



15/3/18



Case No: A 443/2016

SIGNATURE:

DATE:
E/M Bush

Respondent

JUDGMENT

1

INTRODUCTION

1. This is an appeal against the final order granted by the magistrate for the District of Atteridgeville held at Atteridgeville Pretoria, the court *a quo*. Before the court *a quo* the respondent was the complainant and the appellant the respondent. The court *a quo* granted a *rule nisi* against the appellant which was returnable on 3 May 2016. On 7 June 2016 the *rule nisi* was confirmed. A protection order was granted against the appellant, which has the effect of evicting the appellant from stand number JV7301. The appellant seeks to set that part of the order aside.

2. The appeal is unopposed and there was no appearance on behalf of the respondent at the hearing of the appeal. The appellant's heads of argument were filed eleven days before the hearing of the appeal instead of fifteen days. The application for condonation for such late filing as applied for by the appellant's counsel was granted.

3. The court *a quo* granted an order for the eviction of the appellant in circumstances where the relief sought by the applicant was in accordance with the provisions of the Protection from Harassment Act 17 of 2011 ("the Harassment Act").

4. The evidence that served before the court *a quo* and which forms part of the record before this court consists of the application form submitted by the respondent in terms of section 2 (1) of the Harassment Act as contained in Annexure "I" attached to the record; the evidence adduced by the respondent and her witness Mafodi Thomas Maroko (Thomas); the judgment of the presiding magistrate and the resultant order made by the court *a quo*.

5. The record of proceedings before the court *a quo* is laden with gaps. The appellant tried to fill these gaps in his heads of argument. But this is of no assistance, as heads of argument do not form part of the record and what is stated therein cannot be regarded as evidence for purposes of the appeal. Only evidence adduced at the trial forms part of the record and stands to be considered by the appeal court. On the basis of the decision this court comes to, the court is prepared to proceed with the appeal on the record as it stands. The view is that the record of proceedings is adequate for consideration of the appeal.

BACKGROUND

6. From the record it is evident that only the respondent and her witness, Thomas, testified before the court *a quo*. The factual background to this matter can be gleaned from the evidence of Thomas. Thomas is the owner of the piece of land, stand number JV7301, on which the premises in question are situated. At the time of testifying he did not reside on the land. He ran away to the homeland in 2008 when his place caught fire and the community attacked him. The appellant was a tenant on the land and Thomas left her in charge when he fled. According to Thomas the respondent was previously a tenant on the premises for four years but in 2004 he moved out and Thomas rented the premises to a next-door neighbour. The appellant returned to the premises after the community attacked Thomas.

7. It is not evident from the record why the appellant and the respondent were at loggerheads. It, however, appears that on 24 March 2016 the respondent applied for a protection order against the appellant in terms of section 2 (1) of the Harassment Act. The Harassment Act requires the complainant (respondent herein) to complete a Form (Form 2) setting out her complaint which form is then lodged with the clerk of

the court. The full details of the incidents of harassment the respondent complained about are stated in that Form as:

"He fired me on the toilet and that toilet I got shares, and I built my toilet, Tebogo [the appellant] also use my toilet, when I am talking he promise me to kill me. One day he plough (patse) in the yard. He said I am the boss in this yard. This year January he promise to hit me. And he switch the Radio on the whole day and night it play music loudly." [Sic!]

In the same Form the respondent requested the court *a quo* to stop the appellant from harassing her.

8. Pursuant to such an application the respondent was granted an *interim* protection order which entailed a *rule nisi* returnable on 3 May 2016. In terms of the interim protection order the appellant was prohibited by the court *a quo* from engaging in or attempting to engage in the harassment of the respondent and/or committing any of the acts stated in section 7 of the application (harassment). The interim protection order was served on the appellant on 31 March 2016 and he appeared in the court *a quo* on 6 June 2016. It is not clear from the record what transpired between 3 May 2016 and 6 June 2016. As already stated, at the inquiry, only the respondent and Thomas gave evidence. The respondent was not afforded an opportunity to present his side of the story. He was asked a few questions only, some of which he was not even allowed to respond to. At the end of the inquiry the court *a quo* ruled in the respondent's favour and confirmed the *rule nisi*. The appellant noted an appeal against that judgment.

THE JUDGMENT OF THE COURT A QUO

9. In addition to the terms set out in the interim protection order, the court *a quo* imposed further conditions that were necessary to protect and to provide for the safety and well-being of the respondent as follows:

"Do not assault or threaten with violence, do not swear at Applicant. The respondent has until the 30th of June 2016 to leave stand number JV7301, failing which applicant may fetch a warrant of arrest for execution thereof by SAPS for failing to comply with the court order."

GROUND OF APPEAL

10. The appellant's grounds of appeal are succinctly summarised in his heads of argument as follows:

10.1 Right of fair hearing

10.2 Arbitrariness of the eviction order;

10.3 Wrong application of the law;

10.4 Suitable alternative accommodation; and

10.5 Failure to balance the rights of the parties.

11. Before this court, only two grounds were argued, namely the failure by the court *a quo* to afford the appellant the right of hearing; and the application of the wrong law by the court *a quo*. In essence what is appealed is the eviction part of the court *a quo*'s judgment, the harassment part thereof is not in issue.

THE ISSUE

12. The protection order granted by the court *a quo* has the effect of evicting the appellant from the premises. This court is to determine whether or not the court *a quo* was correct in granting the eviction order against the appellant.

The Right of Fair Hearing

13. The submission on behalf of the appellant is that the court *a quo* erred in not affording the appellant an opportunity to present his case and/or an opportunity to answer to any of the allegations levelled against him.

14. In the case of *De Beer NO v North Central Local Council and Others*,¹ the court stated the following:

"The right to fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court has as a prerequisite to an order being made against anyone is fundamental to a credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution. The courts must interpret legislation and rules of court, where it is reasonably possible to do so in ways that would render the proceedings fair. It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to present their case."

15. In *Hlope v Constitutional Court of South Africa and Others*,² the court reiterated on the right of parties to be heard in court. In that regard the court stated as follows:

¹ 2001 JOL 8930 (CC).

² (08/22932) [2008] ZAGPHC 289 (25 September 2008).

"The foundation of the right to be heard is not only constitutional; it is also anchored in the common law principle of audi alteram partem that recognises as part of the rules of natural justice the right of every person to be consulted or heard before a decision or step is taken that affects or may affect such person."

16. It is quite obvious that the record does not reflect any instance where the appellant is engaged on the allegations levelled against him by the respondent (complainant). The appellant challenged the application by making an appearance in court on the day of the proceedings. He attempted to place his version on record but that was thwarted by the threatening interjections of the court. The appellant was only asked questions by the court *a quo*. He was not even given a chance to respond to some of them. As such the appellant was denied the right to be heard which, is a fundamental requirement of constitutionalism and justice. The court *a quo* having acted as it did, it misdirected itself, which calls for interference by this court. Actually, on this ground alone the appeal ought to be upheld.

Wrong Application of the Law

17. The Harassment Act was enacted to provide for the issuing of protection orders against harassment and in order to afford victims of harassment an effective remedy against such behaviour. Such remedy is encapsulated in section 10 of the Harassment Act (for purposes of this matter, section 10 (1) thereof). Section 10 (1) of the Act provides that –

(1) *The court may, by means of a protection order, including an interim protection order, prohibit the respondent from –*

(a) *engaging in or attempting to engage in harassment;*

- (b) *enlisting the help of another person to engage in the harassment; or*
- (c) *committing any other act as specified in the protection order.*

18. Section 10 (5) (b) of the Harassment Act provides as follows:

- “(b) If the court is of the opinion that any provision of a protection order deals with a matter that should, in the interest of justice, be dealt with further in terms of any other relevant law, the court must order that that provision remains in force for the limited period as the court determines, in order to afford the party concerned the opportunity to seek appropriate relief in terms of that law.”*

19. The effect of the order granted by the court *a quo* is that appellant stands evicted from his dwelling. Firstly, the order as granted militates against the relief sought by the respondent in her application. It is apparent from the reading of the application that the respondent wanted the appellant to stop the conduct by which he was harassing her as she had complained of in her application. She seeks protection from being harassed by the appellant. The relief sought by the respondent was: *“Please stop to harass me.”* Nowhere in the application was an order sought for the eviction of the appellant from his dwelling.

20. Secondly, it is trite that where an order is sought for the eviction of a person from residential premises the provisions of the Prevention of Illegal Eviction from the Unlawful Occupation of Land Act 19 of 1998 (“the PIE Act”) come into play. It means that if the *court a quo*, was of the opinion that the respondent ought to be evicted from the property, it ought to have granted the eviction order for a limited period in order to afford the respondent an opportunity to seek relief in terms of any other law

dealing with the eviction. It is patently clear from the provisions of section 10 of the Harassment Act that the court *a quo* had no authority to grant an order of eviction without allowing the respondent to invoke the provisions of the PIE Act. In terms of the Harassment Act the court *a quo* should have afforded the respondent time within which to comply with the applicable legislation, namely, the PIE Act. Having not done so, the court *a quo* erred.

CONCLUSION

21. This court is persuaded, as such, that the appeal should be upheld, the order set aside and the matter referred back to the court *a quo*.

22. In the circumstances, the following order is made:

22.1 The appeal is upheld.

22.2 The judgment and order of the court *a quo* granted on 7 June 2016 under case number H236/2016 is set aside in as far as it relates to the eviction of the appellant from stand JV3701 Jeffsville.

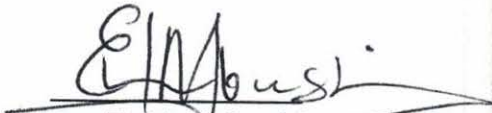
22.3 The matter is remitted to the court *a quo* for hearing before another magistrate.

22.4 No order is made as to costs.



T.A. Maumela.
Judge of the High Court of South Africa.

I agree.



E. M. Kubushi.

Judge of the High Court of South Africa.

APPEARANCES

HEARD ON	: 05 DECEMBER 2017
JUDGMENT ON	: 15 MARCH 2018
APPELANT'S COUNSEL	: ADV. N.S MTETO
APPELANT'S ATTORNEY	: LAWYERS FOR HUMAN RIGHTS
RESPONDENT'S ATTORNEYS	: NO APPEARANCE
RESPONDENT'S ATTORNEY	: NO APPEARANCE