

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

Case number: A 85/2024

Date of hearing: 15 August 2024

Date delivered: 6 September 2024

1. Reportable : No

2. Of Interest of Other Judges : No

3. Revised

6/9/2024

In the appeal of:

G[...], K[...] J[...]

Appellant

and

G[...], J[...] T[...]

Respondent

JUDGMENT

SWANEPOEL J: (Mooki J concurring)

[1] This is an appeal against an order granted against the appellant in terms of the Domestic Violence Act, 116 of 1998 ("the Act") in the Madibeng District Court on 27 November 2023. The appellant was interdicted from physically abusing, intimidating, stalking or contacting the respondent. The final order was granted pursuant to a similar interim order granted against the appellant on 11 June 2020.

[2] The preamble to the Act recognizes the undisputed fact that domestic violence is a widespread evil in our society. It is also unarguable that the vast majority of victims of domestic abuse are women. The Act therefore has the laudable purpose of affording victims of domestic abuse the maximum protection from domestic abuse that the law can provide. In order to attain its purpose, the Act has created a process whereby victims may approach a court for interim relief on an ex parte basis.

[3] Section 5 (2) of the Act provides as follows:

"(2) If the court is satisfied that there is prima facie evidence that-

(a) the respondent is committing, or has committed an act of domestic violence; and

(b) undue hardship may be suffered by the complainant as a result of such domestic violence if a protection order is not issued immediately, the court must, notwithstanding the fact that the respondent has not been given notice of the proceedings contemplated in subsection (1), issue an interim protection order against the respondent, in the prescribed manner."

[4] The aforesaid provision has the effect of relieving the applicant in such an application of the obligation to show that the purpose of the application would be thwarted if the respondent were to be given notice of the application.

[5] Once an interim order has been granted, it is served on the respondent, and the respondent is called upon to appear on a return date to show cause why the order should not be made final. If the respondent does appear on the return date, the provisions of section 6 (2) of the Act apply:

"(2) 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 proceedings."

[6] The court must, after a hearing as contemplated in subsection 6 (2), issue a protection order in the prescribed form if it finds, on a balance of probabilities, that the respondent has committed or is committing an act of domestic violence. Simultaneously, the court must issue a warrant for the respondent's arrest and suspend the operation of the warrant.¹ The warrant is then handed to the applicant who may hand it to the police, together with an affidavit wherein it is stated that the respondent has contravened the order, in order to secure the respondent's arrest. The police may then, if they believe that the applicant might suffer imminent harm unless the respondent is arrested, forthwith effect an arrest.

[7] There can be no dispute that if a final order is made, a powerful tool is placed in the appellant's hands. Laudable as the purposes of the Act are, it cannot be denied that a malicious applicant can cause serious harm to the respondent if he/she abuses the procedure by making false allegations. It is therefore necessary that a court must carefully consider the entirety of the facts before issuing a final order.

[8] The history of the relationship between these parties is sad. They have been married since November 2016. The respondent (an accountant) says that the appellant (a businessman) has been abusive, controlling and manipulative for most of their married life. The appellant says much the same about the respondent. The fact is that their relationship has been one of strife and conflict.

[9] On the evening of 8 June 2020, in the midst of the Covid-19 pandemic, the parties had an argument. The respondent thought that the appellant had not been sufficiently forthcoming about his financial affairs. She had apparently been made certain promises regarding the appellant's businesses that he had not fulfilled. When the appellant did not respond as the respondent wished

¹ Section 8 (1) of the Act

him to, she threatened to go on a hunger strike until he provided her with the information that she had requested.

[10] On the following morning the appellant went to make tea for the respondent. He brought the tea to the bathroom where he told the respondent that he was going to stop taking his medication until she started eating again. When the appellant left the bathroom, the respondent followed him and they continued to argue. The appellant sat down and ignored the respondent. That must have frustrated and angered the respondent because she threw the cup of tea to the ground, allegedly to get the appellant's attention.

[11] The respondent says that the appellant then grabbed her by the shoulders and pushed her backwards against a painting. He allegedly shook her around. She shouted that he was an abuser, and after what she says was a couple of minutes, the appellant released her, turned around and picked up his laptop. The respondent then grabbed the laptop and shouted that it was her property. She would not let go of the laptop, a tussle ensued, and in this process the respondent was thrown onto the dining room table. All the while the respondent was shouting at the appellant to let go of her. The appellant was concerned that the neighbours might hear the altercation and think that he was hurting her. The appellant then took his diary, some cash, his phone and left the house.

[12] That afternoon the respondent was examined by Dr Pierre van Staden. the only visible injuries were two bruises on her left leg.

[13] That evening the appellant returned and asked to speak to the respondent. He wanted to speak to her privately, but she insisted on a security guard being present. They spoke for approximately an hour. There is no allegation that there was anything untoward about their conversation or that the respondent felt threatened thereby. The appellant had arranged to stay over in a guest house. He took some belongings and also the laptop, apparently without any objection by the respondent. Later than night the respondent laid a charge of

common assault against the appellant. Thereafter the appellant made no attempt to return to their residence.

[14] The above is the respondent's version of events. The respondent later testified that this was the only incident in which there had been a physical altercation between them. Based on this version, an interim order was granted interdicting the appellant from physically abusing the respondent and from entering the respondent's residence.

[15] On 24 September 2020 the respondent sought a variation of the interim order. She said that since the interim order was granted the appellant had intimidated, threatened, harassed, stalked her, and had enlisted the assistance of third parties to intimidate her. Her first complaint was that the appellant had rented a property in the Pecanwood Estate where her house was situated, despite the fact that he had been ordered to vacate the premises. This complaint ignored the fact that the appellant had been ordered not to enter the residence, and nothing prevented him from renting property in the estate.

[16] The second complaint was that the appellant had been trying to communicate with her. Initially she regarded the messages as innocuous, but later, she says, they seemed to have a threatening and intimidating tone. The one message that the respondent believed to be threatening was sent on 19 August 2020 in which the appellant said:

"You are refusing to talk to me, but it is absolutely critical that you do, as there are things about to happen, which will change the course of your life forever."

[17] That message was sent in the context of an impending divorce action, and when seen in context with the other sms messages, clearly reflect the appellant's wish to speak to the respondent to attempt a reconciliation. The sms messages generally express the appellant's love for the respondent, his belief that she required mental care, and his wish to reconcile. None of the messages

can be regarded as being abusive or threatening.

[18] The complaint that the appellant was enlisting other persons to intimidate the respondent arose apparently because one of the appellant's friends sent her a message asking her to read the appellant's messages. That cannot possibly constitute intimidation. The appellant's domestic helper also apparently called the respondent to tell her that the appellant was crying all the time. There is no indication that the appellant had asked her to call the respondent, but nevertheless, the respondent complained about the call.

[19] The respondent also complained about the appellant stalking her. On 3 September 2020 the respondent says she entered a shop and saw the appellant outside watching her. The respondent asked the owner of the shop to wait in a back office. When the appellant left, so did she. On 19 September 2020 the appellant played golf on the seventh tee of the course, which adjoins the house, and he asked the gardener to call the respondent. Later that day she saw the appellant at the nearby Spar supermarket. She panicked and went to hide at the optometrist's office.

[20] On the above facts the respondent sought the following variation:

[20.1] That the appellant was not to enlist the help of another person to commit acts of domestic violence against her;

[20.2] The appellant was not to intimidate the respondent;

[20.3] The appellant was not to contact the respondent by any means;

[20.4] The appellant was not to stalk the respondent, nor to come within 5 meters of the respondent or her home.

[21] The appellant delivered an answering affidavit in which he set out a concerning history of erratic behaviour by the respondent. The appellant said that

the respondent has had long-standing mental health issues. He believes that she suffers from a multiple personality disorder. During the course of her treatment her doctor suggested that the appellant should record concerning incidents so that the respondent could later be confronted with those events. The appellant attached to the papers the transcripts of recordings of two such incidents that occurred late on the evenings of 28 August 2017 and 27 January 2018 respectively. The appellant alleges that the respondent has had long-standing mental health issues, that she believes that she has alter egos, and that she has flights of fancy.

[22] The transcripts are troubling. They clearly reveal a different side to the respondent's personality as to what she tried to put forth in court. She is heard to abuse the appellant for long periods of time, despite the appellant's attempts to calm her down. The respondent's response to the recordings is to deny having any knowledge of the incidents, and to suggest that the appellant had drugged her.

[23] As far as the incident of 9 June 2020 is concerned, the appellant admits that he threatened to stop taking his medication. He says that he wanted the respondent to understand that her hunger strike was futile. He says that the respondent had become violent and had smashed the tea cup, causing shards of the glass to cut his face. However, it was when he picked up the laptop that the respondent lunged at him in an attempt to wrest it away, and a struggle then ensued. He says that given the respondent's escalation of the incident, he was concerned that she would damage the laptop which is why he tried to remove it.

[24] As far as the alleged stalking is concerned. The appellant says that there is a small shopping center nearby Pecanwood where he waited on one occasion for a puncture to be repaired. He noticed that the respondent had arrived, but he had not known in advance of her impending arrival, nor had he orchestrated them being there at the same time. He says that the Pecanwood area is sparsely populated and has few retail centers. He says that inevitably, at some stage, they would run into one another.

[25] The respondent provided a complete version of the events as he saw them. The parties then agreed to lead evidence to attempt to resolve the many factual disputes. Ultimately, the respondent was the sole witness to give oral evidence. She testified and was cross-examined at length. After her evidence was completed, the appellant took the view that the respondent had not discharged the onus of proving that the order should be made final, and he closed his case.

[26] The appellant did not apply for absolution from the instance as one would do in terms of the magistrate's rules of court in civil proceedings, and as the court a quo apparently believed. In such an application the party seeking absolution does not close its case, it seeks an order for absolution, and if that is refused, then that party continues with its case. In this instance, the appellant simply closed his case, taking the position that the evidence for an interdict was insufficient.

[27] In the judgment the learned magistrate confusingly said the following:

'The respondent's attorney made an application for absolution from the instance. This appears to be absolution at end of the domestic violence hearing as there were no indication that the respondent would give oral evidence in the matter The respondent elected to close his case and did not give evidence on his counter-application.

The respondent did no request ruling on absolution of the instance at the end of leading of evidence at the Domestic violence hearing, but the respondent made an application for absolution of instance at the end of the applicant's case" (sic)

[28] Confusing as this passage may be, it seems that the court a quo believed that absolution was not possible in a domestic violence application. In any event, the appellant never brought an application for absolution. It is therefore not necessary to decide whether the magistrate's court civil rules relating to

absolution apply to these type of applications.

[29] The court a quo then went on to say that there were two irreconcilable versions before the court. This is not really so, as there are many commonalities between the two versions, more especially as far as the events of 9 June 2020 are concerned. The magistrate then went on to say:

“The onus is on the applicant to convince the court on a balance of probabilities that she is entitled to be granted a final protection order and she is in dire need of it.

The respondent has not shown that the final order should not be granted and has elected not place his version before court and close his case.”
(sic)

[30] It is incorrect to say that the appellant did not put his version before court. The appellant delivered a comprehensive affidavit in which he set out his version. Section 6 (2) of the Act requires the court a quo to consider all of the evidence, whether contained in affidavits or in oral evidence. I accept that a version tested under cross-examination might well carry more weight than a version put forth in an affidavit, but that does not mean that the affidavit is to be ignored. In ignoring the appellant's version on affidavit, the court a quo clearly erred.

[31] The court a quo also misconceived where the onus lay. Although the judgment says that the onus was on the respondent, at the same time the court a quo suggested that the appellant had an onus to show that the order should not be granted. This is incorrect. The onus is on the applicant throughout.

[32] The court a quo listed a number of factors that have to be considered when one assesses the credibility of a witness. There is, however, no indication whatsoever that the court a quo actually tested the respondent's version against these factors. In the absence of the court a quo carefully considering the respondent's credibility, it is open to us to do so with regard to the transcript.

[33] I have concerns regarding the reliability of the respondent's testimony. For instance, in many passages in her evidence the respondent was not a forthright witness. She failed to answer questions, she obfuscated, and she was generally argumentative. In my view the respondent was not an impressive witness. The court a quo should have considered the quality of the respondent's evidence before merely accepting her evidence.

[34] Should the final order have been granted? In my view not. It is common cause that the respondent had been upset since the previous evening because of her perceived exclusion from the appellant's financial affairs. It is also common cause that when the argument erupted in the bathroom on the morning of 9 June, the respondent followed the appellant from the bathroom because she thought that he was ignoring her. She threw a cup of tea in order to get the appellant's attention. When he tried to take the laptop and remove himself from the altercation, she grabbed the laptop and tried to wrest it from him.

[35] None of the above facts are in dispute. It seems more likely to me that it was the respondent who was the aggressor in this incident. She was also the party who felt aggrieved by having been left in the dark with regard to the appellant's finances. Having read the transcripts of the recorded incidents, I believe that the respondent was abusive towards the appellant during these conversations, despite his best attempts at calming her, she was lucid and her speech did not seem to be affected. I find the respondent's version, that she had been drugged, difficult to believe. The respondent's version, that the appellant was constantly abusive and that she was the submissive quiet wife is, in my view, not so.

[36] It should have been factored into the process of considering credibility that the respondent had on previous occasions been extremely abusive towards the appellant. If considered with the fact that the respondent was clearly the aggressor on the morning of 9 June 2020 when the one single physical assault allegedly occurred, that should have given the court a quo pause for thought.

[37] Finally, the court a quo took into consideration that the appellant apparently had a "violent outburst in court". The nature of that outburst is not recorded in the record, and it is uncertain what deduction the court a quo sought to make from the so-called outburst. I can only say that if a trial court observes behaviour from which it seeks to make a deduction on the merits of the matter, it must record the exact nature of the behaviour so that a court on appeal may consider whether the deduction is warranted or not.

[38] A domestic violence order is not simply there for the taking. As I have pointed out above, it can have devastating consequences for a respondent who is, firstly, denied the right to engage with the matter before an interim order is granted, and, secondly, is the subject of a warrant of arrest that can be wielded at a whim by an applicant. In circumstances such as in this case, a final order was not appropriate.

[39] Consequently, I propose the following order:

[39.1] The appeal is upheld.

[39.2] The order of the court a quo is amended to read as follows:

"The application is dismissed."

**[39.3] The respondent shall pay the costs of the appeal on
Scale B.**

SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

I agree:

MOOKI J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

AND IT IS SO ORDERED:

Counsel for the appellant: Adv. J Smit

Instructed by: Christo Rheeders Attorneys

Counsel for the respondent: **Adv. I Ossin**

Instructed by: Warrener De Agrella and Associates Inc

Date heard: 15 August 2024

Date of judgment: 6 September 2024