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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: **AR 220/2022**

In the matter between:

A[....] M[....]

APPELLANT

and

S[....] D[....]

RESPONDENT

Coram: Mossop J (Madondo DJP concurring)

Heard: 21 April 2023

Delivered: 12 May 2023

ORDER

On appeal from: The Magistrates' Court, Pietermaritzburg (sitting as court of first instance):

1. The appeal is upheld.

2. The order granted on 30 March 2022 is set aside and replaced with the following order:

'The application for a protection order in terms of the provisions of s 9(4) of the Protection from Harassment Act 17 of 2011 is dismissed.'

3. There shall be no order as to costs either in the court a quo or on appeal.

JUDGMENT

Mossop J (Madondo DJP concurring):

[1] On 30 March 2022, the respondent obtained a protection order from the Pietermaritzburg Magistrates' Court against the appellant in terms of section 9(4) of the Protection from Harassment Act 17 of 2011 (the Act).

[2] The terms of the protection order that was sought before the court a quo reads as follows:

'The court is requested to –

7.1 prohibit the respondent from –

*7.1.1 engaging in or attempting to engage in harassment of the complainant;

*7.1.2 engaging in or attempting to engage in harassment of the related persons whose particulars are provided in paragraph 3, above;

*7.1.2 [sic] enlisting the help of another person to engage in harassment of the *complainant/*related person;

*7.1.3 committing any of the following act/s:

- (a) engaging in or attempting communication of the complainant verbally, physically, visually, or any other way (e.g. digitally, etc.)
- (b) approaching the complainant within one kilometre of the complainant.'

In paragraph 3 of the application, dealing with related persons, appear two names, apparently being the names of a cousin of the complainant and the complainant's half-brother.

[3] The protection order sought appears on a pre-printed document with spaces for relevant information to be inserted. The relief claimed in sub-paragraphs 7.1.3 (a) and (b) is inserted in manuscript but all the other relief claimed is typed and forms part of the pre-printed document. It will be observed that each pre-printed potential order has an asterisk before it. There is no explanation for the appearance of the asterisk, but ordinarily it would mean that if something is not applicable, it should be deleted. None of the words marked with an asterisk have been deleted and so it must be assumed that all the relief identified was granted.

[4] The judgment of the magistrate presiding is singularly unhelpful in determining precisely what relief was ultimately granted. The magistrate merely states at the end of her judgment that she grants the application and that:

'The complainant is given protection by this court.'

What is of importance is precisely what protection was given.

[5] It is worth mentioning in this regard that the appellant requested reasons from the magistrate for her decision. The magistrate sat with that request for over two months and then responded that she had nothing further to add. Magistrates should respond with promptitude to invitations to provide further reasons and not dwell on matters unnecessarily. There is no explanation in this instance as to what delayed

the magistrate for two months. Magistrates should also carefully consider their ex tempore judgments and assess whether they have clearly and explicitly expressed themselves in their judgment before concluding that they have nothing to add to it. In this case, the magistrate should have clarified whether she found that acts of harassment had been established or whether she found that acts of sexual harassment had been established. Clarification of what order was actually granted would have been of immeasurable assistance in this matter. I shall, however, assume that the order granted is that as set out in paragraph 2 of this judgment. That order is now challenged on appeal before this court by the appellant.

[6] The respondent and the appellant are not blood relatives, but are linked through the fact that the appellant is married to the respondent's paternal aunt. He is thus the respondent's father's brother-in-law. The events that populate the respondent's version arose from contact that the complainant and the appellant had with each other over the years, primarily at family gatherings. Before getting to those events, it would be prudent to consider the requirements of the Act.

[7] The Act was enacted with the purpose of protecting citizens' rights of privacy, dignity, freedom and security of the person and their right to equality as enshrined in the Constitution. On a practical level, it is intended to provide victims of harassment with a robust, swift, cheap and effective remedy against such harassment. In *DVT v BMT*,¹ the Supreme Court of Appeal noted that while the Domestic Violence Act 116 of 1998 (the DVA) is gender neutral in its content:

'... the undisputed reality remains that domestic violence is "systemic, pervasive and overwhelmingly gender-specific", and "reflects and reinforces patriarchal domination and does so in a particularly brutal form". It is therefore still the most vulnerable members of society, namely women and children, who are invariably the victims of domestic violence and thus the beneficiaries of the protection accorded by the [DVA].' (Footnote omitted.)

¹ *DVT v BMT* [2022] ZASCA 109; 2022 (6) SA 93 (SCA) para 1.

While it is acknowledged that what is being referred to is not the Act but the DVA, there can be no doubt that those words are equally applicable to the Act. Those that seek the benefit of the Act's protection appear to be overwhelmingly female.

[8] What the concept of harassment comprises is considered and defined in section 1 of the Act:

“harassment” 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 a related person; or

(b) amounts to sexual harassment of the complainant or a related person.’

[9] Sexual harassment has its own definition in the Act, and means any:

‘(a) unwelcome sexual attention from a person who knows or ought reasonably to know that such attention is unwelcome;

(b) unwelcome explicit or implicit behaviour, suggestions, messages or remarks of a sexual nature that have the effect of offending, intimidating or humiliating the complainant or a related person in circumstances, which a reasonable person having regard to all the circumstances would have anticipated that the complainant or related person would be offended, humiliated or intimidated;

(c) implied or expressed promise of reward for complying with a sexually-oriented request; or

(d) implied or expressed threat of reprisal or actual reprisal for refusal to comply with a sexually oriented request.'

[10] Finally, the Act defines 'harm' as being:

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

[11] The relief claimed by the respondent in her application made no specific reference to sexual harassment. The magistrate in granting the order that she did, made no reference to sexual harassment. I must therefore approach the matter on the basis that what was found established was harassment *simpliciter*.

[12] The respondent raised four separate complaints against the appellant in the proceedings before the court a quo. Each must be considered.

[13] The first incident occurred on an unspecified date. That we have any certainty about when it may have occurred is largely based upon the age of the respondent. She indicates that she was 13 years old at the time that it occurred. She filed her complaint against the appellant in this matter in the court a quo on 24 November 2021, when she was then 22 years old. Thus, the events described in this complaint occurred sometime in 2012. When the events described in this complaint occurred is of some significance, as we shall later see.

[14] On an unidentified date in 2012, the complainant was at her father's residence

in Pietermaritzburg,² and the appellant and his family drove up from their home in Durban in order to visit the respondent's grandmother who was ill in hospital in Pietermaritzburg at the time.³ At some stage during the day, the appellant's family found themselves at the respondent's father's residence. At a particular moment, the respondent was in a room, seated on a sofa watching television by herself when the appellant came into the room and sat down next to her on the sofa. He then apparently touched her on her legs and on her inner thigh with his hand whilst asking her questions about the nature of secretions that emanated from her private parts. He asked her whether she got wet and whether it felt nice. The house was full of people, but the respondent, after extricating herself from the sofa and the appellant, did not report to any of them what had just happened. Instead, she went outside to the garden and used her cellular telephone (a Blackberry) to send an electronic message to her cousin, Ms T S[...], informing her of what had just occurred.

[15] The respondent thereafter returned to the room where the television was but chose to sit on a single chair so that the appellant could not again sit next to her. He nonetheless found her in that room again, and sat on the arm of the chair. The respondent was wearing a tight fitting, buttoned shirt. Because of its tightness, gaps appeared between the buttons when she sat down. Whilst so seated on the arm of the chair, the appellant then placed his fingers in the gaps between the buttons on her shirt and touched her brassiere and what the respondent described as her 'chest area private parts'. These events were reported the next day to the respondent's aunt and uncle but nothing appears to have been done about the appellant's conduct.

[16] The second incident occurred approximately seven years after the first incident. Again, no specific date is referred to other than the respondent indicated that it occurred sometime in 2019. She must then have been approximately 20 years old. The respondent took her then boyfriend, later her fiancé, and her brother to her father's residence to visit her ill grandmother. The appellant was present when they arrived. Upon her arrival, the respondent bent over to hug her grandmother, who was

² While that is where the respondent's father resides, the house is apparently owned by his mother. It shall, nonetheless, be referred to henceforth as 'the respondent's father's residence'.

³ Sight must also not be lost of the fact that the appellant and the respondent ordinarily live some 80 kilometres apart from each other.

seated in a chair. As she did so, she felt someone slap her on the buttocks. Immediately after being slapped, she heard the appellant ask her why she had not greeted him. She concluded that it was he who had slapped her. She acknowledged him and felt obliged to hug him. These events were witnessed by the respondent's cousin, Mr R S[...], who confirmed in an affidavit that he saw the appellant slap the respondent on her buttocks.

[17] The third incident of which complaint is made occurred during May 2021 at the appellant's daughter's wedding ceremony. Again, an exact date is not provided. The respondent was given a task that required her initially to sit at a table outside the hall where the wedding reception was to be held. The appellant came to the table where the respondent was sitting and sat on a chair next to her. He then moved the chair that he occupied closer to the respondent. When the respondent's father approached, he moved away. The appellant then went and sat at the table inside the hall where the respondent would be required to sit after her duties outside the hall were complete. He sat on the chair on which the respondent had placed her shawl to reserve it for her later use after her duties outside the hall had terminated. That left only three seats available at the table, one of which was directly next to the appellant. The respondent believed that this was a stratagem devised by the appellant to force her to sit next to him. The respondent was, however, not prepared to do so and sat elsewhere.

[18] The fourth incident occurred on 7 November 2021. A prayer session was arranged to occur at the respondent's father's residence on that day. The respondent attended with her erstwhile boyfriend, now her fiancé. They arrived late. The prayer had already commenced and there was limited seating available. A space behind the respondent's father, who was seated on the floor, was opened up and the respondent managed to move a chair into that space. When she sat down, the appellant, who was also present, was on her left hand side. At a certain stage in the prayer, the participants were required to close their eyes and keep them closed. After she closed her eyes, the respondent felt someone on her left hand side grab her left hand, touched her engagement ring on her left ring finger and began moving her ring up and down her finger. The respondent concluded that it could only have been the

appellant who had grabbed her hand given the seating arrangements. As the respondent described it:

‘I do not know if he knew about my engagement but his grip felt fuelled with anger.’

The respondent’s cousin, Mr S S[...], observed what occurred and confirmed that it was, indeed, the appellant who had grabbed the respondent’s hand.

[19] This event was the straw that broke the camel’s back. Seventeen days later, on 24 November 2021, the respondent approached the Pietermaritzburg Magistrates’ Court and ultimately obtained the order that is today appealed against.

[20] In challenging the decision of the court a quo, the appellant raises two principal misdirections allegedly committed by the magistrate.

[21] The first misdirection identified is that the appellant alleges that the magistrate ought to have referred the matter to oral evidence to resolve disputes of fact which he claims exist. A judicial officer has a discretion as to whether to hear oral evidence and is not obliged to do so. The Act indicates that such oral evidence shall be ‘as the court may direct’.⁴ In other words, the court may determine whether oral evidence is required and, if so, to what it should relate. This complaint by the appellant lacks substance and cannot be sustained, for two reasons. Firstly, both the respondent’s legal representative and the appellant’s legal representative indicated at the commencement of the proceedings in the court a quo that they elected not to call oral evidence and were content to argue the matter on the papers. In making the election to argue on the papers, the appellant must have instructed his legal representative not to call him as a witness. The appellant can hardly be heard to now complain that this is what then occurred. Secondly, the magistrate actually did call for oral evidence where she deemed it necessary and heard the testimony of a witness, namely the respondent’s father. She thus exercised her discretion properly and determined what oral evidence should be heard. There can accordingly be no cause for complaint.

⁴ Section 9(2)(b) of the Act reads as follows: ‘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) ...

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

[22] The second misdirection raised by the appellant is that the magistrate allegedly had not read the papers before hearing the matter. This is obviously not something of which the appellant can have direct personal knowledge of but is a deduction that he makes from a single remark made by the magistrate during the course of the hearing. Thus, the appellant suggests that the following interaction:

MS SOKHELA: ... In her explanation, Your Worship, she gives details of the first incident that took place when she was 13 years old. Your Worship, this incident happened when ... [intervenes]

COURT: When she was 13 years old?

MS SOKHELA: Yes, Your Worship',

demonstrates that the magistrate had not read the papers. Had she read the papers, so the argument goes, she would not have sought clarification of the age of the complainant, as she would have known it.

[23] The argument proceeds that had the magistrate read the papers she would have had doubts about the credibility of the respondent. That, of course, is another conclusion drawn by the appellant. It has as its foundation the notion that the appellant's view of the respondent's credibility is the correct view and would be shared by other like-minded persons.

[24] As with the first alleged misdirection, there is no merit in this alleged misdirection. There are any number of reasons why the magistrate may have interposed in the fashion that she did. The most obvious is that she did not clearly hear what the legal representative had said and sought confirmation of what had been said. To suggest that this single question reveals her failure to read the papers is entirely fanciful. The record reveals that the magistrate was fully conversant with the facts of the matter.

[25] In my view, neither of the alleged misdirections by the magistrate hold any water and neither can be sustained. I am, nonetheless, of the view that the order of the court a quo is wrong and cannot be left to stand. In coming to this conclusion, I am mindful of the fact that an appeal court will, in general, be slow to interfere with the findings of a lower court, but if such findings are plainly wrong, the court of appeal will indeed interfere therein.⁵ In the absence of any misdirections, an appeal court is thus bound by a lower court's factual findings. I also acknowledge that it is not an appeal court's task to second guess the factual findings of a lower court.⁶ Applying these salutary principles, a court will thus only interfere in the factual findings of a lower court in exceptional circumstances, such as where the court has come to a clearly erroneous finding. I find this to be the case.

[26] The appellant denies that any of the four complaints occurred. He admits his presence on each occasion mentioned by the respondent, but insists that he never acted in an inappropriate manner or in a manner that would bring him into conflict with the provisions of the Act. His denials about his conduct are seasoned with additional argument as to why he could not or would not have acted in the fashion of which complaint is made, flavoured further by submissions as to the probability of him having acted in this fashion. I do not regard the defence, such as it is, as being effective or persuasive.

[27] On the other hand, the respondent's version is compelling. If all of which the respondent complains is a figment of her imagination, as the appellant insists it is, then one would have expected that the further incidents that followed the first incident would have intensified in their detail and seriousness. That the first incident demonstrates conduct that is oppressive and unacceptable brooks of no doubt. The second incident, likewise, involves unacceptable conduct: no man may touch a woman's buttocks without her consent. But the third and fourth incidents cannot be classified as falling into that category of conduct. Indeed, it could be argued that the third and fourth incidents diminish in their objective seriousness. I find that to be a reliable indicator of the respondent's honesty and candour. If she was making all of

⁵ *R v Dhlumayo and another* 1948 (2) SA 677 (A) at 705-6.

⁶ *Mashongwa v Passenger Rail Agency of South Africa* [2015] ZACC 36; 2016 (3) SA 528 (CC) para 45.

this up, then she would surely have made up far more explicit allegations concerning the appellant's conduct to ensure that there could be no doubts about his guilt. The respondent's evidence was, in any event, buttressed in at least two of the incidents by the evidence of witnesses who confirmed her version.

[28] To the extent that the magistrate accepted the evidence of the complainant in preference to the version of the appellant, she was entitled, in my view, to do so. But even if the magistrate was correct in her findings in this regard does not mean that she was entitled to arrive at the conclusion to which she came. In my view, the magistrate came to an incorrect finding for the reasons that now follow.

[29] The first difficulty with the magistrate's finding is that she seems not to have appreciated that the most egregious complaint made by the respondent, the first incident, occurred in 2012. This, as previously mentioned, is significant as the Act only came into effect on 27 April 2013. No new statute is to be construed as having retrospective operation, unless that fact is explicitly stated in the statute.⁷ There is a compelling reason for this and it is to allow citizens an opportunity to become familiar with the new law and to permit them to conform their future conduct to its requirements.⁸

[30] It is not clear from the magistrate's judgment that she appreciated this difficulty in the respondent's case. She certainly did not mention it in her judgment. If she had relied upon the first incident as a foundation for the order that she granted, she was not entitled to do so.

[31] That brings me to the second difficulty with the magistrate's order. In *Mnyandu v Padayachi*,⁹ a decision of this division, when dealing with the meaning of the concept of harassment in the Act, the court stated that:

'However, although the definition does not refer to "a course of conduct", in my view the conduct engaged in must necessarily either have a repetitive element which

⁷ *Peterson v Cuthbert* 1945 AD 420 at 430.

⁸ *Landgraf v USI Film Products* [1994] USSC 10; 511 US 244 (1994) at 265.

⁹ *Mnyandu v Padayachi* 2017 (1) SA 151 (KZP) para 68.

makes it oppressive and unreasonable, thereby tormenting or inculcating serious fear or distress in the victim; alternatively, the conduct must be of such an overwhelmingly oppressive nature that a single act has the same consequences, as in the case of a single protracted incident when the victim is physically stalked.'

The conduct of which complaint is made therefore must result in some form of torment arising out of constant and ongoing interference or intimidation. The conduct of which complaint is made must therefore be persistent and not intermittent.¹⁰

[32] Accepting for a minute that all the incidents are actionable in terms of the Act, and had the respondent and the appellant only met on the occasions of the four incidents, then notionally it could have been argued that a course of conduct with a repetitive element had been established, notwithstanding the length of the intervals between the meetings. But the respondent and the appellant did not only meet on those four occasions. The appellant states in this regard that the respondent:

'... has come to my house, to my daughter's wedding, she willingly visited my mother in laws [sic] home while I was there on numerous occasions, she attended braai's with me being present, she attended new year's eve functions with my family and I, she visited the Wild Coast Sun with my family and I and in all those times she seemed perfectly fine...'

The respondent did not deny these allegations in her replying affidavit but chose to 'note' them, a far from satisfactory way of dealing with precise and important allegations. The appellant's allegations must therefore be accepted.

[33] In the English matter of *Majrowski v Guy's and St Thomas's NHS Trust*,¹¹ the following was said, with which I agree:

¹⁰ *R v Smith* [2012] EWCA Crim 2566; [2013] 2 All ER 804 para 24.

¹¹ *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34; [2006] 4 All ER 395; [2006] UKHL 34; [2007] 1 AC 224 para 30 per Lord Nicolls.

‘Where . . . the quality of the conduct said to constitute harassment is being examined, courts will have in mind that irritations, annoyances, even a measure of upset, arise at times in everybody's day-to-day dealings with other people. Courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the boundary from the regrettable to the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability ...’

[34] The first incident is not actionable as it predates the commencement of the Act. The second incident is notionally actionable and occurred two years before the respondent actually sought the protection of the Act. The conduct of the appellant as regards the third and fourth incidents, in my view, is unattractive, and potentially upsetting, but not actionable in terms of the Act. There is therefore only a single actionable act on the part of the appellant. *Mnyandu* teaches us that that there must be repetitive conduct or conduct that arises from a single act that is overwhelming in its oppressiveness. I am not able to find that in the conduct alleged of the appellant. Had the second incident been overwhelmingly oppressive then I have no doubt that the respondent, who by then was an adult, would have immediately taken steps against the appellant. She did not do so.

[35] The third difficulty that exists in the order granted by the magistrate lies in the relief that she afforded to the related parties. No evidence whatsoever was adduced about any harassment of the related persons. The complaint heard by the magistrate related only to conduct by the appellant towards the respondent and to no other person.

[36] The fourth and final difficulty is to be found in the magistrate's reasoning. She stated that the appellant would not suffer any inconvenience by the granting of the order if he had not acted as described and if he had no intention of acting that way in the future. That form of reasoning cannot be supported. Orders are to be granted purely on the strength of the available evidence presented and not on the basis that, if granted, they will not cause inconvenience.

[37] I, nonetheless, find the appellant's conduct disquieting. In the circumstances, while the appellant has succeeded in overturning the order that he appealed against, I am of the view that the interests of justice require that there be no order as to costs.

[38] I would accordingly propose the following order:

1. The appeal is upheld.
2. The order granted on 30 March 2022 is set aside and replaced with the following order:

'The application for a protection order in terms of the provisions of s 9(4) of the Protection from Harassment Act 17 of 2011 is dismissed.'

3. There shall be no order as to costs either in the court a quo or on appeal.

MOSSOP J

I agree and it is so ordered:

MADONDO DJP

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Date of Hearing : 21 April 2023

Date of Judgment : 12 May 2023