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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO.: 3424/2023

In the matter between:

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

Applicant

And

**MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES**

1st Respondent

**MS MVIKO, THE DISTRICT COURT MAGISTRATE
MTHATHA**

2nd Respondent

Z[...] D[...] M[...]

3rd Respondent

REVIEW JUDGMENT

RUSI J

[1] On 23 August 2023 the applicant brought this application in two parts – in its Part A, he sought an interim order pending the determination of Part B in which he sought an order reviewing and setting aside a final protection order granted by the second respondent acting in her official capacity.

[2] In terms of the final protection order issued by the second respondent, the applicant was ordered not to enter the marital home where he lived with the third respondent who is his wife and their minor child among other persons. Further in terms of the protection order he was ordered not to commit certain acts of domestic violence including assaulting or threatening the third respondent, *inter alia*.

[3] On 29 August 2023 the applicant was granted the interim order¹ sought in Part A of the application in terms of which the third respondent was ordered to allow him into their marital home. He was also granted other ancillary relief.

[4] The review of the final protection order as envisaged in Part B of the application served before us unopposed on 27 February 2024. The first and second respondents filed a notice to abide this Court's decision on condition that no cost order was sought by the applicant against them. Mr *Zilwa* appeared on their behalf in order to argue the issue of costs.

The factual background

[5] These are the facts giving rise to the review application. The applicant and the third respondent are married to each other in community of property and their marriage still subsisted at the time of the issuing of the protection order. They lived together with

¹ Per Malusi J.

their minor child and two other persons at house number 2[...] i[...] Ridge Ncambedlana.

[6] On 22 March 2023 the applicant was arrested on allegations that he had assaulted the third respondent. Following his arrest, he appeared in the Mthatha Magistrate's Court on 23 March 2023 and was legally represented. While waiting for his case to be called on this day, it was brought to his attention that the third respondent was preparing a statement withdrawing the assault charge against him. Even though the third respondent's statement of withdrawal of charges was brought to the attention of the court, the case was nonetheless postponed to 31 March 2023, and he was remanded in custody.

[7] On this latter date the applicant intended to apply for his release on bail and anticipated that charges against him would be withdrawn. He goes on to state that shortly before the court started on 31 March 2023, he was instead served with an application for a protection order and an interim protection order granted apparently on 24 March 2023 under case number DV 513/2023.

[8] He had no knowledge of the protection order prior to his appearance in court as he had come from a detention facility. The prosecutor's application that the charge of assault against him be withdrawn was not acceded to by the second respondent who instead instantaneously dealt with his domestic violence case and admitted him to bail of R1000.00 on certain conditions. The second respondent summarily issued a final protection order.

[9] It is the applicant's contention that when this happened, he had not had an opportunity to read the contents of the application and the interim protection order that were served upon him and to prepare his defence. He further asserts that in conducting the hearing of the domestic violence case, the second respondent merely asked questions regarding his marriage to the third respondent after which she issued a final protection order against him. He was thereafter furnished with a copy of the final

protection order, and his case of assault was simultaneously postponed to 05 May 2023.

[10] The third respondent's application for a protection order (Form 2); the interim protection order (Form 4); the final protection order (Form 6) and a warrant of arrest (Form 8) are annexed to the applicant's founding papers. For the sake of completeness, it is worth mentioning that these are forms prescribed by the Regulations to the Domestic Violence Act, 116 of 1998 (the Domestic Violence Act).

The grounds of review

[11] The applicant states that the second respondent committed an irregularity in arbitrarily granting the final protection order and was actuated by bias and malice against him. He bases this assertion on the following: on the face of it, the interim protection order had as its return date 10 July 2023 at 8h30. On this day he would show cause why a final protection order could not be issued. In terms of the same interim protection order he was also granted a right to anticipate the return date of 10 July 2023 on 24 hours written notice to the applicant and the court.

[12] It is the applicant's contention that he was not afforded an opportunity to show cause why a final order could not be made, and the interim protection order was granted without notice being given to him which conduct offended his right to be heard. He further contends that the second respondent failed to follow the correct procedure as envisaged in section 6 of the Domestic Violence Act in that she did not hold an inquiry during which she would hear evidence before granting the final order and therefore violated his right to adduce and challenge evidence. Furthermore, he says, he was denied legal representation as envisaged in section 14 of the Domestic Violence Act as he knew nothing about the domestic violence case and had been coming from his place of detention.

[13] In support of his assertion of bias and malice on the part of the second respondent, the applicant contends that she was wrong in dealing with both his bail application in relation to the criminal charge and the domestic violence case. According to the applicant, the second respondent ought to have caused the domestic violence case to be heard in the Domestic Violence court and not 'usurp the powers of this latter court'.

[14] As a further basis for the contention of bias, the applicant highlights the second respondent's refusal to withdraw the charge of assault and her instantaneous or summary determination of his domestic violence case. He further states that on the date of the hearing no explanation was given to him of his rights in those proceedings, the second respondent only interacted with the third respondent regarding their marriage and never with him. She only informed him that a final protection order was granted.

[15] Further according to the applicant, the second respondent improperly infused in the order granting him bail the terms of the final protection order. She also inappropriately amended the interim protection order² without specifying the extent or terms of such amendment. This in turn causes him embarrassment and confusion as he does not know what terms of the final protection order ought to bind him.

[16] Concerning the facts and the basis on which the interim protection order, and ultimately the final order, was made, the applicant further contends that the said facts were untenable and should not have resulted in the granting of the interim protection order to begin with. He points out that in her sworn statement the third respondent does not state where, how and when the incidents of domestic violence took place. This, according to him, was exacerbated by the fact that when the final protection order was issued no evidence was adduced before the second responded.

² This amendment apparently relates to paragraph 3.1.2.8 of the interim protection order which reads: "Not to commit any of the following acts to wit assault; threaten; enter my home/my place of employment – not to enter applicant's home." On the face of the interim protection order, there is no amendment effected on paragraph 3.1.2.8. The terms of whatever such amendment do not appear *ex facie* the final protection order either.

[17] The applicant therefore states that the information contained in the interim protection order could not have been sufficient to sustain the interim and final protection orders particularly when regard is also had to the fact that the protection order affected his rights to housing, property, privacy and dignity as he was evicted from the marital home which he shared with the second respondent and their minor child among other persons. He also laments the second respondent's failure to hold an inquiry for the purposes of determining whether he would have alternative accommodation in the event of him being evicted from his marital home.

The parties' submissions

[18] Mr Zono who appeared for the applicant *in casu* persisted with the contention that the conduct of the second respondent evinced malice and bias on her part. This relates to her failure to hold an inquiry before granting the final protection order and her ostensible conflation of proceedings of the criminal case of assault and the domestic violence matter.

[19] On behalf of the first and second respondents, Mr Zilwa argued that this Court must have regard to the provisions of section 60(12)(b) of the Criminal Procedure Act, 51 of 1977 (the CPA) which make provision for the granting of a final order upon the determination of an accused's release on bail. This would be of relevance, so the submission went, regarding the malice and bias on the part of the second respondent which the applicant contends for and on which reliance is placed for the costs that the applicant seeks against her.

The law

[20] Section 22 of the Superior Courts Act, 10 of 2013 makes provision for grounds on which proceedings of any Magistrate's court may be brought under review before a court of a Division. Those grounds include interest in the cause, bias, malice on the part of the presiding judicial officer; gross irregularity in the proceedings; and the admission

of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

[21] Uniform Rule 53 of the Rules of Court in turn provides for the procedure to be followed in bringing under review a decision or proceedings of any inferior court and of any tribunal, board or other officer performing judicial, quasi-judicial or administrative functions.

[22] It is trite that the Court will not set aside proceedings on review if it is satisfied that no substantial wrong was done to the applicant, i.e. where the irregularity was not likely to prejudice the applicant.³

[23] As regards bias on the part of a judicial officer, it has been held that it entails a departure from the standard of even-handed justice which the law requires from those who occupy judicial office. Furthermore, not only actual bias but also the appearance of bias disqualifies a judicial officer from presiding or continuing to preside over judicial proceedings.⁴

[24] The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is, a mind open to persuasion by the evidence and the submissions of counsel.⁵ It is therefore the reasonable perception of the parties as to the judicial officer's impartiality that is of importance in determining bias on his part.

[25] Since the application implicates the provisions of the Domestic Violence Act regarding the procedure to be followed in granting a protection order, I set out

³ *Building Improvements Finance Co (Pty) Ltd v Additional Magistrate, Johannesburg, and Another* 1978 (4) SA 790 (T) p 792H-793C.

⁴ *Roberts v S* [1999] 4 All SA 285 (A), at 292e –h, para 25 and 26.

⁵ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others - Judgment on recusal application* (CCT16/98) [1999] ZACC 9; 1999 (4) SA 147; 1999 (7) BCLR 725 (4 June 1999) para 48.

hereunder for the sake of completeness and ease of comprehension, the relevant provisions of this legislation, as well as the interrelated provisions of the CPA.

[26] The issuing of an interim protection order is governed by section 5 of the Domestic Violence Act which in essence grants the court powers to grant such a protection order upon a consideration of oral evidence or evidence on affidavit.

[27] In terms of section 5(2) the court is entitled, without notice to the respondent⁶, to issue an interim protection order if it is satisfied that there is *prima facie* evidence that the respondent is committing, or has committed an act of domestic violence; complainant is suffering or may suffer harm as a result of such domestic violence; and the issuing of a protection order is immediately necessary to protect the complainant against harm resulting from domestic violence. The granting of an interim protection order on *ex parte* basis is, therefore, sanctioned by this provision of the Domestic Violence Act.

[28] It is imperative in terms of section 5(3) of the same Act that the respondent be served with the original interim protection order by the clerk of the court, sheriff or peace officer identified by the court, and such interim protection order must call him to show cause on the return date specified in the order why the interim protection order should not be made final. (my emphasis)

[29] It bears mentioning that upon appearance in court an accused who has been arrested in connection with an offence committed against a person in a domestic relationship has the onus of satisfying the court that interests of justice permit his release on bail. This is in terms of the new section 60(11) of the CPA which provides:

“(11) Notwithstanding any provision of this Act, where an accused is charged with an offence —

⁶ Emphasis intended.

(a) referred to in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release;

(b) referred to in Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release; or

(c) contemplated in section 59(1)(a)(ii) or (iii), the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.”

[30] And in terms of the new section 60(12) of the CPA, if the court is satisfied that interests of justice permit the release of the accused who is charged with an offence committed against a person in a domestic relationship, it must issue a final protection order where there is none already in place.

Discussion

[31] I make a preliminary observation that even though the long hand record of the proceedings made by the second respondent indicates that the proceedings before her were mechanically recorded, no transcript of proceedings and no reasons as may have been given by her for her decision were placed before us. There is no indication *ex facie* the Notice of Motion that the second respondent was called upon in terms of Uniform Rule 53 to furnish the said record with reasons for her decision. It is trite that litigants

are ordinarily entitled to reasons for a judicial decision following upon a hearing, and, when a judgment is appealed, written reasons are indispensable. Failure to supply them will usually be a grave lapse of duty, a breach of litigants' rights, and an impediment to the appeal process.⁷

[32] It must be emphasized that the record of second respondent's decision and reasons therefor are necessary in an application for review so that all relevant material be placed before court in order for it to assess the lawfulness of the decision concerned.⁸ This is so that light may be thrown on the decision making process and the factors that were likely at play in the mind of the decision maker.⁹

[33] That being said, in the instant matter we have been furnished with a clearly and legibly reproduced copy of the second respondent's long hand record of proceedings at which the impugned final protection order was issued, and the various annexures to this application. Those annexures, as alluded to herein above, are the third respondent's application for a protection order; the interim protection order; and Form 6 being a form used to signify that the interim protection order has been confirmed. These are the portions of the record on which the applicant bases his challenge of the second respondent's decision.

[34] Therefore, there is before this Court sufficient material to enable it in the specific circumstances of the instant matter, to assess the lawfulness of the second respondent's decision. With this said, I turn to deal with the merits of the application.

[35] In paragraph 4.2 of her application for a protection order dated 24 March 2023 which she made under oath, the third respondent is invited to set out how persons sharing her residence including children were affected by the alleged acts of domestic. She stated the following (*all sic*):

⁷ *Strategic Liquor Services v Mvumbi NO 2010 (2) SA 92 (CC)*, at para 15.

⁸ *Ekuphumleni Resort (Pty) Ltd and Another v Eastern Cape Gambling and Betting Board and Others 2010 (1) SA 228*, at 233 D-F.

⁹ *Helen Suzman Foundation v Judicial Service Commission 2018 (4) SA 1 (CC)* at 9F.

“When my husband insults and getting physical with me they see him in his state of anger and to myself being vulnerable and helpless. The children will cry and try to escape at night which poses risk to them. They are psychologically affected. My sister is also insulted in the process of trying to intervene.”

[36] In paragraph 5 which required her to set out the full details regarding all incidents of domestic violence and also indicate whether firearms or other dangerous weapons were used, what injuries had been sustained and whether medical treatment was obtained, the applicant stated as follows (*all sic*):

“Insulted intimidation emotionally abused beaten and pulled by the hair. Dragged and strangled.”

[37] The relief that the third respondent sought (as selected among several other pre-listed reliefs) appears in paragraph 7 of the application form as follows:

“It is required that the Respondent must be ordered:

(e) not to enter the Complainant’s residence situated at 2[...] i[...] Ridge Ncambedlana, Mthatha.

(f) Not to enter the complainant’s place of employment namely DBSA 0[...] S[...] Street Fort Gale Mthatha.

(h) Not to commit any other act, namely to get near the complainant and her children and her sister, physically abuse the complainant and any form of abuse. Stop using her vehicle and any other property belonging to her.

[38] These became the terms of the interim protection order that the second respondent granted, with the following clauses, in particular:

“3.1.2.1 not to commit physical abuse, emotional verbal psychological abuse. Not to enlist the help of another person to commit these acts of domestic violence.

3.1.2.8 Not to commit any of the following acts to wit assault; threaten; enter my home/my place of employment – not to enter applicant’s home.”

[39] The return date for the final determination of the application for the protection order was set out in the interim order, as already mentioned, as 10 July 2023 in the domestic violence court, on which date the applicant *in casu* would show cause why a final order could not be issued. In the interim protection order, the applicant was further warned of his right to anticipate this return date on 24 hours’ notice to the third respondent and the court.

[40] Below I set out the relevant portions of the long hand record of proceedings which the second respondent made for the proceedings of 31 March 2023 and which culminated in the final protection order (*all sic*):

“Ms Ncaza informs court that this is an unopposed schedule 1 application. Accused and complainant are husband and wife. An interim protection order was applied for on 24/3/2023 and was consequently granted. As the interim protection order was granted as per DV 513/2023 and had not been served on the respondent.

Mr. Qina confirms appearance for the accused on private instructions. Confirms seeing withdrawal statement but the case will be referred to Dep social workers. Not opposed to the granting of the final order.

For bail application (section 60 11(c) proceedings mechanically recorded. In terms of section 60 (11)(c) the court is satisfied that interests of justice permit the release of the accused on days. The final order as per TV 513 / 2023 is granted and served upon accused in court F by Sergeant Boo.

Accused is granted bail and fixed at 1000 Rand cash.

The accused is ordered to comply to come to court on each day on each court day starting from 5 day of May 2023 at D court in Mthatha until the case is finalised.

They accused is ordered to comply with their protection order conditions issued by this court as per case DV 513/ 2023 with final order issued today and served in court (interim protection order and final order are attached).

Must not commit further criminal offences whilst still on bail.

3. 1 Accused must undergo victim empowerment counselling.

Must not influence or intimidate state witness.

Must not contact the complainant Z[...] M[...] in any manner until this case is finalised.

Must obey bail laws. Section 67 of the Criminal Procedure Act 61 of 1977 makes it an offence to breach the bail conditions. The consequences of breach of conditions are explained. . . Bail granted and fixed at R1000.00 (one thousand rand cash only). If paid accused is warned for 08.30 am in D court and to remain in attendance until his name is called and is excused by the court.

Date suites Mr Qina and the state.”

[41] It is also evident from the annexed record of proceedings of 05 May 2023 that on that day the assault charge against the applicant was withdrawn as a result of the applicant’s completion of the diversion programme. I assume that this follows the court’s order on 31 March 2023 that the applicant attends as a condition of his release on bail, the ‘victim empowerment program’.

[42] As the Constitutional Court once said, judges (by parity of reasoning, this applies to magistrates) take the oath of office to administer justice without fear or favour and must be assumed to be capable of disabusing their minds of any irrelevant personal beliefs or predispositions.¹⁰

¹⁰ SARFU, footnote 5 supra, para 48.

[43] According to the applicant, on his first appearance in court on 23 March 2023 on the charge of assault, his case was postponed to 31 March 2023. However, he does not state that he appeared before the second respondent. Nor does he state the reasons why his case was postponed with him being remanded in custody even though there was a statement by the third respondent withdrawing the charge against him. There is no record for the proceedings of 23 March 2023 when he first appeared in court. This Court must accept that the second respondent dealt with the applicant's case for the first time on 31 March 2023.

[44] I must interpose to mention that the CPA has recently been amended to bring in line with the protections afforded by the law to the victims of domestic violence. The relevant amending Act is the Criminal Law and Related Matters Amendment Act 12 of 2021 which came into effect on 05 August 2022. It amended sections 59 and 60 of the Criminal Procedure Act, *inter alia*, in so far as these provisions are brought in line with the imperative to give protection to the victims of domestic violence, among other things.

[45] The amending Act does so, as I will demonstrate herein below, by providing for a more stringent procedure in securing the release of an accused who is charged with an offence committed against a person in a domestic violence. It also imposes a duty on the court to ensure that when an accused who is charged with an offence committed against a person in a domestic relationship is released on bail, there is in place a protection order to ensure the safety of the victim of domestic violence.

[46] Important to note, however, is that ordinarily, after an interim protection order has been issued, the granting of a final protection order is governed by section 6(2) of the Domestic Violence Act which provides:

(2) If the respondent appears on the return date contemplated in section 5(3) or (4), 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);

(b) consider such further affidavits or oral evidence as it may direct, which must form part of the record of the proceedings; and

(c) if there is a dispute of fact, the court—

(i) may on application of the complainant or the respondent adjourn the proceedings to any time and date on the terms and conditions which the court deems appropriate in order to afford the party concerned the opportunity to adduce further evidence; and

(ii) must extend the interim protection order.

[47] On the other hand, the new section 60(12) introduces a dispensation in terms of which the court ought to determine the release on bail of an accused charged with an offence committed against a person in a domestic relationship. This section provides:

(12) (a) The court may make the release of an accused on bail subject to conditions which, in the court's opinion, are in the interests of justice: Provided that the interests of justice should be interpreted to include, but not be limited to, the safety of any person against whom the offence in question has allegedly been committed.

(b) If the court is satisfied that the interests of justice permit the release of an accused on bail as provided for in subsection (1), in respect of an offence that was allegedly committed by the accused against any person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998, with the accused, and a protection order as contemplated in that Act has not been issued against the accused, the court must, after holding an enquiry, issue a protection

order referred to in section 6 of that Act against the accused, where after the provisions of that Act shall apply.” (emphasis added)

[48] Upon a reading of the provisions of section 60(12)(b) of the CPA, it becomes clear that they apply only where there is no interim protection order in place. Had the legislature intended to include a situation where an interim protection order is in place at the time of the determination of an accused’s release where he faces a charge of an offence committed against a person in a domestic relationship, it would have expressly provided so. The interpretative principle *expressio inius est exclusio alterius* which means “*the specific inclusion of one implies the exclusion of the other,*” is of importance in the circumstances of the present case.

[49] Here is where the anomaly is with the proceedings that took place before the second respondent – there was already in place an interim protection order when the applicant appeared before her. Therefore, it would have been sufficient for her to determine the applicant’s release and allow him to return to court on the return date subject to his right to anticipate the return date. This would afford the applicant an opportunity to prepare his defence fully and appropriately show cause on 10 July 2023, as envisaged in the interim protection order, why a final protection order could not be granted. That did not happen, instead, the applicant’s legal representative at the time indicated to the court that there was no objection to the granting of a final protection order.

[50] It is not discernible from the record how the acquiescence of the applicant’s legal representative to the issuing of a final protection order came about in the circumstances set out in the preceding paragraphs. The applicant does not deal with this issue pertinently in his founding affidavit save his assertion that his right to legal representation was violated as he was caused to face a hearing without having had time to prepare for it. I digress to mention that the applicant’s legal representative was there in order to take care of his interests.

[51] The second respondent recorded only that the interim protection order which was served on the applicant formed part of the record of the proceedings. It does not appear that the application for the protection order was also before her and that she considered the evidence set out therein. This is where the evidence given by the third respondent on oath is contained. However, no case has been put forward by the applicant that there was incompetence on the part of his legal representative which resulted in an unjust result in his hearing. A finding cannot be made on the facts before us that he was denied (competent and effective) legal representation.

[52] That being the case, there is no record of the applicant confirming that he was indeed conceding to the final protection order. The second respondent was informed by the prosecutor that the applicant was served with the protection order and the application therefor in court. The applicant had from 31 March 2023 (being the date of service on him of the interim protection order) to 09 July 2023 to prepare his defence. His uncontroverted version is that he was served with the application for the protection order upon his arrival in court and had no opportunity to prepare fully for the hearing of the application. There is, furthermore, no indication *ex facie* the record that notice was given by the applicant to court that he wished to anticipate the return date of the interim protection order.

[53] To the extent that in subjecting the applicant to an instant hearing the second respondent may have thought that she was bound to issue a final protection order, and also bound by the concession made by the applicant's attorney, she committed an irregularity. In *Matatiele Municipality v President of the Republic of South Africa*¹¹ it was held concessions that are wrong in law cannot bind the court.

[54] It must be understood that the test for determining fairness in proceedings or decision making process is objective with prejudice as the determining factor as a trial cannot be completely fair when the accused is in any way prejudiced. The converse is that the trial will not be unfair where there is no prejudice. It is my finding that the final

¹¹ 2006 (5) SA 47 (CC), para 66 and 67.

protection order was therefore issued by the second respondent arbitrarily. In so doing she committed an irregularity and acted in gross violation of the applicant's right to be heard before an adverse finding is made against him (the *audi alteram partem* rule) and his right to be afforded an opportunity to prepare fully for his hearing.

[55] The contention made by the applicant that the second respondent improperly conflated proceedings in his criminal case of assault and the domestic violence case must, in the present circumstances, be sustained.

[56] Regarding the refusal to withdraw the charge of assault, it appears on a reading of the second respondent's record of proceedings that she made a decision to refer the assault matter to the social workers or Department of Social Development. I should perhaps state as a reminder that in terms of section 6 of the CPA the prosecutor has powers to withdraw the charge before an accused pleads to it. This is in line with the duty of the prosecutor to determine what charges are to be preferred against an accused.

[57] Put differently, at any time before the accused pleads to a charge the prosecutor is still *dominus litis* and has full control over the charge. At this stage no *lis* has been established between the state and the accused. The court has not become seized with any duty to determine issues between the state and the defence. Because the prosecutor is *dominus litis* the court has no control over the withdrawal of the charge before the accused pleads to it.¹²

[58] It is under limited circumstances that it would be impermissible for a prosecutor to withdraw a charge against an accused without being authorized thereto by the Director of Public Prosecutions. In the context of an offence against a person in a domestic relationship, section 18 of the Domestic Violence Act provides:

¹² *S v Cordozo* 1975 (1) SA 635 (T) at 638E – G.

‘(1) No prosecutor may—

(a) refuse to institute a prosecution; or

(b) withdraw a charge,

in respect of a contravention of section 17(1)(a), or in respect of any offence against a person in a domestic relationship—

(i) involving the infliction of grievous bodily harm or a dangerous wound against the complainant or a related person; or

(ii) where the complainant or a related person is threatened with a weapon, unless authorised thereto, whether in general or in any specific case, by a Director of Public Prosecutions as contemplated in section 13(1)(a) of the National Prosecuting Authority Act, 1998 (Act 32 of 1998), or a senior member of the prosecuting authority designated thereto in writing by such a Director.’

[59] The applicant’s legal representative merely submitted that he had seen the withdrawal statement. Nothing further than this appears from the second respondent’s record of proceedings. There is no indication either from the third respondent’s application for a protection order or the record of proceedings of 31 March 2023 that the third respondent was threatened with a weapon; or sustained grievous bodily harm or a dangerous wound as a result of the alleged assault by the applicant. There is also no full detail of how the applicant committed the acts of domestic violence.

[60] Therefore, there does not appear to be any justification for the second respondent’s refusal to withdraw the charge of assault against the applicant when it was brought to her attention that the third respondent had sworn to a statement withdrawing the assault charge.

[61] I must make it clear though, that since there was in place an interim protection order when the applicant appeared before the second respondent, the withdrawal of the criminal charge of assault would not affect its validity and operation until it was discharged or confirmed on the return date or such anticipated date as the case may be.

[62] The fact that the assault charge was not withdrawn would not in and by itself have prejudiced the applicant. But the position would have been different if no protection order was already in place since in such a case the issuing of a final protection order (as envisaged in section 60(12)(b)) would clearly have depended on the existence of the assault committed against the person in a domestic relationship being the third respondent in this case.

[63] The existence of malice or bad faith is not an issue which can be observed in the abstract. It is *perforce* an issue which must be determined by drawing an inference from established factual circumstances.¹³ What becomes clear from the record of the proceedings before the second respondent is that far from malice and bias, she was aware of her obligation in terms of the law to ensure the protection of the victim of domestic violence when it was brought to her attention that the applicant and the third respondent are married to each other. It is regrettable that in doing so she failed to follow the correct procedure and committed an irregularity.

[64] I am unable to make a finding on the facts of the instant matter that her decision, albeit vitiated by the irregularity mentioned herein above, was actuated by malice nor was she biased. If anything, the second respondent was vigilant and sensitive to her obligations as she had before her a case involving domestic violence which has become a societal menace. This leads me to the issue of costs and the submissions made at the hearing of the review.

¹³ *Janse Van Der Walt and Another v Minister of Safety and Security and Others* (26171/06,26119/06) [2011] ZAGPJHC 15 (25 January 2011), para 48.

Costs

[65] In the light of the findings I made that the second respondent was not actuated by malice neither was she biased, Mr Zono's submission that she be mulcted with costs cannot be sustained.

[66] Courts do not generally grant costs against judicial officers in relation to the performance by her/him of such functions solely on the ground that they acted incorrectly as to do so would unduly hamper a judicial officer in the proper exercise of her/his judicial function.¹⁴ The exception is where it is established that the judicial officer acted with malice or is guilty of grossly improper conduct.¹⁵

[67] There is no basis for saddling the first respondent with costs of this review either. The court's dictum in *Magistrate Du Preez* is, with respect, apposite in this regard, where it held:

'There is no justification for saddling the State with liability for costs where the action of a judicial officer in his capacity as such has been corrected or set aside on review. Costs are not awarded against the State when on appeal a magistrate's judgment is set aside because he is in error as to the law or in his findings of fact. It would be surprising if, in the event of the same result being achieved on review, the State were to be held responsible for the successful applicant's costs. Moreover, it is inappropriate that the Court's displeasure with the conduct of an appellant should result in an order mulcting in costs the State which was neither a party to the suit nor responsible for the judicial officer's actions. There is no room in such a case for the application of the doctrine of *respondeant superior*.'¹⁶

¹⁴ *Magistrate du Preez v Walker* 1976 (4) SA 849 (A) at 852H – 853A – D.

¹⁵ *Magistrate du Preez*, at 853D; *Magistrate Pangarker v Botha and Another* 2015 (1) SA 503 (SCA) at 513G, para. 39.

¹⁶ At 856A.

[68] In the result, the following order accordingly issues:

1. The final protection order issued by the second respondent on 31 March 2023 **under case number DV 513/2024**, is hereby reviewed and set aside.
2. The matter is remitted back to the Domestic Violence Court, Mthatha, for the determination by another magistrate in accordance with the procedure set out in section 6(2) of the Domestic Violence Act, 116 of 1998, whether a final protection order should be issued, which determination shall be **on an expedited basis on a date no later than 14 days from the date of this order**.
3. The interim protection order issued on 24 March 2023 under case number DV 513/2023 **shall remain valid until the said expedited date**.
4. The Registrar of this Court is directed to forthwith (and no later than 24 hours from the time of this order) deliver or cause to be delivered a copy of this order to the clerk of the Domestic Violence Court, Mthatha.
5. Upon receipt of this order, the clerk of the Domestic Violence Court, Mthatha **shall immediately issue appropriate notice to the applicant and third respondent to attend the hearing mentioned in (2) above**.
6. There shall be no order as to costs.

L. RUSI
JUDGE OF THE HIGH COURT

I agree,

M. NOTUNUNU
JUDGE OF THE HIGH COURT (ACTING)

Appearances:

Attorney for the applicant : Mr AS Zono
A.S. Zono & Associates
Suite 153, 1st Floor
ECDC Building
MTHATHA

Counsel for the 1st respondent
and 2nd respondents : Adv. N Zilwa
The Office of the State Attorney, Mthatha
The Broadcast House
94 Sissons Street, Fort Gale
MTHATHA

Date heard : 27 February 2024
Date delivered : 09 July 2024