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IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: A20/2021

In the matter between:

L[...] M[...] H[...]

Plaintiff

and

W[...] A[...] H[...]

Respondent

CORAM: **MHLAMBI J *et* M E MAHLANGU, AJ**

JUDGMENT BY: **M E MAHLANGU, AJ**

HEARD ON: **8 MAY 2023**

DELIVERED ON: 19 MAY 2023

INTRODUCTION

- [1] This is an appeal against the decision of Magistrate van der Westhuizen stationed at Vrede Magistrate Court (the court *a quo*), delivered on 12 November 2020. The appellant applied for a protection order in terms of the Domestic Violence Act 116 Of 1998 (the Domestic Violence Act) against the respondent which was granted on 29 May 2020. On 12 November 2020, the court *a quo* dismissed the application of the final protection order with costs.
- [2] On 22 November 2021, the appellant brought a condonation application for the late prosecution of the appeal which sought that the late prosecution of the appeal be condoned and that the time to prosecute the appeal be extended. The condonation application was granted at the start of the hearing of the appeal.
- [3] Pursuant to the appeal lodged by the appellant, the respondent raised the following issues:
- 3.1 That the appellant has not provided the security for costs in terms of the Magistrate's Court Rule 51(4) ; and
 - 3.2 That the appellant has not provided the special power of attorney in terms of Rule 7(2) of the High Court Rules.
- [4] Rule 51(4) of the Magistrate's Court provides that:

“ (4) An appeal shall be noted by the delivery of notice, and, unless the court of appeal shall otherwise order, by giving security for the respondent’s costs of appeal to the amount of R1000; Provided that no security shall be required from the State or, unless the court of appeal otherwise orders, from a person to whom legal aid is rendered by a statutorily established legal aid board.”

[5] Rule 7(2) of the Uniform Rules of Court provides that:

“ (2) The registrar shall not set down any appeal at the instance of an attorney unless such attorney has filled with the registrar a power of attorney authorising him to appeal and such power of attorney shall be filed together with the application for a date of hearing.”

[6] Mr Botha submitted on behalf of the respondent that the security for costs and the power of attorney were not provided by the appellant and therefore the appeal was not properly enrolled and therefore should not be heard. He further submitted that the issue of the failure to provide the security for costs and the power of attorney was raised 10 months prior to this hearing and the appellant did not comply to date. Mr Botha submitted that the application to appeal should be dismissed with costs.

[7] Ms Nortje on behalf of the appellant submitted that, according to Rule 7(2), the register could not have enrolled the matter if the power of attorney was not filed. She further submitted that, the application for appeal was ready to be heard.

- [8] Consequently, after hearing the submissions made by both parties representatives, the court exercised its discretion and ordered that, the appeal application should proceed.

Appeal

- [9] The appellant brought the appeal on the grounds that the court *a quo* erred in upholding the points *in limine* raised by the respondent at the hearing of the final interdict.

- [10] The following were the points *in limine* raised during the application of the final protection order:

- 10.1 That the appellant's application does not comply with the Domestic Violence act;
- 10.2 That the applicant's affidavit is not properly signed;
- 10.3 That the confirmatory affidavit of Mr Booysen is not signed and it is not also commissioned by the Commissioner of Oaths;

- [11] The court *a quo* upheld the points *in limine* in that although there were averments of domestic violence mentioned in the applicant's sworn affidavit, there was no evidence that was placed before the court corroborating such evidence.

- [12] The main purpose for the application of the protection order was to allow the appellant to relocate to Pretoria. The appellant had relocated, the court *a quo* was correct in dismissing the final protection order as it would not serve any purpose.

[13] Section 6(4) of the Domestic Violence Act 116 of 1998 provides that:

“(4) The court must, after a hearing as contemplated in subsection (2), issue a protection order in the prescribed form if it finds, on a balance of probabilities, that the respondent has committed or is committing an act of domestic violence.”

[14] In the matter of **S v Engelbrecht [2005] JOL 1337 (W) Satchwell J** at paragraph 146 defined the domestic violence a pattern of coercive control characterized by the use of physical, sexual and psychological abusive behaviour. Control is an element for the definition of domestic violence contained in the Domestic Violence Act. The victim must be able to highlight the continuous abusive behaviour of the abuser. In this matter, the appellant could not show to the court the abusive patterns that the respondent had done to her. I am therefore of the view that, the court’s *a quo* dismissal of the final interdict was justified.

[15] The appellant also appealed against the cost orders granted by the court *a quo*, the reason being that the appellant acted frivolously, vexatiously and unreasonably in bringing the application for the final interdict. The court *a quo* stated that the main purpose of the interim protection order was to enable the appellant to relocate to Pretoria. The other conditions of the interim protection order, namely, that the respondent should not enter the appellant’s residence in Pretoria, that the respondent should not prevent the appellant from entering her place of employment at Spar, Vrede and that the respondent should not

contact the appellant, could have been discussed by the parties and a decision to be made either to alter the conditions of the interim protection order or to set them aside. I am in agreement with the court *a quo*, the main purpose of the interim protection order has been fulfilled. The appellant has relocated to Pretoria. The appellant should not set the matter down for the final interdict.

[17] It is trite that the costs follow the results. The application for final protection order was dismissed and therefore had to be in favour of the respondent. The court *a quo* rightfully granted the costs against the appellant.

[18] Relating to the costs granted against the appellant on 18 July 2022, Mr Botha submitted he did not ask for them. They were *meru meto* granted by the court as the appeal was not ready to be heard. I am therefore of the view that I should not interfere with the cost order granted against plaintiff on 18 July 2023.

Conclusion

[19] In light of the above, the appeal is dismissed with costs.

MAHLANGU, AJ

I concur, and it is so ordered

MHLAMBI, J

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