

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

Case No: **(Court aquo) A193/2023**

GDP Case No: **A193/2023**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

NKOSI AJ

DATE: 03 May 2024

In the matter between:

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

Appellant

and

RAMOND CLIFFED KIEWIET

Respondent

JUDGEMENT

NKOSI AJ

INTRODUCTION

[1] This is an appeal against the order and judgement of Magistrate Mfulwane delivered in the Magistrates' Court for the District of Tshwane Central ("court a quo"), held in Pretoria on 15 May 2023 and 01 June 2023 respectively.

[2] On 01 February 2023, the appellant obtained an interim protection order¹ against the respondent, in terms of Section 3(2) of the Protection from

¹ Caseline – 01 - 4

Harassment Act² (“the harassment Act”). The respondent was restrained from committing the following acts:

- (i) *not to verbally and physically abuse the complainant (“the appellant”),*
- (ii) *not to threaten the complainant,*
- (iii) *not to harass the complainant, and*
- (iv) *not to have contact with the complainant*³

[3] The interim protection order must have been informed by the sworn statements of the appellant and her witness as well as the medical report confirming injuries sustained by the appellant. These sworn statements and the medical report formed part of the appellant’s application for the interim relief.

[4] The respondent was called upon to show cause on the return date, being the 21 February 2023, why the Court should not issue a final protection order. The matter was eventually heard on 15 May 2023 and finalised.

[5] At the hearing, the respondent raised a point *in limine* that, the application should have been brought and adjudicated in terms of Section 39(2) of the Community Scheme Ombud Services Act⁴ (“CSOS Act”) and not in terms of the Harassment Act.

[6] The Court was persuaded by the arguments in support of the point *in limine* and dismissed the application for a final protection order. The Court gave the following order:

*“No adjudication order in terms of Act 9 (2011) – matter is premature before this Court. The application is dismissed.”*⁵

² Protection from Harassment Act 17 of 2011

³ Caseline – 01 - 5

⁴ Community Scheme Ombud Services Act 9 of 2011

⁵ Caseline – 01 – 68; paginated bundle page 65

- [7] The appellant requested full reasons for the order dismissing the application. The written judgement was availed on 01 June 2023, and at paragraph 14 of the judgement the Magistrate held that:

“I am of the view that as both parties live in the same community scheme, they fall under CSOS Act. The adjudicator is empowered in terms of the provisions of Section 39(2) to make orders where a nuisance which requires a person to refrain from acting in a specified way”.⁶

- [8] The appellant is aggrieved by the order and has launched this appeal on three grounds which may be summarised in this manner:

(i) The court a quo erred by failing to abide by the peremptory provisions in Section 10(5) of the Harassment Act,

(ii) The Court erred in making findings on issues not before it,

(iii) In the alternative, the Court has concurrent jurisdiction to adjudicate on the matter.

- [9] These grounds of appeal beg the question whether, does the CSOS Act oust the jurisdiction of the Magistrate’s Court. The question may be answered in the affirmative under these circumstances:

“(a) the Court’s jurisdiction is excluded only if that conclusion flows by necessary implication from the particular provisions under consideration, and then only to the extent indicated by such necessary implication⁷

⁶ Caseline – 01 – 68; paginated bundle page 65

⁷ Welkom Village Management Board v Leteno 1958(1) SA 490 (A) at 502 G-H, see also Richards Bay Bulk Storage (Pty) Ltd v Minister of Public Enterprises 1996 (4) SA 4900 (A) at 495 B and Paper Printing Wood and allied Workers’ Union v Pienaar NO and others

(b) *the respondent, who opposes the appeal, succeeds to prove that it is the intention of the legislature⁸ to oust the jurisdiction of a Magistrate's Court by enacting the CSOS Act."*

[10] It is prudent at this stage to consider the legal framework relevant hereto and in so doing, I shall pay special attention to the provisions of Harassment Act, CSOS Act and the Constitution of the Republic of South Africa.

[11] The purpose of the Harassment Act is indicated in the preamble which states that:

"SINCE the Bill of Rights in the Constitution of the Republic of South Africa, 1996, enshrines the rights of all people in the Republic of South Africa, including the right to equality, the right to privacy, the right to dignity, the right to freedom and security of the person, which incorporates the right to be free from all forms of violence from either public, or private source, and the rights of children to have their best interest considered to be of paramount importance;

AND IN ORDER TO –

(a) afford victims of harassment an effective remedy against such behaviour, and

(b) introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act."

[12] It is clear that the object of the Harassment Act is to give effect to the provisions of the Bill of Rights. A Court, including a Magistrates' Court, when interpreting the Bill of Rights,

"(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom".⁹

⁸ Richards Bay Bulk storage (Pty) Ltd at 495 supra

⁹ Section 39(2) – Constitution of the Republic of South Africa, Act

The court *a quo* missed the opportunity to afford the appellant the protection of her basic rights by failing to recognise the purpose of the Harassment Act as stated in paragraph (a) of the preamble.

[13] Section 38 of the constitution¹⁰ provides that:

“Anyone listed in this section has the right to approach a competent Court, alleging that a right in the Bill of Rights has been infringed or threatened, and the Court may grant appropriate relief, including a declaration of rights. The persons who may approach a Court are –

(a) anyone acting in their own interest;

(b) ...

(c) ...

(d) ... , and

(e) ...”

[14] Section 1 of the Harassment Act defines harassment as:

“directly and 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;

¹⁰ Constitution of the Republic of South Africa

(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 related person;*

(b) *amounts to sexual harassment of the complainant or related person*

[15] The acts of harm alleged by the appellant are obviously catered for in the definition of what constitutes harassment. The definition is broad enough to indicate the intention of the legislature for enacting the Harassment Act. The mischief which the legislature intended to cover and eliminate, is the prevalent violent behaviour in our society and in particular gender-based violence. It is not surprising that in this matter, the allegations of harassment are raised by a woman against a male person. The full citation of the Harassment Act is also indicative of the purpose of the act and the intention of the legislature.

[16] Section 10(5) of the Harassment Act¹¹ provides that:

“5 (a) provided that the complainant is not in possession of or not in the process of applying for a protection order against harassment or stalking as provided for in the Domestic Violence Act, 1998 (Act 116 of 1998), the Court may not refuse: -

(i) *to issue a protection order; or*

(ii) *to impose any condition or make any order, which it is competent to impose or make under this section, merely on the grounds that other legal remedies are available to the complainant.*

¹¹ Ibid at 2

[17] Section 10(5) requires a Magistrate to issue a protection order and not refuse merely because other legal remedies are available. The use of the word “premature” in the court order, confirms the court *a quo*’s misdirection. Magistrate Mfulwane is of the view that, because both parties live in the same community scheme, the CSOS Act is therefore applicable. Such view is in conflict with the provisions of Section 38 and 39 of the Constitution which Section 10(5) is meant to give effect to.

[18] It is trite that a Magistrates’ Court is a creature of statute. Its powers and discretion are limited to what the enabling Act permits.

[19] Section 9¹² provides that:

“(2) if the respondent appears on the return date and opposes the issuing of a protection order, the Court must (my emphasis) proceed to hear the matter and –

(a) consider any evidence previously received in terms of Section 3(1); and

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

[20] On the return date, 15 May 2023, both parties appeared in the court *a quo* for the interim order to be confirmed or dismissed. The court *a quo* erred in refusing to act in accordance with the peremptory provisions of Section 9(2) without providing any provision in the Harassment Act and, or the CSOS Act which explicitly precludes the magistrates’ court from considering an application for a final protection order.

[21] On the other hand, the, the purpose of CSOS Act is stated as follows:

“To provide for the establishment of the community Scheme Ombud Services; to provide for its mandate and functions; and to provide for a dispute resolution mechanism in Community Schemes and to provide for matters connected therewith”.

¹² Protection from Harassment Act 17 of 2011

[22] The CSOS Act defines a community scheme as follows:

“Community scheme means a scheme or arrangement in terms of which there is a shared use of and responsibility for parts of land and buildings, including but not limited to a sectional titles development scheme, a share block company, a home or property owner’s association, however constituted, established to administer a property development, a housing scheme for retired persons, and a housing co-operative as contemplated in the South African Co-operatives Act, 2005(Act 14 of 2005) and “scheme” has the same meaning.”

[23] The purpose of CSOS Act read with the definition of community scheme, clearly indicate that the disputes to be dealt with under this Act, are those which concern the well-being of a community scheme as opposed to individuals’ dispute. This view finds support from the fact that CSOS Act makes no mention of the word “harassment”.

[24] Section 39 of CSOS Act caters for the relief which a party may seek and the issues relating to finance. In respect of the issues of relief, Subsection 2 provides that:

“(2) In respect of behavioural issues-

(a) an order that a particular behaviour or default constitutes a nuisance and requiring the relevant person to act, or refrain from acting, in a specified way.”

[25] The court *a quo* concluded that the harm allegedly suffered and reported by the appellant in terms of the Harassment Act, constitute nuisance to be dealt with in terms of Section 39(2) of the CSOS Act. It is worth mentioning that the CSOS Act does not define what is nuisance or what constitutes nuisance. The court *a quo*’s conclusion that the dispute constitutes nuisance and should have been referred to the adjudicator in terms of the CSOS Act does not find support from the provisions of the very same CSOS Act. Otherwise, that Act would have explicitly ousted the jurisdiction of the Magistrates Court by firstly

defining what is nuisance and what constitutes nuisance; and explicitly mentioning the word harassment in any of its provisions.

[26] I therefore find that the CSOS Act does not oust the jurisdiction of a Magistrates' Court. The court *a quo* has a statutory obligation to deal with the appellant's complaint in terms of the provisions of the Harassment Act. The court *a quo* misdirected itself by holding otherwise.

[27] In the premises I propose that the following order is made:

- (i) *The appeal is upheld;*
- (ii) *The order and judgement of the court a quo are set aside;*
- (iii) *The matter is referred back to the magistrates' court for hearing on the return date to be set within 60 days of this order.*

NKOSI AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree and it is so ordered:

BAQWA J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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