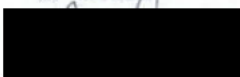




IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO.: A238/2019

(1) REPORTABLE: YES/NO	/
(2) OF INTEREST TO OTHER JUDGES: YES/NO	/
(3) REVISED	/
	25.5.2022
SIGNATURE	DATE

In the matter between:

J MOOS

Appellant

and

F MAKGOBA

Respondent

JUDGEMENT

Raulinga J

Introduction

1. The appellant in the appeal has appealed to this court against an order granted by the Magistrate dismissing her application for a protection order in terms of the Protection from Harassment Act, 17 of 2011. Relying on the case of *Mnyandu v Padayachi*, the appellant argues that in that case the Judge held that for conduct to constitute harassment, the conduct must be repeated or be a pattern of conduct regarded as abuse and must induce fear. The appellant also argues that the Magistrate hearing

her case should have given a subjective interpretation to what she believes harassment is and what her fear of irreparable harm was.

Legislation

2. The Protection from Harassment Act was enacted to, *inter alia*, give effect to the rights of privacy, dignity, freedom and security of the person and the right to equality as enshrined in the Constitution of the Republic of South Africa. It affords victims of harassment the opportunity to an effective remedy against the various forms of harassment they may face.

Harassment is defined as follows in 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...”

The Act defines ‘harm’ as any mental, psychological, physical or economic harm.

3. Therefore, for conduct to be considered as harassment, the respondent must have directly or indirectly engaged in harmful conduct and must have known or ought to have known that his/her conduct causes harm or inspires the belief that harm may be caused. The applicant must have believed that the conduct of the respondent will cause harm or have the reasonable believe that it will cause harm.

Is the test that harm will or may be reasonably caused an objective or subjective one?

4. In the Appellant's Heads of Argument, counsel for the appellant argues that that the Magistrate should have given a subjective interpretation to what the appellant believes harassment is and what her fear of irreparable harm was. No authority is given for this argument. Nor does counsel make reference to any provision in the Act in support of this argument.
5. One cannot support this argument by the appellant's counsel. A subjective interpretation would leave the scope too wide and courts would be inundated with harassment claims where even the slightest conduct could be subjectively interpreted as harassment. It would also stifle engagements and interactions with one another. Further, legislation is enacted to regulate certain aspects of society and must be applicable equally to all persons. A subjective interpretation of 'harassment' would flout this and would result in the scenario I explain in the sentences above. Further, the definitions section in legislation provides guidance of the essential elements that need to be proven by all persons who wish to use a particular piece of legislation to enforce their rights. Using the subjective interpretation of harassment – as understood by an applicant personally, would be potentially detrimental to respondents who would be found guilty of harassment even where their conduct, does not meet the elements of harassment as defined in the Act.
6. Further, as we learn in *Mnyandu*, the onus is on the party making an application for a protection order in terms of the Act, to prove on a balance of probabilities, that the respondent knew or ought to have known that their conduct would cause harm or

inspire the reasonable belief that harm would be caused - be it mental, psychological or physical harm; and that their conduct was unreasonable in the circumstances. Once this is established, the applicant must then show that such conduct caused harm or inspired the belief, to the applicant, that harm will be caused.

7. In **Mnyandu**¹, the court highlighted that “given the ambit of the Act, it is essential that a consistent approach be applied to the evaluation of the conduct complained of, although the factual determination will depend on the circumstances under or context within which the alleged harassment occurred. The court further indicated that “the legal test as to whether a person is guilty of harassment is therefore objective: the assessment of the conduct by a reasonable person.” That is, would a reasonable person, in the position of the appellant have known or reasonably have known that their conduct amounts to harassment.
8. The court in **Mnyandu**² also expressed the view that shifting the legal test evaluation from the conduct of the perpetrator – which is judged objectively and the impact to the victim – where suggestion is that it must be judged subjectively, is contradictory. The test ought to remain consistent. That test is objective.

Continuous nature of the offence

9. Counsel for the Appellant also argues that in **Mnyandu**, the Judge held that for conduct to constitute harassment, the conduct must be repeated or be a pattern of conduct regarded as abuse and must induce fear.
10. However, what the Judge said in this regard³, is that “...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 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

¹ At para 44

² At para 67

³ At para 68

same consequences, as in the case of a single protracted incident when the victim is physically stalked."

Do issues of harassment arise in these appeal proceedings.

11. The appellant's evidence is that the respondent continuously taunted her by placing a bucket under the tap of running water while she was bathing, continuously blocked door entrances when she entered. The appellant also noted that she fears imminent harm.
12. The listed conduct in (i) to (iii) of the definition of harassment is what the alleged perpetrator must have been engaged in for there to have been harassment. That is, the alleged perpetrator must have unreasonably followed, watched, pursued or accosted, loitered 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. They must have engaged in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or must have been 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.
13. My difficulty with the appellant's evidence is that she fails to provide details of how the respondent's conduct of placing a bucket under the tap when she takes a bath has caused her emotional, psychological, economic or mental harm. Due to the lack of further details, both in the heads of argument and from the Magistrate Court transcript, it is difficult to deduce whether objectively speaking, such conduct may cause harm. It is my considered view that the legislators were deliberate in requiring that there be harm that is caused as opposed to hurt. Harm requires a more objective analysis as opposed to the subjective nature of 'hurt.' The respondent's conduct of placing a bucket under the tap may have hurt the appellant. That is, it may have upset or offended her, which is different from causing harm.

14. Further, from the appellant's evidence, the parties reside or resided in the same house. She mentions conduct whereby the respondent would continuously block the entrances to the living room and her bedroom. However, once again there is no indication of how this conduct was harmful to her or caused the belief that she can be harmed.
15. On the assault allegations, a court hearing an application or an appeal in terms of harassment allegations, cannot extend itself to assault allegations or charges. The appellant should institute criminal proceedings for assault in that regard.
16. It is important to note that the circumstances of this case are different from those in *Scott v Scott*⁴. In that case, the brothers' feud was more than a mere 'siblings' rivalry', there were serious incidents which occurred that caused harm or reasonable belief that harm will be caused.

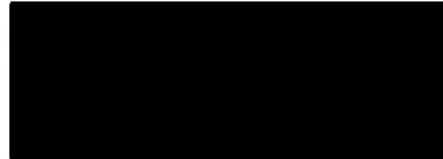
Conclusion

17. Having read the appellant's evidence in both the Heads as prepared by her legal representative, and as outlined in the record of the Magistrate Court, it is my view that the appeal be dismissed. It appears (from the Magistrate Court transcript) that the real issue between the appellant and the respondent is a feud between a step daughter and the respondent who has been living in the house with the appellant's father for 15 years. I do not believe that a case for harassment has been established and proven by the appellant. Perhaps she has a difficult relationship with the respondent, but I do not believe, based on the facts and on the legal definition of harassment, that harassment did in fact occur.

⁴ Case number: A100/2018, Free State Division of the High Court, Bloemfontein

Order

18. In the premises the appeal is dismissed with costs.



T.J RAULINGA

JUDGE OF THE HIGH COURT

PRETORIA

I agree,

A handwritten signature in black ink, appearing to read 'S. M. Mfenyana', written over a horizontal line.

S. M MFENYANA

ACTING JUDGE OF THE HIGH COURT

PRETORIA

For the Appellant : G Louw

For the Respondent : No appearance

Heard on : 10 March 2022

Judgement handed down on : 25 May 2022