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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: A2025-055489

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO THE JUDGES: YES/~~NO~~

(3) REVISED.

DATE: 6 November 2025

SIGNATURE:

In the matter between:

M[...] **H[...]**

Appellant

And

S[...] **S[...]** **H[...]**

Respondent

This Order is made an Order of Court by the Judge whose name is 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 Judge's secretary. The date of this order is deemed to be 6 November 2025.

J U D G M E N T

LIEBENBERG AJ:

BACKGROUND

[1] The parties to this unopposed appeal are married to each other and the parents of three children – a daughter Z, born in August 2012, and her brothers, B, born in January 2016, and J born in October 2017. Since at least December 2020, the parties have been embroiled in divorce litigation pending in this Court. Over the years, there have been applications in terms of Rule 43, applications in terms of Rule 43(6), attempts to set aside Rule 43 orders, applications convicting each other of contempt of court, and more.

[2] On 22 June 2023 the appellant-husband as complainant obtained, on an *ex parte* basis, an interim protection order in terms of the Domestic Violence Act¹ (*“the DV Act”*) in the Johannesburg Magistrate's Court, against the respondent-wife directing her not commit or attempt to commit the following acts of domestic violence against the complainant², or enlist the help of another to do so: physical abuse, emotional, verbal and psychological abuse, intimidation,

¹ Act 119 of 1998.

² By virtue of section 1 of the DV Act, '**complainant**' means any person who is or has been in a domestic relationship with a respondent and who is or has been subjected or allegedly subjected to an act of domestic violence, including any child in the care of the complainant.

harassment, related person³ abuse, controlling behaviour, intimidating behaviour, abusive behaviour, offensive behaviour, or humiliating behaviour. She was also ordered not to publish information of the appellant on social media platforms. The return date was set for 11 July 2023 for the confirmation of the interim order.

- [3] In addition to the founding affidavit which accompanied the Form 6 in the application, the respondent filed her answering affidavit on or about 22 July 2023, whereafter the appellant delivered not only is replying affidavit on 31 August 2023, but he also sought leave file a supplementary affidavit under cover of a notice to that effect delivered on the same day. By notice dated and delivered on 26 September 2023, the appellant sought leave to file a second supplementary affidavit. The respondent did not file any answering affidavits to the appellant's two supplementary affidavits.
- [4] The matter was eventually argued on 9 July 2024. Despite both parties expressing their preference to lead oral evidence, the matter was heard on the affidavits filed of record only. On the same day the presiding magistrate, by way of an *ex tempore* judgment dismissed the application.
- [5] By notice dated 20 September 2024, the appellant noted an appeal against the whole of the *ex tempore* judgment and order granted on 9 July 2024.
- [6] Subsequent to the delivery of the notice of appeal, the magistrate produced what was titled "*Substituted Reasons in terms of Rule 51(1) of Magistrate Court Act*", dated 14 November 2024, with the clerk of the court's date stamp bearing 18

³ The interim order is silent on the identity of the "related person(s)".

November 2024. Unsurprisingly, the notice of appeal does not speak to these substituted reasons.

[7] The respondent did not oppose this appeal.

CONDONATION

[8] The first order of business was the appellant's formal application for condonation for the late filing of the appeal.

[9] In light of the appellant's full and frank exposition of the material facts resulting in the delay in filing the appeal, together with the view this Court takes on the merits of the appeal, it is appropriate that the appellant's non-compliance with the time-periods laid down in the rules of court be condoned.

[10] It is necessary to restate the relevant court rule. Appeals against proceedings in terms of the DV Act⁴ are dealt with by the Magistrates' Court Act.⁵ 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.

...

⁴ In terms of section 16 of the DV Act.

⁵ 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 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.”

[underlining added]

[11] in *Lucas v Minister of Safety & Security*⁶ 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.

[12] It was within six calendar days of the granting of the *ex tempore* judgment, that the appellant delivered his notice calling for written reasons. As intimated before, those written (substituted) reasons were only provided on 14 November 2024, and the appellant’s notice of appeal was only due 20 days thereafter.

[13] Also on 15 July 2024, the appellant’s attorneys engaged with the appropriate transcribers to obtain a transcription of the *ex tempore* judgment. According to the appellant, his attorneys had to attend the Magistrates’ Court personally to

⁶ [2015] ZAECGHC 81.

locate the recordings and ensure the transcribers receive the recordings. The transcription was eventually produced on 9 September 2024, the appellant's notice of appeal was delivered on 20 September 2024, even prior to receipt of the magistrate's substituted reasons. Accordingly, and 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 above.

[14] The notice of appeal having been filed, the appeal had to be prosecuted within 60 days thereafter, as contemplated by Uniform Rule 50(1). Already on 9 October 2024, the appellant's attorneys engaged with a firm to present a quotation for the preparation of the appeal record. By all accounts, there were challenges in compiling the record, caused in part by the bad quality of the copies of documents annexed to the respondent's answering affidavit. The appeal record, comprising nine volumes, was ready for collection on 17 March 2025. The record was filed on 7 May 2025.

[15] I am satisfied that the delay in prosecuting the appeal timeously cannot be ascribed to the appellant's negligence or tardiness. By all accounts, the preparation of the voluminous appeal record proved challenging for those engaged to attend thereto.

[16] In absence of any prejudice having been raised by the respondent, there is no reasonable basis to refuse the condonation sought by the appellant.

THE APPELLANT'S CASE

[17] In the court below, and although the interim order granted does not reflect as much, the appellant sought relief in respect of himself, each of the three children and his new partner, Ms A, including the following orders:

[17.1] That the respondent be interdicted from coming within 100 meters of the appellant, and of Ms A.

[17.2] That the respondent be interdicted from psychologically, verbally, and emotionally abusing the appellant.

[17.3] That the respondent be interdicted from physically, psychologically and emotionally abusing the minor children.

[17.4] That the respondent be interdicted from harassing the appellant and soliciting the services of third parties to harass him.

[17.5] That the respondent be interdicted from utilising social media platforms to harass, and emotionally and verbally abuse the appellant.

[18] In his substantial founding affidavit, supported by various annexures, the appellant provided sufficient *prima facie* evidence to satisfy the granting of the interim order. What follows is but a precis of the evidence.

[18.1] On 17 December 2021, and at the instance of the respondent, this Court granted an order in terms of Uniform Rule 43 by consent between the parties *inter alia* appointing Dr Ronel Duchon to provide a report by 31 January 2022 on the best interests of the children with specific reference to the children's care, contact and residence. The order also included

detailed arrangements in respect of the parties' care and contact with the children pending the delivery of Dr Duchen's report.

[18.2] At the instance of the respondent, and on 12 September 2022, this Court granted an order in terms of Rule 43(6), stipulating that the children's primary residence shall vest with the respondent, and that the appellant shall have rights of contact on alternate weekends from Friday after school until Monday morning.

[18.3] According to the appellant, the order of September 2022 was granted notwithstanding there having been no material change in circumstances, and the terms of which "*completely contradicted Dr Duchen's first and second reports.*"

[19] In respect of the children, the appellant recorded:

[19.1] Subsequent to the order of September 2022, the respondent had subjected the children to severe psychological abuse and she subjected the two boys to physical abuse.

[19.2] Dr Duchen found in her (second) report dated 15 August 2022 that Z, the daughter, presented as polarised and alienated, and expressed her concern that the respondent is undermining Z's relationship with the appellant.

[19.3] The findings of Ms Mary Bothma, who had been appointed as the children's therapist, and who published a psycho-emotional report dated August 2022, that in her relationship with the respondent, Z has become

“parentified”. She identified closely with her mother, feeling that she needs to protect her and ensure that her siblings also protect their mother.

[19.4] In her second report dated October 2022, Ms Bothma recorded that the instances of parentification and attachment based parental alienation had taken new and profound heights which may have irreversible consequences for the children. Ms Bothma expressed extreme concern that all three children’s emotional wellbeing seemed to have deteriorated since the change in contact arrangements pursuant to the order of September 2022 and the apparent escalation of negative discussions regarding their father. Thematic analysis of therapeutic themes stage that their relationship with their father is being destroyed instead of healed. Ms Bothma expressed the conclusion that Attachment Based Parental Alienation is a severe form of emotional-psychological domestic violence perpetrated on both the targeted parent and the victimised child.

[19.5] On 8 January 2023, B consulted with a general practitioner Dr Dornan when B presented with an extremely swollen ear. B had told the appellant that his ear was sore because the respondent had twisted and pulled his ear because he had mislaid a R 100.00 note. It is evident from Dr Dornan’s note, annexed to the founding affidavit, that B had repeated this version to the doctor as well.

[19.6] When the appellant collected the children from school on 15 February 2023, being his allocated day of contact, he noticed that J, the youngest boy, had a serious injury to his torso. When J would not tell his father what had happened, the appellant took J to Dr Dornan for a consultation.

The latter noted two large areas of redness on J's torso and expressed concern that J had refused to make any disclosure, and had curled up on the examination table, speaking in a very soft and suppressed voice.

[20] In respect of acts of domestic violence against the appellant personally, he detailed that:

[20.1] In August/October 2021, the respondent issued a veiled threat to the effect that the appellant knows what happened to a friend and his dog. The appellant explained that, barely two months prior, this particular friend was nearly murdered and his dog was killed.

[20.2] On 3 July 2022, it became apparent that the respondent had appointed a third party investigator to harass and issue threats against the appellant during a telephone conversation between the investigator and the appellant's attorneys. A transcript of the recorded conversation formed an annexure to the founding affidavit.

[20.3] From 3 July 2022⁷ onwards, the respondent had taken to harass and abuse the appellant on a near daily basis *inter alia* by refusing electronic contact between the appellant and the children, and by sending abusive and insulting text messages.

[20.4] The respondent would purposefully drive past his home slowly, taking photographs and/or videos with her telephone.

[20.5] For a period of eight weeks from end October 2022, the respondent unilaterally withheld physical contact between the appellant and the

⁷ The founding affidavit appears to contain a typographical error referring to 2023.

children on the false premise that J had nearly drowned whilst in the appellant's care. It was only after the appellant had laid criminal charges against the respondent for failing to adhere to the terms of a court order, that the respondent relented. But not without having launched an urgent application where she accused the appellant of having bribed the police officers.

[20.6] By email dated 17 February 2023 addressed to the appellant's attorneys, and in response to the latter's recent correspondence in relation to the divorce action, the third part investigator again issued various threats of harm and other defamatory allegations. The respondent did not take up invitations addressed to her attorneys, to distance herself from the investigator's impugned behaviour.

[20.7] On 18 June 2023 the respondent placed the following publication on her Facebook page: *"I am married to a man ... [the appellant], he used me, abused me .. I will not be intimidated by him or his nor his money ... truth will prevail #blackwomen"*.

[21] It bears mentioning that the founding affidavit also contains allegations pointing to the respondent having subjected Ms A to harassment but given that the appellant did not persist with the appeal against the dismissal of the application in respect of Ms A, nothing more needs to be said on this score.

[22] In the first of his two supplementary affidavits, the appellant recorded that:

[22.1] He had the children in his care for a period of some 12 days between 5 and 19 July 2023 during their school vacation. Upon the children being

delivered to the respondent's care on 19 July 2025, all three children were healthy, clean, and free from harm. The appellant then departed to Cape Town on a business trip of a week's duration.

[22.2] On 25 July 2023, the respondent's attorneys addressed a letter recording that both boys had scrapes on them and their nails were uncut, Z had an abscess of her buttock, all three children's lips were dry and cracked, and B had a bruise on his arm.

[22.3] Concerned about these allegations, the appellant, upon his return home from Cape Town, took the children to a general practitioner for consultations on 26 July 2023. According to the J88 form annexed to the supplementary affidavit, J had old bruises on his lower legs, and B had no bruising or signs of recent injury as alleged by the respondent. Upon questioning, the boys explained to their father in detail how that the respondent had put make-up on B's arm before she took photographs of these "injuries".

[22.4] On 28 July 2023, when the appellant collected the children from school to exercise contact over the weekend, he immediately noticed a bruise on B's arm, which had manifested after the doctor's visit on 26 July 2023.

[22.5] During his weekend contact commencing 11 August 2023, the appellant noticed another severe bruise on B's leg but B would not tell how this came to pass.

[23] In the second of his supplementary affidavits, the appellant detailed how:

[23.1] After a hearing on 24 August 2023 in the court below, the respondent's attorney, outside the courtroom approached the appellant and started antagonising him but repeatedly asking whether he was scared of leading oral evidence. According to the appellant, the respondent's attorney was so persistent that his own attorney had to intervene.

[23.2] The respondent, when filling out school application forms for the two boys on 5 September 2023, used the opportunity to defame the appellant and spread false narratives, creating ambiguity in her version set out in her answering affidavit filed in the proceedings in the court below.

[23.3] Whilst exercising video/electronic contact with the children on 18 September 2023, B showed the appellant injuries to his face, explaining that he had walked into a steel railing in the respondent's home. Given the nature and extent of the injury, the appellant was unconvinced by B's explanation and arranged for a doctor's consultation on 19 September 2023. B gave contradictory accounts to the doctor about how he sustained the injury to his face.

THE RESPONDENT'S CASE

[24] Stripped of hyperbole and matters extraneous to the relief sought in the court below, the respondent denied that she ever instructed the third party investigator to intimidate, harass or abuse the appellant, alleging that she approached this individual for assistance to ensure that SAPS officers do not abuse their positions and do not entertain the appellant's frivolous complaints against her. The respondent denies having subjected the children to physical abuse, referring to the office of the Senior State prosecutor having declined to

prosecute her. She also denied having perpetrated acts of domestic violence against the appellant.

[25] As a preliminary point, and in circumstances where the respondent's attorney had warned the appellant's attorney not to do so prior to the launching of the application in the court below, the applicant sought and obtained relief on an *ex parte* basis. The respondent contended that interim order should be discharged on this ground alone.

[26] Contending that the appellant is a man of substantial means, the respondent argued that the application in the court below was an abuse of process employed by the appellant in an attempt to avoid honouring his maintenance obligations vis-à-vis the respondent and the children.

[27] In response to the allegations in the founding affidavit:

[27.1] The respondent denies that she subjected the children to psychological abuse, and she denied the expert psychologists confirmed as much.

[27.2] She denied having physically abused B and J and denied that Dr Dornan found and confirmed as much. She also denied having twisted and pulled B's ear, welcoming the opportunity for the children to give their versions to the court below.

[27.3] She denied having stalked the appellant's home, that she threatened him on a daily basis or that she solicited the services of third parties to threaten or harass the appellant.

[27.4] Inviting the appellant to make Dr Duchen available for examination, the respondent denied the contents of Dr Duchen's report.

[27.5] Objecting to Ms Bothma's failure to consult or interview her, the respondent described Ms Bothma's conclusions as blind and one-sided, and wholly unprofessional.

[27.6] Admitting that she used the words in relation to the appellant's friend and his dog, the respondent contended that her words must be regarded in context of her having expressed exasperation because of the appellant's conduct and the potential exposure of the children to the threats he had been receiving from third parties.

[27.7] According to the respondent the Facebook post is contrived, engineered and fake, and it appeared that her Facebook account had been compromised.

[28] The respondent did not deliver any further answering affidavits to refute the allegations contained in the two supplementary affidavits the appellant had delivered.

THE *EX TEMPORE* JUDGMENT

[29] Regrettably, the *ex tempore* judgment does not reflect the reasoning of the court below.

[30] On a reading of the transcript, it is evident that magistrate did not have regard to all the affidavits filed of record. He referenced only the Form 6 notice (the formal notice of application) and the second of the appellant's supplementary

affidavits, having quoted the contents thereof in full, and noting that the respondent did not deliver any answer thereto. He ostensibly had regard to the answering affidavit, but no mention is made of the allegations in the supporting affidavit attached to the Form 6 or the appellant's first supplementary affidavit.

[31] Having correctly recorded that the parties are agreed that there is or was a "*domestic relationship*" between them, the court below correctly identified the dispute to be resolved as being whether or not the respondent committed the acts of domestic violence as alleged.

[32] Expressing referring to the trite principles for resolving factual disputes in motion proceedings for final relief,⁸ the magistrate failed to indicate the nature of the material factual disputes on the various affidavits. There is no discernible reason for the court below having ruled for the matter to be argued on the affidavits only in circumstances where both parties were of the view that oral evidence ought to be led.

[33] Despite the founding affidavit clearly having been framed for relief not only in respect of the appellant, but also in respect of the children, there is no indication in the *ex tempore* judgment that the magistrate had any regard to the complaints of the acts of domestic violence having been committed by the respondent in respect of the children.

[34] Ultimately, the court below professing to have analysed, scrutinised and evaluated the arguments (as opposed to the affidavits filed of record) of both

⁸ Enunciated in *Plascon-Evans (Pty) Ltd v Van Riebeeck Pains (Pty) Ltd* 1984 (3) SA 623 (A).

the appellant and the respondent, concluded that it is not satisfied “to grant a final protection order”.

THE SUBSTITUTED REASONS OF THE COURT BELOW

[35] The magistrate’s substituted reasons which were delivered belatedly, served to confound matters even more. The confusion created includes the use of incorrect pronouns, referring to the appellant as “she” and “her”, and by referring to the defence of *de minimis non curat lex* having been raised, when the respondent’s answering affidavit does not bear out a factual basis for the defence.

[36] The substituted reasons underscore the perception that the court below had regard only to the allegations in the appellant’s second supplementary affidavit together with the respondent’s answering affidavit, and not those in the other affidavits filed by the appellant. By all accounts, the uncontroverted allegations proffered by the appellant in the two supplementary affidavits, clearly establishing the commission of acts of domestic violence against the children and against the appellant, went unnoticed.

[37] The magistrate found “*that there is no clear case of domestic violence by the respondent towards the complainant and his application has no basis whatsoever, the evidence presented by complainant is out of context. the complainant and the respondent has now aired their grievances in a public forum and which leads me to believe that they have now have spent their emotions, this will be the end of it. hence the Court found that it will not be necessary or in the interests of justice to grant a final order in favour of Applicant.” [sic] (underling added)*

THE GROUNDS OF APPEAL

[38] The grounds raised in the notice of appeal were aimed solely at the *ex tempore* judgment, and include:

[38.1] The magistrate having failed to take into account the allegations in the founding affidavit attached to the Form 6 and the first of the two supplementary affidavits delivered by the appellant.

[38.2] The magistrate failed to apply provisions of the DV Act as amended with effect from 14 April 2023.

[38.3] By failing to have regard to all the affidavits filed by the appellant, the magistrate erred in proceeding from the premise that the application was for relief in respect of only the appellant, when it was patent from the founding affidavit that the appellant also sought relief on behalf of the children and his partner, Ms A.

[38.4] The magistrate erred by not considering the evidence presented by the appellant in the form of reports from expert psychologists, supporting the acts of psychological abuse perpetrated by the respondent against the children, and official J88 forms from practicing medical practitioners in support of the appellant's case of acts of physical abuse of minor children.

[38.5] Had the court below correctly applied the provisions of the DV Act to the conduct of the respondent, it would have been enjoined in terms of section 6(4) of the DV Act to issue a final protection order in the prescribed form as the balance of probabilities showed that the respondent has committed or is committing an act of domestic violence on the uncontested facts.

[38.6] The magistrate erred in conflating the test for harassment (as incorrectly interpreted) with the test for an order in terms of section 6(4) of the DV Act as amended.

THE LEGISLATIVE FRAMEWORK

[39] The DV Act seeks to address the scourge of domestic violence plaguing South Africa. Although the vast majority of victims of domestic violence are women and children, men are also victims, and they are also entitled to the protection offered by the DV Act. The magistrate appeared to discount the appellant's entitlement to protection offered by the DV Act in the event of him being the victim of domestic violence.

[40] The application before the court below was launched subsequent to the amendment to the DV Act, which came into effect on 14 April 2023. Various amendments were introduced *inter alia* by the expansion of the definition of "domestic violence" to include related person abuse;⁹ coercive behaviour;¹⁰ and to expose a child to domestic violence.¹¹

⁹ Section 1 defines '**related person**' as any member of the family or household of a complainant, or a person in a close relationship with the complainant; and '**related person abuse**' to mean to-

- (a) threaten the complainant with causing of physical violence to, or the damage of property of, a related person;
- (b) threaten a related person with physical violence or causing damage to the property of, such a person;
- (c) threaten a related person with causing of physical violence to, or the damage of property of, a complainant; or
- (d) commit an act of physical violence against or cause damage to property of a related person,

where such actions can in the circumstances be regarded to cause harm to the complainant.

¹⁰ Defined in section 1 to mean to compel or force a complainant to abstain from doing anything that they have a lawful right to do, or to do anything that they have a lawful right to abstain from doing.

¹¹ Defined as to intentionally cause a child to-

- (a) see or hear domestic violence; or

[41] Section 4 of the DV Act regulates the manner in which an application may be made in terms of the DV Act: An application for relief may be launched on an *ex parte* basis, in the prescribed form and manner,¹² to be lodged with the clerk of the court or electronically,¹³ and such an application may be accompanied by supporting affidavits of persons who have knowledge of the matter concerned.¹⁴

[42] Section 5 deals with the initial consideration of an application in terms of section 4. By virtue of section 5(2), a court may issue an interim protection order on an *ex parte* basis, if is satisfied that (a) there is *prima facie* evidence the respondent is committing, or has committed an act of domestic violence; (b) the complainant is suffering or may suffer harm as a result of such domestic violence; and (c) the issuing of a protection order is immediately necessary to protect the complainant against the harm contemplated. In issuing such an interim order, the court is to set a return date when the respondent is to show cause why the interim order should not be made final.¹⁵

[43] On the (extended) return date, the court is obliged by virtue of section 6(2) to hear the matter and consider all the evidence previously received in terms of section 5 (1), that is the Form 6 and any supporting affidavits which may have been submitted, consider such further affidavits or oral evidence as it may direct, which forms part of the record. If there is a dispute of fact, the court may on application by either party, adjourn proceedings on the terms and conditions

(b) experience the effects of domestic violence.

¹² Section 4(1)(a). By virtue of regulation 7(1) of the Domestic Violence Regulations, 2022, the application is to be made on a form which substantially complies with Form 6.

¹³ Section 4(1)(b).

¹⁴ Section 4(6). Regulation 7(5) reiterates that supporting affidavits may be submitted with the application.

¹⁵ Section 5(3)(b).

the court deems appropriate, in order to afford the party the opportunity to adduce further evidence, in which event the interim order must be extended.

[44] In determining whether there is a dispute of facts on the affidavits filed, the court must heed the warning that “[a] bare denial of the applicant’s material averments cannot be regarded as sufficient to defeat applicant’s right to secure relief by motion proceedings in appropriate cases. Enough must be stated by respondent to enable the Court to conduct a preliminary examination . . . and to ascertain whether the denials are not fictitious intended merely to delay the hearing.’(or for some other purpose) The respondent’s affidavits must at least disclose that there are material issues in which there is a bona fide dispute of fact capable of being decided only after viva voce evidence has been heard... It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.”¹⁶

[45] By virtue of the provisions of section 6(4) of the DV Act the court must, after a hearing as contemplated in section 6(2), issue final protection order if it finds, on a balance of probabilities, that the respondent had or is committing acts of domestic violence. The DV Act does not endow the court with a discretion to refuse a final order on the basis of the “*interest of justice*” or otherwise in circumstances where it finds that the respondent had or is committing acts of domestic violence. Yet, in crafting the contents of the interim or final protection

¹⁶ *Soffiantini v Mould* 1956(4) SA 150 (E) at 154.

order, the court has various discretionary powers set out in section 7 of the DV Act.

DISCUSSION

Acts of domestic violence against the children

[46] It is patent that the magistrate did not have due regard to all the affidavits placed before court. Had it done so, it would have been manifest that the appellant sought relief in the first instance to protect the children from acts of domestic violence perpetrated against them by the respondent. These included acts of emotional and psychological abuse referred to in the psycho-legal reports of Dr Duchen and Ms Bothma, as well as physical abuse of the children.

Emotional and psychological abuse of the children

[47] Dr Ronel Duchen was appointed by consent between the parties to perform a forensic investigation regarding the best interests of the children. She rendered two reports: the first, dated 21 June 2021, was annexed to the respondent's answering affidavit; and the second dated 15 August 2022 was annexed to the founding affidavit. Evident from both these reports is Dr Duchen's findings that Z presented as polarised and alienated, with the respondent undermining the relationship between Z and the appellant.

[48] During the course of Dr Duchen's forensic investigation, she suggested that the children ought to receive psycho-therapy to deal with the fall-out of their parents' separation. As the parties were especially concerned about Z's emotional functioning, Z's therapy with Ms Bothma commenced in April 2021. During May 2022, and with Z's buy-in, her two brothers also commenced

therapy with Ms Bothma. Ms Bothma's role was not that of a forensic investigator, but as the children's therapist. As such, she was under no obligation to ascertain the veracity of the clinical observations made during therapy but interviewing either of the parents.

[49] Ms Bothma also published two reports: the first in August 2022 and the second in October 2022. Both reports speak to:

[49.1] Especially Z struggling with anxiety, hypervigilance, living in trauma, depression, emotional exhaustion and a lack of inner resources to navigate the minefield caused by her parents' acrimonious divorce. Z was described as a "parentified" child who had aligned herself with the respondent, believed it her duty to protect her mother, and to ensure that her siblings are also protected. In light of this polarised alignment, Z excluded the possibility of embracing and enjoying a relationship with her father. Ms Bothma expressed concerns regarding Z's relationship with her mother due to a lack of appropriate boundaries, Z parentification, and her perception that her relationship with her mother is of such a nature that she believed it her job to discipline and even punish her brothers.

[49.2] In relation to B, Ms Bothma expressed grave concern that he believed that his father had put cameras in his mother's home to "spy" on her, and that B started worrying about his mother's financial well-being.

[49.3] Ms Bothma noted her concerns that J, who was barely 5 years old at the time, had built strong emotional walls around himself; and that, although he loves both his parents dearly, he saw himself as a baby in his mother's house, drinking from a bottle to self-soothe.

[50] The second of Ms Bothma's reports include her clinical observations of the effect of the change in their residence regime brought about by the order of 12 September 2022.

[50.1] She commented on a marked deterioration of the children's emotional functioning, an increase in their anxiety, and the apparent escalation of negative discussions regarding the appellant since the change of the contact arrangements. Ms Bothma recorded that it appeared that the children's relationship with the appellant was being destroyed rather than healed.

[50.2] Ms Bothma warned that the children's ever more crystallised "knowledge" of what makes their father "bad" is extremely destructive not only of their relationship with him, but also their own emotional functioning, mental health and trust in themselves and their own realities and experiences. This Ms Bothma termed as emerging themes of severe parental alienation which must be investigated and addressed as a matter of extreme urgency before the children's mental health and functioning becomes irreparably damaged.

[51] In the various publications quoted by both Dr Duchon and Ms Bothma, "parental alienation" is termed a form of psychological abuse, as alienation implies that a child cannot find a sense of security with the targeted parent because the child's relationship with that parent continues to be undermined. This has potentially detrimental mental and psychological long-term consequences for the child.

[52] Albeit that neither Dr Duchen nor Ms Bothma made any pertinent diagnosis of parental alienation, they each identified acts of alienation perpetrated by the respondent, including undermining the children's relationship with the appellant by "bad-mouthing" him, and creating the impression in their minds that their father is "bad" or that they are "unsafe" in his care.

[53] Subjecting a child to acts of alienation or creating a belief in a child's mind that his or her other parent is "dangerous" or "all bad" equates to behaviour that *inter alia* degrades, manipulates, and/or causes of emotional pain to the child, all of which causes mental and psychological harm to such child. Thus, the acts of alienation fall within the definition of "*emotional and psychological abuse*" in the DV Act.

[54] The respondent's bald denials, without any alternate explanation for the findings and observations of Dr Duchen and Ms Bothma do not disturb the *prima facie* evidence presented by the appellant of her having subjected the children to acts of domestic violence in the form of emotional and psychological abuse.

[55] Had the court below followed a robust approach, a final protection order ought to have been granted.

Acts of physical abuse

[56] The appellant's case, supported by notes from Dr P Dornan and J88 forms completed by Dr Adam, is that the respondent had physically assaulted the two boys.

[56.1] On 8 January 2022, B presented with a severely swollen ear and complained of it being painful. During her consultation with B on the same day, Dr Dornan noted the swollen ear and received the same explanation that B had given the appellant: the respondent had pulled his ear because he placed a R 100-note in the couch and then could not find it.

[56.2] On 15 January 2023, when the appellant collected the children from school, he noticed that J had an injury to his torso. On the same day, Dr Dornan examined J and found two large areas of redness. Both the appellant and Dr Dornan confirmed that J would not disclose how he sustained the injury but appeared very scared and curled up on the examination table.

[57] For relief brought in terms of the DV Act, it matters not whether or not a respondent is criminally prosecuted or not. To obtain relief under the DV Act, the applicable onus is one of a balance of probabilities.

[57.1] In respect of the injuries B sustained in January 2022, the respondent's bald denial simply does not trump the appellant's case as supported by Dr Dornan's clinical observations and B's own account to the latter. Accordingly, the court below erred in not finding that the respondent committed an act of physical abuse in respect of B.

[57.2] However, in relation to J's injuries sustained in January 2023, in the face of J's refusal to explain how he sustain the injuries, there is no reasonable basis to conclude that the injuries were caused by the respondent.

[58] But that is not the end of the appellant's case regarding physical abuse of the children. In the first of his supplementary affidavits, the appellant recorded having noted:

[58.1] A bruise on B's arm on 28 July 2023, which manifested after 26 July 2023. The appellant expressed his suspicion that the respondent had injured B because he had told his father that she had put make-up on his arm when suggesting that his father had previously injured him.

[58.2] A severe bruise on B's leg on 11 August 2023. B refused to explain how he sustained this injury, which was noted on the J 88 completed by Dr Adam.

[59] These allegations stand uncontroverted.

[60] Similarly, the allegations contained in the second supplementary affidavit, regarding B having sustained a massive injury running the down the front of his face, the side of his head and the bottom of his jaw on 18 September 2023, coupled with the contradictory explanations B offered to his father and to the doctor who examined him, were also unchallenged.

[61] Accepting that the children, especially the boys, were still very young and could have been injured playing or by a third party all together, there is nothing inherently unconvincing about the appellant's version of events, and his suspicions and concerns about the respondent's part in B's injuries.

[62] In sum, the court below erred in not adopting a robust approach in relation to the respondent's bald denials, and in not granting a final protection order against the respondent in favour of the children.

Acts of domestic violence against the appellant

The DV Acts of the third party investigator

[63] The parties are agreed that a third party investigator became involved in the respondent's case – whether at her specific mandate or by his offer to assist her free of charge is irrelevant. Whilst the respondent denied having mandated the investigator from harassing, threatening, or abusing the appellant, it is evident that she did not distance herself of the investigator's actions, in circumstances here the latter had copied the respondent in on emails he addressed to the appellant and the appellant's attorneys in response to emails addressed by the latter to the respondent's attorneys.

[64] On the allegations before the court below, the appellant established that the investigator is a "third party actor"¹⁷ as contemplated in the DV Act.

[65] The investigator's email of 17 February 2023 is replete with threats of emotional pain, incarceration, decades-long litigation, insults, ridicule, name-calling, defamatory descriptions of the appellant, and intimidation. All of which the appellant explained caused him mental and psychological harm. This email amounts to emotional and psychological abuse and intimidation by the respondent having enlisted the assistance of a "third party actor". Such a finding entitled the appellant to a final protection order against the respondent.

¹⁷ **'third party actor'** means any person-

- (a) who is not or has not been in a domestic relationship with a complainant;
- (b) who conspired with, was procured by, or used by, the respondent to commit an act of domestic violence against the complainant; and
- (c) who-
 - (i) committed or allegedly committed an act of domestic violence against the complainant; or
 - (ii) aided or allegedly aided the respondent in the commission of an act of domestic violence against the complainant.

Acts of harassment

[66] By all accounts, the parties reside in close proximity to each other.

[67] The appellant detailed how the respondent on Wednesday, 17 August, Thursday, 18 August and Sunday 11 September 2022 slowly drove past his home using her mobile phone to take photos and/or recordings. When the respondent was called out for her behaviour via text message, her response was not to deny her actions, but to taunt, humiliate and ridicule the appellant.

[68] The answering affidavit does not evidence a denial of the appellant's allegations, but a rather obtuse jibe that how her driving past his home to get to her can be interpreted as an act of stalking in beyond belief.

[69] From its *ex tempore* judgment and the substituted reasons delivered later, it is evident that the magistrate conflated the definition of "harassment" in section 1 of the DV Act¹⁸ with the definition contained in the Prevention of Harassment

¹⁸ **'harassment'** means-

(a) the unreasonable-

(i) following, watching, stalking, pursuing or accosting of the complainant or a related person; or

(ii) 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,

which inspires the belief in the complainant that they or a related person may be harmed or their property may be damaged;

(b) to repeatedly contact the complainant by means of an electronic communications service, irrespective whether or not-

(i) a conversation ensues; or

(ii) any information is conveyed to the complainant;

(c) the repeated sending or delivering of packages, communications or other objects to the complainant, or leaving them where they may be found by, given to, or brought to the attention of, the complainant;

(d) the unauthorised access to a complainant's communication or electronic communication;

(e) the monitoring or tracking of the complainant's movements, activities or interpersonal associations without the complainant's consent, including, for example, by using technology;

Act (*“the PH Act”*).^{19 20}

[70] The PH Act requires that a respondent knows or ought to know that particular conduct amounts to “harassment”, the definition of which is more limited than the definition contained in the DV Act. The DV Act on the other hand, does not require such knowledge. The DV Act is aimed at specified conduct “*where such conduct harms, or inspires the reasonable belief that harm may be caused to the complainant.*”²¹

-
- (f) to enter any part of the joint residence that is exclusively used by the complainant or other property of the complainant, without the complainant's permission;
 - (g) to unreasonably interfere with any property that is exclusively used by or is in the possession of the complainant;
 - (h) to disclose an electronic communication to the complainant, or cause the complainant to receive a communication, which-
 - (i) is abusive, degrading, offensive or humiliating;
 - (ii) violates or offends the sexual integrity or dignity of a complainant; or
 - (iii) inspires the belief in the complainant that they or a related person may be harmed or their property may be damaged; or
 - (i) to disclose an electronic communication, or to make a communication available, to another person concerning a complainant, which-
 - (i) contains information of a private nature;
 - (ii) violates or offends the sexual integrity or dignity of a complainant;
 - (iii) is abusive, degrading, offensive or humiliating; or
 - (iv) inspires the belief in the complainant that they or a related person may be harmed or their property may be damaged.

¹⁹ Act 17 of 2011.

²⁰ In terms of section 1 of the PH Act, **'harassment'** means directly or indirectly engaging in conduct that the respondent knows or ought to know-

- (a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably-
 - (i) following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;
 - (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.

²¹ In terms of the definition of “domestic violence” in section 1 of the DV Act.

[71] The respondent's failure to engage with the appellant's detailed allegations, including those contained in the confirmatory affidavits of three security guards, does not pass muster, but tends to underscore the *prima facie* case of harassment and stalking set out in the founding affidavit.

[72] In the result, the court below erred in not finding that the respondent perpetrated acts of harassment of the appellant.

Acts of emotional and psychological abuse

[73] Axiomatically, when a parent's once-close and loving relationship with his child is undermined by the other parent of the child, the latter's conduct may cause the former to suffer emotional pain, humiliation, insult, humiliation, which causes mental or psychological harm. Put differently, acts of alienation does not only amount of "*emotional and psychological abuse*" of the child concerned, but also the targeted parent.

[74] As already stated, the third party investigator's email of 17 February 2023 is constituted acts of domestic violence in the form of emotional and psychological abuse as well as intimidation. The investigator having acted on behalf of the respondent in doing so, the court below erred in not applying the trite principles for determining factual disputes in motion proceedings for final relief correctly. The court below ought to have found that the appellant established, on a balance of probabilities, that the respondent had subjected the appellant to emotional and psychological abuse, entitling him to a final protection order.

CONCLUSION

[75] Ultimately, the court below failed to apply the law correctly. It failed to apply the provisions of the DV Act in its amended form. It failed to have regard to all the evidence before him. It demonstrated a failure to correctly apply the principles for determining disputes of fact in motion proceedings for final relief. Most pertinently, it failed to appreciate the harm which befell the children as a result of the respondent's behaviour towards them and their father.

[76] Accordingly, the order of the court below stands to be set aside.

[77] During argument, the appellant abandoned certain of the orders he previously sought. Sensibly, he also did not persist in seeking costs against the respondent.

ORDER

[78] In the result, the appeal is upheld, and the order of the court below under case number 1611/2020, granted on 9 June 2024 is set aside and replaced with the following:

1. It is ordered that, in terms of Section 6(4) of the Domestic Violence Act 116 of 1998 (*"the DV Act"*), the application for final protection order is granted in favour of M[...] H[...] (*"the complainant"*) as well as Z[...] H[...] H[...], B[...] B[...] H[...], and J[...] H[...] (collectively referred to as *"the children"*).
2. A final protection order is issued against Dr S[...] Karan S[...] H[...] (born S[...]) with identity number: 7[...] (*"the respondent"*).
3. The respondent is prohibited from committing any further acts of domestic violence defined in DV Act against the complainant and the children.

4. The respondent is prohibited from engaging in any conduct which causes or may reasonably be expected to cause physical, psychological and/or emotional abuse to the children.
5. The respondent is prohibited from enlisting the help of any third party to commit or attempt to commit any of the aforementioned acts of domestic violence.
6. With effect from the date of the order of the court of appeal, the terms of this order shall endure:
 - 6.1. For period of 5 years, in respect of the complainant; and
 - 6.2. In respect of the children, until they each reach the age of majority.
7. The Clerk of the Johannesburg Magistrates Court is ordered to immediately, and in the prescribed manner endorse the requisite domestic violence order forms with the terms of this order and forward certified copies of the protection order and the signed and authorized warrant of arrest contemplated in section (1)(a) of the DV Act to the relevant police station where the children reside.

SARITA LIEBENBERG

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

I agree

MP MOTHA

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

Heard on 4 September 2025

Judgment on 6 November 2025

For the appellant:

Advs N Jagga and M Peacock (heads drawn by Adv Jagga)

Instructed by:

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