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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A033757/2024

DATE: 15-10-2024

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE

SIGNATURE

In the matter between

P[...] N[...]

Appellant

and

Z[...] N[...]

Respondent

JUDGMENT

POTTERILL, J:

The appellant is appealing the order granted by the Court *a quo*, wherein the application for a final protection order, which was done in terms of the Domestic Violence Act, was dismissed.

The grounds of appeal revolve around the magistrate erring and failing to consider each incident of domestic abuse and therefore neglecting to make individual findings on each incident.

Furthermore, the Court *a quo* failed to properly apply the principles enunciated in *Plascon Evans Paint Limited v Van Riebeeck Paints (Pty) Limited* 1984 (3) SA 623 (A).

The court *a quo* further erred in conflating the law under the Harassment Act 17 of 2011 and the Domestic Violence Act 116 of 1998, wherein here after I shall just refer as the Act.

The magistrate's finding that the applicant's application for a final protection order was used for an ulterior purpose is simply wrong. Accordingly, the appellant's application in terms of section 6 of the Domestic Violence Act should have been granted and in the alternative, the appellant seeks that the magistrate ought to have afforded the parties an opportunity to lead *viva voce* evidence in accordance with Section 6(2) of the Act.

The applicant applied for a protection order for physical assaults on 6 September 2023, 13 June 2022, and November 2021. Furthermore, the appellant claimed they were verbal, emotional, psychological abuse, controlling behaviour, name-calling, insults, harassment, and threatening behaviour all channelled against her.

Although a Court must not, as stated in *Johnson v SLC* 2022 (1) SACR 250 GJ, have a formalistic and technical approach to domestic violence, the Court has to evaluate the evidence. If one has regard to the evidence in this matter, and applying the Plascon-Evans principle, I am without fear of contradiction satisfied to say that in fact, there is a genuine and real *bona fide* dispute in this matter and that the Court therefore in harmony with

the principles of the Domestic Violence Act, the magistrate should have referred the matter to oral evidence.

This is so because that would strike a balance between the need to afford protection, to expose any manipulation of the Act, to gain technical advantages in divorce litigation and to discover in fact whether there was domestic violence from which the appellant in this matter should always be afforded protection.

In terms of *Roberts v Roberts*, A3088 (2016), ZACBJHC408 (1) November 2020, the Court found that in these circumstances the parties must be afforded a hearing, a hearing with *viva voce* evidence where the averments by both the parties can be tested and the Court can come to a proper conclusion.

I am accordingly satisfied that the order of the magistrate must be set aside, and it must be replaced with the following:

THE FINAL PROTECTION APPLICATION OR MATTER IS REFERRED BACK TO THE MAGISTRATE'S COURT FOR A HEARING BY MEANS OF *VIVA VOCE* EVIDENCE. This is only to happen if the appellant so wishes. If it is not prosecuted within the next three months, then *ipso facto*, the interim order will be uplifted.

As far as the cost is concerned, the cost is then reserved to be determined in the application before the magistrate's court.

MOSTERT AJ: I agree.

POTTERILL J: It is so ordered.

POTTERILL, J
JUDGES OF THE HIGH COURT
DATE:

CASE NUMBER-initials
YEAR-MONTH-DAY

3

JUDGMENT

MOSTERT, AJ
JUDGES OF THE HIGH COURT
DATE: