



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

NOT REPORTABLE
CASE NO: AR241/2016

In the matter between:

SHANTELLE NAIDOO

APPELLANT

and

KESANDERAN PILLAY

RESPONDENT

Coram : Balton J et Seegobin J

Heard : 16 September 2016

Delivered : 13 March 2017

ORDER

On appeal from the Magistrates' Court, Pinetown (sitting as a court of first instance):

(a) The appeal succeeds to the extent set out here below.

(b) The order granted by the court *a quo* in case 807/2015 is hereby set aside and is replaced with the following:

“The application is dismissed”.

(c) There will be no order as to costs.

JUDGMENT

SEEGOBIN J:

[1] *Martha Minnow* in her essay ‘Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice’¹ explains that:

“Under restorative justice, repairing relationships between offenders and victims and within the community take precedence over law enforcement. *Forgiveness and reconciliation are central aspirations.* Also elevated are the goals of healing individuals, human relationships, and even entire societies. One reason to pursue these aspirations is pragmatic and psychological. Retributive approaches may reinforce anger and a sense of victimhood; reparative approaches instead can help victims move beyond anger and beyond a sense of powerlessness . . . where victims do forgive, it is much for their own healing and embrace of a future without rage as it is for the benefit of the offender.” [my emphasis]

[2] The above passage which emphasizes the need for forgiveness and reconciliation was quoted with approval by Sachs J (writing for the Court) in *S v Baloyi*.² It applies with equal force to the present matter in which the two parties, who are husband and wife, have pursued each other quite relentlessly

¹ (1998) 32 New England Law Review 967 at 969-70.

² 2000(1) SACR 81 (CC). The issue in *Baloyi* was whether the provisions of section 3(5) of the Prevention of Family Violence Act, 133 of 1993 had infringed the accused’s right under section 35(3)(h) of the Constitution to be presumed innocent under section 35 of the Constitution. It should be noted that Act 133 of 1993 has subsequently been replaced by the Domestic Violence Act 116 of 1998.

through the courts in an endeavor to have their personal differences and petty disputes resolved through unnecessary litigation rather than seeking to restore their relationship through dialogue, forgiveness and reconciliation. Over the past two to three years, they have embarked on an abusive tit for tat campaign against each other, vilifying and denigrating each other at every opportunity. What they hope to achieve at the end of all of this is anyone's guess.

[3] The present is an appeal arising from two domestic violence applications which were brought by the parties against each other in the Magistrate's Court, Pinetown, one under case number 807/2015 and the other under case number 871/2015. In respect of the matter under case number 807/2015 which was brought by the respondent, Mr Pillay, against his wife, the appellant, the court *a quo* varied the order by effectively discharging the interim protection order that was initially granted. In essence that interim protection order was aimed at interdicting the appellant from stalking the respondent and from harassing Mr Pillay's staff and from communicating with him in any manner whatsoever. The court *a quo* went on to grant a final order against the appellant not to commit certain acts of domestic violence, namely that she was not to swear at or insult the respondent or assault or threaten harm to him.

[4] In respect of the application under case number 871/2015 which was brought by the appellant, the finding of the court *a quo* was rather brief: it found that the appellant 'must show that objectively on a balance of probabilities her apprehensions were well-grounded. Mere assertions of her fears are insufficient and it is therefore my view that the interim protection order under 871/2015 is hereby set aside in total.'

[5] The court *a quo* declined to make any costs order in both applications.

[6] One of the issues arising on appeal is whether the court *a quo* acted incorrectly in not referring both applications for the hearing of oral evidence given the material disputes of fact on the papers.

[7] The referral to oral evidence in the Magistrate's Court is governed by the provisions of sub-rules 55(1)(k) (i) and (ii)³ which are couched in almost identical terms as the provisions of sub-rule 6(5)(g)⁴ of the Uniform Rules of this Court. The overriding consideration in the exercise of the discretion conferred by these sub-rules is to ensure a just and expeditious decision. In other words, in matters in which a genuine and *bona fide* dispute of fact arises, the court hearing the application must be persuaded that the hearing of evidence will be fair to the parties and will conduce to an effective and speedy resolution of the dispute and the overall application.⁵ How this discretion is to be exercised is to be found in the various rules of practice which have been developed by our courts from time to time. For the purpose of this appeal I merely refer to two such practices herebelow.

[8] The first is that motion proceedings are only appropriate for the resolution of legal issues based on common cause facts and are not designed to determine

³ SS(1) (a) . . .

. . .

(k) (i) Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision.

(ii) The court may in particular, but without affecting the generality of subparagraph (i) direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for that person or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.

⁴ Uniform Rule 6(5)(g) provides as follows: Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.

⁵ *Lombard v Dropop* 2010(5) SA 1 SCA.

probabilities. In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*⁶ Corbett JA set out succinctly the approach to be adopted to factual disputes arising on application papers as follows:

“It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact. . . . If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court . . . and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks. . . . Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers. . . .”

[9] With reference to the general rule in *Plascon-Evans*, Harms DP in *National Director of Public Prosecutions v Zuma*⁷ pointed out that the position may be different ‘if the respondent’s version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers’. In *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and Another*⁸ Shongwe JA was of the view that this could be done where ‘the version propounded by the respondent was fanciful and wholly untenable’.

⁶ 1984(3) SA 623 (A) at 634H-635C.

⁷ 2009(2) SA 277 (SCA) para 26.

⁸ 2011(1) SA 8 (SCA) para 21.

[10] The second principle is that an application to refer a matter to oral evidence should be made at the outset and not after argument on the merits. This is a salutary rule of practice which always applied despite the judgment in *Kalil v Decotex (Pty) Ltd and Another*⁹ which seemed to have ushered in a new approach which permitted counsel for an applicant to present his case on the footing that the applicant was entitled to relief on the papers but to apply in the alternative for the matter to be referred to evidence if the main argument should fail. In *De Reszke v Marais & Others*,¹⁰ it was pointed out, correctly, in my view, that many practitioners, seem to take it half for granted that a court will hear argument notwithstanding disputes of fact and, failing success on such argument, will seek to refer such disputes, or some of them, for oral evidence. It should be borne in mind that the general rule remains that an application to refer a dispute for oral evidence should be made prior to argument on the merits. While there are certain exceptions to this general rule, they remain exceptions.

[11] A further matter that should be borne in mind is that while the provisions of Rule ss(1)(k)(l) and (iii) of the Magistrate's Court Rules and 6(5)(g) of the Uniform Rules of this court extend a wide discretion to a court to make any order which to it seems meet at the time, including a referral, *mero motu*, to oral evidence, in practice this hardly ever happens. The undesirability of a judge (or magistrate) *mero motu* ordering a referral to oral evidence or to trial was highlighted by then full court of the Transvaal Provincial Division in *Joh-Air (Pty) v Rudman*¹¹ in which Myburgh J, writing for the court, said the following:

“It requires in my view a bold step, by a presiding Judge in an opposed application, to refer the matter to evidence or trial *mero motu*, because it is a real possibility that the applicant had decided not to ask for such procedure to be followed because: he may not want to be involved in the cost thereof; his prospects of success, after studying the

⁹ 1988(1) SA 943 (A) at 981F.

¹⁰ 2006(1) SA 401 (CPD).

¹¹ 1980(2) SA 420 (T). See also: *Santino Publishers v Waylite Marketing* 2010(2) SA 53 GSI, and also *Ter Beek v United Resources CC and Another* 1997(3) SA 315(c) at 337G.

answering affidavits, may be slender; it may possibly lead to an undesired protracted hearing; the amount involved may be small; the respondent may be a man of straw or on account of any of the other usual considerations in deciding whether or not to apply for the provisions of Rule 6(5)(g) to be invoked. In the present case the amount involved is only half of R5375. In my view it should not be left to the presiding Judge to determine, in the light of what I have said, whether the application should be decided on the affidavits or not. In proper circumstances the presiding Judge may, in his discretion, decide to do otherwise. In the present case, in my view, the Judge cannot be faulted for not having referred the case to trial, notwithstanding that he had not been requested so to do.”

[12] As I pointed out at the outset, the two applications in the present matter were consolidated before the court *a quo* and proceeded as one. It was only after argument by the respondent’s attorney on the merits that the appellant’s attorney applied, for the first time, for the matter to be referred for the hearing of oral evidence. That application was opposed with the respondent’s attorney pointing out that the appellant was invited on several occasions to consider referring the matter for oral evidence but that she refused to do so. After hearing argument the learned magistrate ruled against such a referral.

[13] In my view and having regard to the principles set out above, the appellant was bound by the election to have the matter argued on the papers. She could not, half way through the argument, change her mind and only then decide that the matter be referred. I accordingly find that the learned magistrate’s ruling in this regard was a correct one in the circumstances. Since the applications were being argued on the papers as they stood and despite the factual disputes that arose, they had to be decided in accordance with the principles set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.¹²

¹² 1984(3) SA 623 (A).

[14] In light of the above the real issue which faced the learned magistrate in the application under case number 807/2015, was whether the applicant in that matter viz Mr Pillay, had satisfied the requirements for a final interdict. The incident giving rise to the granting of an urgent interim protection order in terms of section 52 of the Act allegedly occurred on 23 March 2015 and was referred in argument as the ‘Plantations’ incident. In support of his application on 25 March 2015 for a protection order, Mr Pillay averred that the appellant had verbally abused and insulted him in the presence of their minor children. She also grabbed his phone (in the form of a tablet) and assaulted him with it on his face and chest. While he was attempting to calm their two children down by carrying them, the appellant grabbed hold of his unattended phone and proceeded to smash it. He thereafter proceeded to the Hillcrest Police Station and opened charges of assault, *crimen injuria* and malicious damage to property against the respondent.

[15] It is interesting to note that although the above incident was alleged to have taken place on 23 March 2015, the application for a protection order was only pursued on 25 March 2015 and that too on an urgent basis. It is also worth noting that the nature of the relief sought in paragraph 3 of his founding affidavit is a far cry from the relief that was actually granted by the court. For ease of reference, the order he sought was the following:

- “1. An interim protection order in terms of Section 5 (2) of the Domestic Violence Act be and is hereby granted with the following terms:-
 - a. Respondent must be ordered not to commit any act of domestic violence against me;
 - b. Respondent must be ordered not to enter Applicant’s residence situate at [...], [...] S. Road, Hillcrest, KwaZulu Natal;

- c. Respondent must be ordered not to commit any other acts of domestic violence, namely, physical abuse, emotional, verbal and psychological abuse; intimidation, harassment and damage to property.”

Whereas the order that was granted was the following, viz:

- “1. Stalking;
2. To stop harassing the complainant’s staff;
3. To stop communicating with the complainant in any manner whatsoever.”

[16] In her answering affidavit, the appellant categorically denied the version put up by the respondent. She averred that he arrived at her home uninvited. She denied assaulting him with his phone and averred that he in fact raised his hand to assault her and when she attempted to block her face his phone fell to the floor. She admitted that she raised her voice to draw attention to the danger she faced. She also admitted that she called him a pervert.

[17] Section 6(2) of the Act specifically provides that:

“If the 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 section 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.”

[18] Section 6(4) of the Act provides that a court must, after a hearing as contemplated in s6(2), issue a protection order if it finds, on a balance of

probabilities, that the respondent has committed or is committing an act of domestic violence.

[19] When one has regard to the basic facts put up by the respondent for an interim protection order on 25 March 2015, the complete denial thereof by the appellant as well as her version of what really transpired, the court *a quo* was not justified, in my view, in granting a final order in case number 807/2015. I consider that the alleged acts of domestic violence which occurred on 23 March 2015, cannot by any stretch of the imagination, be objectively found to give rise to a reasonable apprehension of harm which was deserving of protection by a final order. The grounds advanced by the respondent for such relief were not sufficiently serious to secure such an order, whether on an interim basis or finally.

[20] A reasonable apprehension of harm is one which a reasonable person might entertain on being faced with the facts which a court finds to exist on a balance of probabilities.¹³ The author CB Prest: *The Law and Practice of Interdicts* points at page 48 that:

“The test for apprehension is an objective one. The applicant must therefore show objectively that his apprehensions are well grounded. Mere assertion of his fears are insufficient. The facts grounding his apprehension must be set out in the application to enable the court to judge for itself whether the fears are indeed well grounded.”

[21] Apart from the threshold test which the respondent had to meet as set above, there is a further fundamental reason why the court *a quo* should not have found in his favour at all. This relates to the nature of the relief he sought initially and that which he was granted in the first place. As I pointed out

¹³ See *Silberberg v Silberberg; Silberberg v Silberberg and Another* [2013] ZAWCHC 5.

already, the learned magistrate effectively discharged the interim relief and thereafter granted relief which was completely different from that contained in the interim order. It is not clear from the record what motivated the learned magistrate to grant the relief which she did: there was simply no evidence at all of any harassment of the respondent's staff or of any stalking of the respondent. In my view, it was highly inappropriate and incompetent for the court *a quo* to grant relief which had not been sought on the papers and which was different from the case which the appellant was required to meet in the first place.

[22] As far as the issue of costs are concerned, while ordinarily the costs should follow the result, in the circumstances of the particular case where the parties have behaved abominably towards each other and have simply refused to reconcile their differences in a mature and responsible manner, I consider that it is appropriate that they carry their own costs.

ORDER

[23] The order I would make is the following:

- (d) The appeal succeeds to the extent set out here below.
 - (e) The order granted by the court *a quo* in case 807/2015 is hereby set aside and is replaced with the following:
“The application is dismissed”.
 - (f) There will be no order as to costs.
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_____ I agree
BALTON J

Date of Hearing : 16 September 2016

Date of Judgment : 13 March 2017

Counsel for Appellant : U. Lennard

Instructed by : Garlicke & Bousfield Inc
c/o Ayoob Attorneys

Counsel for Respondent : VM Naidoo SC

Instructed by : Subhash Maikoo and Associates