REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: A2024-63073

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

14 January 2025
DATE

[redacted]
SIGNATURE

In the matter between:

L[...] H[...] obo C[...] H[...] Appellant

And

R[...] A[...]obo M[...] A[...] Respondent

J U D G M E N T

LIEBENBERG AJ:

[1] This appeal concerns a final protection order granted by Magistrate's Court,

sitting in Randburg in terms of the Protection from Harassment Act[1] (*"the PHA"*). In addition to the merits of the appeal, this Court was also called upon to determine an interlocutory objection by the respondent that the notice of appeal is irregular and the appellant's conditional interlocutory application for condonation for any late filing of his notice of appeal. It is necessary to deal with the relevant background to the appeal first.

The background

[2] The central characters are two boys, M and C. They are represented by their parents. C's father is the appellant and M's mother is the respondent in the appeal. At the time of the alleged harassment, both boys were at the same school in grade 3. Both were 9 years old, albeit that C was some months older than M. They had been firm friends since grade R, and regularly visited each other outside of school, even after the alleged incidents which are the subject of the harassment claim.

[3] At the time, C's father was employed as deputy principal and director of boarding of a high school situated on the same campus as the boys' primary school. By virtue of his father's position, C and his family lived in a home situated on the campus. The relevance of this will become clear further on in this judgment.

[4] Towards mid-September 2022, M complained to his mother that C had been "*bullying*" him and "*squeezed his private parts*". M's mother initially reported matters to the boys' class teacher through a note in M's homework book. When the class teacher allegedly did not act with the necessary haste, M's mother

[1] Act 17 of 2011

addressed an email to the principal of the primary school, and a meeting followed between the deputy principal of the primary school and M's mother in mid-October 2022.

[5] It appears the school followed an informal internal investigation. C was interviewed by the principal of the primary school (without his parents being present). The internal process resulted in C being asked to remain at home for three days. The principal advised M's mother of the outcome of the informal investigation by email dated 1 November 2022.

[6] It is manifest that M's mother was aggrieved by the manner in which the school handled her complaint, and was not satisfied that enough had been done to protect M. She approached the court below for a protection order in terms of the PHA on 29 November 2022.

[7] At the time of launching the proceedings, M's mother was unrepresented, and it would seem that she did not receive adequate assistance from the clerk of the court below in completing the prescribed form. The pre-printed form contains various corrections and deletions of manuscript insertions.

[7.1] Although C is identified as the alleged perpetrator, and his particulars were originally inserted as "RESPONDENT", these particulars were struck through and amended to reflect C's father, the appellant herein, as "*RESPONDENT (THE PERSON RESPONSIBLE FOR HARASSMENT OF THE COMPLAINANT OR RELATED PERSON)*".

[7.2] As reason for making the application on behalf of M, the following was inserted in manuscript:

"- My son was in appropriately touched at school by the deputy principleal

- The school is forcing a relationship with the boys. They decide with no in put from parents"

[sic]

[7.3] The details of the alleged incidents of harassment thus:

"C [the alleged perpetrator] would squeeze my son's private parts.

He would growl at him when asked to please get out of the way.

He would touch my son's bum."

[8] Significantly, M's mother sought a final protection order against the appellant, in his capacity as C's father, prohibiting the appellant from engaging or attempting to engage in harassment of herself as well as her son and her daughter, as "related persons". Additionally, she sought an order that the appellant be prohibited from enlisting the help of another person to engage in harassment which "includes teachers and following the school's bullying policy." The primary school, its principal and teachers were not cited in the application.

[9] No interim protection order was granted, and the appellant was called upon to show cause why a protection order should not be granted.

[10] The appellant delivered an answering affidavit, denying that he perpetrated any untoward acts against M. The appellant also denied that C was guilty of the behaviour attributed to him, explaining that C was, at best, guilty of "rough play".

[11] The answering affidavit elicited the respondent's "*supplementary founding affidavit*" wherein she sought to distance herself from the allegation that C's father had acted inappropriately towards M. She also changed the dates of

alleged incidents, which she sought to explain.

[12] In response, the appellant filed a supplementary answering affidavit which was followed by the respondent's replying affidavit.

[13] The matter came before the court below on 17 August 2023. At the hearing, the magistrate did not accede to a request made on the appellant's behalf to lead oral evidence. No evidence from either of the boys was heard, and no independent reports or investigation reports were filed. The matter proceeded on the original complaint and affidavits filed of record. After argument was heard judgment was reserved.

[14] On 15 September 2023, the court below handed down a tersely worded *ex tempore* judgment, and granted a final protection order, set out in the pre-printed form with the manuscript portions underlined as depicted hereunder:

> "3.1 The respondent is prohibited by this court from –
>
> (a) engaging in or attempting to engage in harassment of –
>
> (i) the complainant;
>
> (ii) the following relation person/s: M[...] A[...]
>
> (b) enlisting the help of another person to engage in the harassment of the complainant and/or above related person/s; and/or
>
> (c) committing any of the following act/s:
>
> (i) NOT TO PHYSICALLY. VERBALLY, EMOTIONALLY AND/OR PSYCHOLOGICALLY ABUSE THE COMPLAINANT'S MINOR SON, M[...].
>
> ...
>
> 5. This protection order expires on 2028-09-15 (date)."

[15] On 18 September 2023, the appellant requested a judgment in writing from the magistrate. Despite the lapse of 15 days, the presiding magistrate failed to give written reasons for the order granted. Numerous attendances at court by employees of the appellant's attorneys to ascertain when the judgment may be expected, elicited broken promises and unfulfilled undertakings. Because of the serious consequences of the order for C, and the appellant, the appellant eventually served a notice of appeal on 31 May 2024 without the written judgment from the lower court.

[16] The delivery of the notice of appeal did not yield a response from the magistrate. In fact, more than 12 months after the order and the requests, there is still no written judgment from the magistrate. The failure to provide a written judgment explaining the reasons for the order is unacceptable conduct of a judicial officer. A judgment predicates an appeal to this Court and the failure to do so prejudices the appellant's rights to fairness and access to court.

[17] In *The State v Lifele,*[2] which was referred to with approval in *New Clicks South Africa (Pty) Ltd v Minister of Health and Another*,[3] the Supreme Court of Appeal remarked thus in respect of a delay in giving a judgment or reasons for a particular order:

> "Much more than a mere courtesy is involved. By such conduct the administration of justice is hampered, and may be seriously hampered, by an arbiter of justice himself, whose responsibility it is to render it effective and not add judicial remissness to its already irksome delays."[4]

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[2] 1962 (2) SA 527 (A).

[3] *Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and Another* 2005 (3) SA 238 (SCA) para 8.

[4] *Lifele* above at 531F.

The interlocutory applications

[18] The first order of business before us was the respondent's application in terms of Uniform Rule 30 for an order setting aside the notice of appeal alternatively dismissing the appeal as having lapsed. In response to the Rule 30 application, the appellant launched a conditional application for an order condoning, in so far as it may be necessary, the late filing of his notice of appeal.

[19] Having heard argument, this Court ruled that it would consider the interlocutory applications and the appropriate costs order, and in so far as it would be necessary, granted condonation in view of what it considered as exceptional circumstances of the appeal. What follows are our reasons of this order.

[20] To contextualise the interlocutory skirmishes, it is necessary to restate the relevant court rule. Appeals against proceedings in terms of the PHA[5] are dealt with by the Magistrates' Court Act.[6] By virtue of section 84 of the Magistrates' Court Act, appeals in civil matters are regulated by the rules promulgated under that Act. Magistrates' Court Rule 51 being the relevant rule, provides *inter alia* that:

> "(1) Upon a request in writing by any party within 10 days after judgment and before noting an appeal the judicial officer shall within 15 days hand to the registrar or clerk of the court a judgment in writing which shall become part of the record showing —
>
> *(a)* the facts he or she found to be proved; and
>
> *(b)* his or her reasons for judgment.

[5] In terms of section 17 of the PHA
[6] Act 32 of 1944

...

(3) An appeal may be noted by the delivery of notice within 20 days after the date of a judgment appealed against <u>or within 20 days after the registrar or clerk of the court has supplied a copy of the judgment in writing to the party applying therefor</u>."

[underlining added]

The Rule 30 application

[21] The appellant served his notice of appeal 31 May 2024, and it was filed on 3 June 2024, in the absence of the written reasons requested in September 2023. When the appellant took steps to prosecute this appeal, the respondent delivered a notice in terms of Rule 30, contending that the appeal had lapsed for want of compliance with the provisions of Magistrates' Court Rule 51(3). The interlocutory application followed on or about 29 August 2024.

[22] In the heads of argument filed on behalf of the respondent, it was contended that Rule 51(3) envisaged two potential timelines for noting an appeal: (a) within 20 days from the date of the judgment appeal against; or (b) 20 days after the clerk had supplied a written copy of the judgment. The argument being that, on either of these two bases, the appeal was noted late. This argument loses sight of the absence of any written judgment having been supplied in response to the request for such judgment.

[23] Both in her heads of argument and before us, Ms Bosman, appearing for the appellant, relied on the judgment in *Lucas v Minister of Safety & Security*[7] for her argument that in the absence of the written reasons, the time period for noting

[7] [2015] ZAECGHC 81

an appeal in terms of Rule 51(3) did not run, and the notice of appeal cannot be held as having been filed late. In *Lucas*, Goosen J (as he was then) on behalf of the full court, summarised the requirements of Rule 51(1) thus:

> "[12] ... When notice is given in terms of Rule 51(1) the magistrate is obliged to deliver to the clerk or registrar a written judgment that complies with the provisions of the Rule. If an oral judgment was delivered then in that event the magistrate is obliged either to deliver a written judgment which complies with the Rule or to deliver to the clerk or registrar a typed transcript of the oral judgment if that transcribed judgment meets the requirements of Rule 51(1).
>
> [13] In the light of the failure to comply with the obligation in terms of Rule 51(1), in this instance, the time period for the noting of the appeal in terms of Rule 51(3) did not run. Even if it did, for the reasons already given and for those which will be apparent from what follows on the merits, good cause was established to justify condonation for the late prosecution of the appeal."

[24] In opposition, the respondent contended the reliance on *Lucas* was misplaced. This Court disagrees with the respondent's contentions. Firstly, despite the judgment emanating from a different division, it is persuasive and accords with our approach at the hearing of the appeal. The appellant's request for written reasons was filed timeously, that is three days after the order and within 10 days period prescribed by the Rule 51(1). The notice of appeal was due 20 days after receipt of the written reasons. Those are yet to be delivered more than a year after the request. It is precisely because the court below failed to provide its written judgment that the noting of the appeal was delayed. There is no suggestion that the appellant and his attorneys did not act diligently in following up with the court officials regarding the requested judgment. Eventually, at the end of his tether, the appellant took it upon himself to obtain a transcription of the

proceedings and file his notice of appeal. As already alluded to above, the transcription itself reveals the paucity of the reasoning applied before granting the order.

[25] Consistent with *Lucas v Minister of Safety & Security* I find, by reason of the failure by the magistrate, the notice of appeal was not filed out of time.

[26] Even if irregularity taints the notice of appeal, which in my view it does not, I am satisfied that the interlocutory application cannot succeed. A rigid adherence to the Rules of Court for its own sake more often than not leads to injustice, delay and unnecessary costs being incurred in litigation.[8] Whilst litigants and their attorneys are not encouraged to adopt a lackadaisical approach to litigation, less-than-perfect procedural steps should not get in the way of a proper ventilation of disputes.[9] As such, it is only if an irregular steps results in real and substantive prejudice to be suffered, that the offending step can and should be set aside.[10]

[27] The respondent did not raise any substantial prejudice, and, given the view I take on the merits of the appeal, it is rather the appellant and C who will suffer substantial prejudice should the appeal be deemed to have lapsed. Ultimately, the appeal concerns the interests of minor children. It is disingenuous for the respondent to seek extract a procedural advantage in the present case. The appellant had no control of the lower court's failure to deliver its written judgment, and the delay and prejudiced this failure caused. Moreover, I am mindful of the

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[8] *Sasol South Africa Ltd t/a Sasol Chemicals v Penkin* at para 13.

[9] *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 278E – G.

[10] E.g. *SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw NO* at 333G–334G; *De Klerk v De Klerk* 1986 (4) SA 424 (W); *Consani Engineering (Pty) Ltd v Anton Steinecker Maschinenfabrik GmbH* 1991 (1) SA 823 (T); *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen* 1992 (4) SA 466 (W); *Gardiner v Survey Engineering (Pty) Ltd* 1993 (3) SA 549 (SE) at 551C; *Van den Heever NO v Potgieter NO* 2022 (6) SA 315 (FB) at paras 23 – 26; *Sasol South Africa Ltd t/a Sasol Chemicals v Penkin* above at paras 44 – 50.

injunction of the apex court that the interests of children should not be held at ransom at for the sake of legal niceties, or the alter of jurisdictional formalism.[11]

[28] In the result, the application in terms of Rule 30 is dismissed with costs, including counsel's fees on scale B.

The conditional application for condonation

[29] In addition to the appellant having opposed the Rule 30 application, the appellant sought condonation for the late delivery of the notice of appeal to the extent that this Court finds that he ought to have done so.

[30] As the notice of appeal was not filed late, no condonation is required. But, if the notice of appeal constitutes an irregularity, I am satisfied that the interests of justice are such that the irregularity ought to be condoned gauged in the context of the (a) the nature of the order (b) the merits of the appeal and the prejudice which will result if the order is allowed to stand, a matter which I turn to later in the judgment.

The merits of the appeal

The relevant legislative framework

[31] The scope of the PHA[12] is provides a remedy against acts of "harassment" which is defined as:

> "directly or indirectly engaging in conduct that <u>the respondent knows or ought</u>

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[11] *AD and DD vs DW and others* 2008 (3) SA 183 (CC) at [30]

[12] The scope of the PHA is substantially more limited than that catered for in the Domestic Violence Act 116 of 1998, even before the substantial amendments to the latter Act coming into effect on 14 April 2023.

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;

(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 a related person; or

(b) amounts to sexual harassment of the complainant or a related person."

[underlining added]

[32] "Harm" is defined as mental, psychological, physical or economic harm, and "sexual harassment" means -

"(a) unwelcome sexual attention from a person who knows or ought reasonably to know that such attention is unwelcome;

(b) unwelcome explicit or implicit behaviour, suggestions, messages or remarks of a sexual nature that have the effect of offending, intimidating or humiliating the complainant or a related person in circumstances, which a reasonable person having regard to all the circumstances would have anticipated that the complainant or related person would be offended, humiliated or intimidated;

(c) implied or expressed promise of reward for complying with a sexually oriented request; or

(d) implied or expressed threat of reprisal or actual reprisal for refusal to comply with a sexually oriented request."

[33] It is only if a respondent knows or reasonably ought to know that the impugned conduct, amounts to "harassment" and/or "sexual harassment", and is unreasonable,[13] that relief may be granted in terms of the PHA.

[34] A material factor in this appeal is whether a respondent "knows or reasonably ought to know" that his or her conduct amounts to "harassment" may be informed by such person's age, stage of development and maturity. In the present case, the children involved are between the ages of 7 and 14 years old and are accordingly presumed to be *doli incapax* (incapable of wrongdoing). Nevertheless, the presumption can be displaced by evidence to the contrary.[14] Subjective considerations inform whether a particular child is *doli capax* (capable of wrongdoing).[15]

[35] A complainant, being the person who alleges that he or she is being subjected to harassment,[16] may apply in the prescribed form, for a protection order.[17] If the complainant does not have legal representation, the clerk of the court must inform the complainant, in the prescribed manner, of the relief available in terms of the PHA, and the right to also lodge a criminal complaint against the

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[13] Section 9(5) reads:

"For the purpose of deciding whether the conduct of a respondent is unreasonable as referred to in paragraph *(a)* of the definition of 'harassment', the court must, in addition to any other factor, take into account whether the conduct, in the circumstances in question, was engaged in

(a) for the purpose of detecting or preventing an offence;

(b) to reveal a threat to public safety or the environment;

(c) to reveal that an undue advantage is being or was given to a person in a competitive bidding process; or

(d) to comply with a legal duty."

[14] *Jones NO v Santam BPK* 1965 (2) SA 542 (A) at 553B-D.

[15] *Weber v Santam Versekeringsmaatskappy BPK* 1983 (1) SA 381 (A) at 339A; *Eskom Holdings Ltd v Hendricks* 2005 (5) SA 503 (SCA) at paras 15-19.

[16] The definition in section 1

[17] Section 2(1)

respondent for *crimen injuria*, assault, trespass, extortion or any other offence which has a bearing on the person or property of the complainant or related person.[18] The application may be accompanied by supporting affidavits of persons with knowledge of the matter,[19] and must be lodged with the clerk of the court who must immediately submit the application and affidavits to the court.[20]

[36] Section 3 of the PHA regulates the consideration of the *ex parte* application. The court must grant an interim protection order if it is satisfied that (a) there is *prima facie* evidence that the respondent is engaging or has engaged in harassment, (b) the complainant may suffer harm if an order is not granted immediately, and (c) the protection accorded by the interim protection order is likely not be achieved if prior notice is given. If the court is not so satisfied, the application and supporting affidavits must be served on the respondent, together with a notice calling upon the respondent to show cause why a protection order should not be granted.

[37] The court seized with an application may, whether by its own accord or at the request of the complainant, conduct the hearing *in camera*,[21] and where a witness is a child, it may direct that no person other than the child, together with a parent, guardian or other person *in loco parentis* (in the place of a parent), may be present at the proceedings.[22]

[38] Section 9 of the PHA regulates issuing of a final protection order. Subsection 3 deals with instances where the respondent appears and opposes the issuing of

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[18] Section 2(2)
[19] Section 2(6)
[20] Section 2(7)
[21] Section 8(1)
[22] Section 8(2)

such an order, when the court must consider the evidence previously received in terms of section 3(1), and any further affidavits or oral evidence as it may direct, which must form part of the record of proceedings [emphasis added].

[39] After the hearing, the court must issue a protection order if it finds, on a balance of probabilities, that the respondent has engaged or is engaging in harassment. Upon the issuing of a protection order, the court must authorise a warrant of arrest against the respondent and suspend the execution thereof subject to compliance with the protection order.[23]

[40] Because section 28(2) of the Constitution stipulates that a child's best interests have paramount importance in every matter concerning that child,[24] additional considerations apply where children are involved in proceedings under the PHA. A court hearing an application in terms of the PHA involving children, is enjoined to adopt a child-centred approach, by embarking on a close and individualised examination of the precise real-life situation of the particular child involved, and not to apply a predetermined formula for the sake of certainty.[25] A court must have regard not only of the provisions of PHA but also the principles espoused by the provisions of the Children's Act. These principles include (a) to respect, protect, promote and fulfil the child's children's rights set out in the Bill of Rights, the best interests-standard and the rights and principles set out in the Children's Act, subject to any lawful limitation; (b) to respect the child's inherent dignity; (c) to treat the child fairly and equitably; and (d) to recognise the child's need for development and to engage in play and other recreational activities appropriate

[23] Section 11(1)
[24] Also section 9 of the Children's Act 32 of 2005 ("*the Children's Act*").
[25] *S v M (Centre For Child Law As Amicus Curiae)* 2008 (3) SA 232 (CC) at para 24

to the child's age.[26]

[41] Also applicable to this appeal is the imperative imposed by the Constitution[27] and the Children's Act[28] which affords a child the right to participate, in an appropriate way, in any matter concerning that child. Thus, when children are involved in litigation under the PHA, a presiding offer has the added responsibility to consider the matter with greater sensitivity, calling for a more inquisitorial approach, in the particular circumstances.

[42] In the court below, neither C nor M was afforded the right to participate in the proceedings and for the court to get a firsthand account of what transpired. The presiding officer did not heed the calls of the appellant's attorney to invoke section 8 of the PHA, which allows for a hearing *in camera,* and put in place the necessary precautions to hear the boys' evidence.

Determination of final relief

[43] Despite being entrusted with wide powers under the PHA and encumbered by the added duties and responsibilities imposed by the other relevant legislation outlined above, the magistrate did not display the requisite sensitivity to the age of the children involved and the nature of the allegations by adopting an inquisitorial approach. He did not allow or call for oral evidence, nor did he seek to involve the children themselves in an appropriate manner. The magistrate decided the matter on the affidavits filed of record and argument presented from

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[26] Section 6 of the Children's Act

[27] Section 28(1)(h) of the Constitution.

[28] Act 38 of 2005. Section 10 provides: "Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration."

the bar.

[44] Accordingly, the respondent would have only be entitled to the relief sought if the facts she averred which were admitted by the appellant, together with the facts alleged by the appellant justified the order sought.[29] However, a court should be slow on deciding probabilities in the face of factual disputes on affidavit; and ought not to decide the credibility of a deponent absent clear and direct contradictions.[30]

[45] There is no indication that the magistrate paid attention to the admissibility of the evidence of C's alleged conduct towards M. It is patent from the respondent's affidavits that she relied on reports M alleged made to her, the evidence of which is inherently of a hearsay nature. The magistrate appeared to be apathetic about the numerous objections to the inadmissible hearsay evidence both in the appellant's answering affidavits and those made during argument presented on his behalf. The terse oral judgment is also silent on this score. Ultimately, the magistrate appears to have accepted, without more, the inadmissible evidence presented by M's mother. In this, he erred.

[46] The court below also failed to adequately consider the substantial inconsistencies of fact evident from the various affidavits filed by M's mother.[31] It had little, if any regard to the appellant's exposition of the facts, and it failed to state the facts found proved and the basis thereof.

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[29] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H–635C

[30] *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and Another* 2011 (1) SA 8 (SCA) at [20] and [21]

[31] These inconsistencies include contradictory dates of M's reports to his mother, and her interactions with M's teacher. The initial allegation that C's father had touched M, which she retracted. Her bald descriptions of C's alleged behaviour towards M also differs. In her replying affidavit, M's mother raised allegations of C's subsequent contact, to which C's father could not respond.

[47] In my view, given the sensitive subjective nature of the conduct constituting the harassment complaint (for both boys), the appellant's version did not consist of bald or uncreditworthy denials, or fictitious disputes of fact, all of which was so implausible, far-fetched or clearly untenable.[32] In sum, there was no justification to reject the appellant's version without first hearing oral evidence adopting an inquisitorial process referred to above.

Did C's actions amount to harassment?

[48] Even if I am to accept the veracity of the respondent's hearsay evidence, I am satisfied that none of the behaviour complained of fall within the scope of the PHA.

[49] Firstly, there is no basis for a finding that C was capable of legal wrongdoing. The record of proceedings evidences the magistrate having put a stop to the argument of the appellant's representative that C lacked capacity, both to testify and to commit the offending acts. The representative's argument that C did not know or reasonably ought to have known that his conduct amounted to "harassment" was also shut down by the court below. Whilst both the appellant and the respondent were adamant that each child was not a competent witness and ought not to be exposed to direct examination, there was no evidence to rebut the presumption that C was *doli incapax* at the time of committing the alleged harassment. In absence such a rebuttal, there was no basis upon which the court below could have found against C given his tender age without more.

[50] Secondly, and in relation to C's alleged actions, it is evident from the transcript

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[32] *Democratic Alliance in re Electoral Commission of South Africa v Minister of Cooperative Governance* 2022 (1) BCLR 1 (CC) at [40] footnote 15 referring to *Plascon-Evans* above.

of the *ex tempore* judgment that the magistrate focused almost exclusively on an incident when C allegedly squeezed M's testicles which, according to the magistrate, did not require extra curial evidence to prove that it caused harm. Although C's alleged conduct cannot be condoned and required correction, proof of sexual harassment is a prerequisite. In the context of this matter, I emphasise that the conduct is unacceptable and required censure, but there is no suggestion on the affidavits filed that the alleged "squeezing" was sexually motivated conduct. Whether the alleged incident amounted to sexual harassment in terms of PHA was not established. Whilst grabbing and squeezing a male's testicles may give rise to a charge of physical abuse, the provisions of the PHA do not relate to physical, verbal, emotional or psychological abuse.

[51] Thirdly, the respondent's affidavits do not bear out a factual basis for the finding of the court below that C had harassed M. I am not satisfied that by seeking out his friend of many years, or sitting close to M on the pavilion at a sports event, amounted to C perpetrating acts of harassment against M.

[52] But for the clear views on the harm a man or boy may befall when grabbed by the testicles, the *ex tempore* judgment does not evidence the magistrate's reasoning underpinning the order granted. In the absence of a written judgment, the only reasonable conclusion is that the magistrate failed to adjudicate the application before him in terms of PHA and the trite applicable principles and granted an order to which the respondent was not entitled.

Conclusion

[53] It follows that the order of the court below must be set aside.

[54] In the result, the following order is made:

1. The appeal succeeds with costs, including counsel's fees on scale B.

2. The order of the court below is set aside and replaced with an order in the following terms:

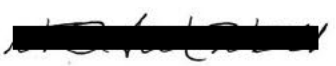
"*The application is dismissed.*"

SARITA LIEBENBERG

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

I agree



NTY SIWENDU

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

This Order is made an Order of Court by the Judges whose names are reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the Parties / their legal representatives by email. This Order is further uploaded to the electronic file of this matter on Caselines/CourtOnline by the Judges their secretaries. The date of this order is deemed to be 14 January 2025.

For the appellant:	Adv (Ms) P Bosman
Instructed by:	Brand Potgieter Inc (Ref Ms Potgieter / Mr Arnold)
For the respondent:	Adv (Ms) A Pillay
Instructed by:	Anya Kurdziel-Audagnotti Inc (Ref: Ms Kurdziel-Audagnotti)
Heard on:	19 November 2024
Judgment on:	14 January 2025