appellant's right to a fair hearing during the final confirmation proceedings.

CONTACT ORDER GRANTED IN RESPECT OF THE MINOR CHILDREN

[45] It is necessary to deal with the contact order confirmed. The Act affords a presiding magistrate with wide powers to "*protect direct and secondary victims*", in particular, children from domestic violence. In this regard, there must be sufficient evidence before the Court to show that the children concerned are at risk and will be adversely affected emotionally or physically if an interim order regulating contact is not granted. Section 7(6) (a) and (b)²⁹ of the Act provides a presiding officer with the power to grant ancillary orders to suspend or limit the contact between a respondent and a child if it is in the best interest of the child to do so.

[46] The purpose of the ancillary order is articulated in ***Narodien v Andrews***,³⁰ namely, that it is intended to ensure that children who are at risk are protected from domestic violence. In particular, that the protection afforded to an adult applicant is not compromised by the arrangements relating to contact between the respondent and any children living with the applicant.

²⁹ If the court is satisfied that it is in the best interest of any child it may –
(a) refuse the respondent contact with such child; and/or
(b) order contact with such child on conditions as it may consider appropriate.

³⁰ 2002 (3) SA 500 (C) at p 31.

[47] In this regard, the Court must assess and determine -

- 47.1 whether an ancillary order in respect of contact is appropriate;
- 47.2 the type of care and contact appropriate to the circumstances; and
- 47.3 whether it is in the best interests of the children concerned.

[48] If satisfied with the existence of the risk, the Court must ensure that there is a correlation between the nature of the domestic violence complained of and the nature of the protection afforded in the interim and/or final protection order. On the facts of this case, there was no rational connection between the allegation by the respondent that she was in fear of the appellant and the order granted for her to supervise the appellant's contact with the children. The contact order did not lend itself to a practical implementation based on the facts.

[49] Having regard to the considerations above, and the shortcomings in the evidence and procedure followed by the court *a quo*, the appeal must succeed.

[50] The only matter that remains is that of costs. The appellant was successful in the appeal. It follows that the costs must follow the result. There is no justifiable reason to deprive him of his costs.

[51] In the circumstances, it is ordered that -

- 51.1 the final protection order and the warrant of arrest are set aside;
- 51.2 the respondent is ordered to pay the costs of the appeal.



NT SIWENDU AJ

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

I concur:



L WINDELL J

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO.

: A3008/2016

HEARD ON

: 1 AUGUST 2016

ATTORNEYS FOR APPLICANT

: RIEKIE ERASMUS ATTORNEYS

COUNSEL FOR THE RESPONDENT

: NICO VAN DER MERWE

ATTORNEYS FOR THE
RESPONDENT

: MATT LARKINS ATTORNEYS

DATE OF JUDGMENT

: 1 NOVEMBER 2016