

**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case A2025-080196

(1) REPORTABLE: Yes ☐ / No ☒
(2) OF INTEREST TO OTHER JUDGES: Yes ☐ / No ☒
(3) REVISED: Yes ☒ / No ☐

Date: 16 March 2026

In the matter between:

C[...] **B[...]** **K[...]**

Appellant

and

A[...] **K[...]** **born H[...]**

Respondent

Keywords: Domestic violence – Protection order – Appeal against final order – Domestic Violence Act 116 of 1998 – Threshold for “domestic violence” and “harm” – Objective test for reasonable apprehension of harm – Interim vs final protection requirements – Contextual evaluation of angry or intemperate conduct in matrimonial disputes

JUDGMENT

DU PLESSIS J (with whom BEN-ZEEV AJ concurs)

Introduction

[1] This is an appeal against a final protection order granted by the magistrates' court, Germiston, in favour of the respondent, Ms A[...]

K[...]

(the complainant a quo), against the appellant, Mr C[...]

B[...]

K[...]

(the respondent a quo), in terms of the Domestic Violence Act 116 of 1998 ("the Act"), in the midst of a contested divorce. The parties will be referred to as they are in these proceedings.

[2] To understand how the order came to be, it is important to consider the facts that led up to that point. The parties were married to one another on 5 March 2022 out of community of property with the accrual system. No children were born of the marriage. Their relationship was relatively short-lived and, by mid-2024, had become strained.

[3] The appellant informed her on 4 August 2024 that he wanted a divorce, whereupon she left the common home for a few weeks and returned on 11 August 2024. On 12 August 2024, the parties discussed the future of their relationship, and the appellant moved into a spare bedroom in the unit. On 13 August 2024, the respondent's attorneys addressed a letter indicating that she wished to try to settle the divorce.

[4] On 20 August 2024, the appellant left the house with a bag of clothing and toiletries. In her founding affidavit, the respondent regards this as the moment the appellant moved out of the matrimonial home. The appellant accepts that he left the home on that date but characterises this as a temporary move prompted by the tension between the parties: he says that most of his furniture and personal effects, including his passport, remained at the unit, and that he did not yet regard the move as final.

[5] Thereafter, the appellant stayed in hotels and Airbnbs. It is common cause that during this period, he returned to the property from time to time. The appellant says that he attended the unit approximately twice a week to drop off washing and collect clean clothing, with the respondent's tacit approval. The respondent accepts that he came and went, but says that his presence made her feel unsafe. She does not, however, allege that she expressly advised him, before 9 September 2024, that he was no longer permitted to enter.

[6] By the end of August 2024, the appellant was in the process of securing a lease for alternative accommodation. On his own version, he was contemplating a more permanent move out of the former matrimonial home, but left his furniture and effects in the house until the events of early September.

[7] On 3 September 2024, the parties, through their legal representatives, engaged in settlement discussions relating to the proposed divorce. The respondent's attorneys transmitted a "without prejudice" proposal. The appellant considered the proposal unreasonable and declined to accept it. It is common cause that this meeting marked a deterioration in the prospects of an agreed resolution of the matrimonial dispute. This is when the respondent instituted the divorce action.

[8] On 9 September 2024, the appellant collected his personal belongings and furniture from the matrimonial home. He indicates that he removed only the property that belonged to him, including an album that the respondent gave him as a wedding gift, which contains some intimate photos of her. The circumstances and characterisation of this event are in dispute.

[9] Unbeknownst to him, on 6 September 2024, and again on 9 September 2024 at 10:23, the respondent requested the removal of the appellant's remote access to the complex gate. The written confirmation records that access was removed and notes that the appellant "no longer resides here". It is not in dispute that the appellant was, by that time, residing elsewhere.

[10] Due to this removal of access, the respondent submits that the appellant "orchestrated a plan" to gain unauthorised access to her residence on 9 September 2024 while she was at work. This included enlisting the assistance of others, entering through the garden gate and a sliding door left open for the domestic worker, intimidating the domestic worker, instructing her not to use her cellular phone, and telling her that he would return to remove her dog and other possessions. She describes the incident as a "house robbery" and laid a criminal charge of theft against him three days later. Her attorneys demanded the immediate return of specific items. They sought an undertaking from the appellant that he would not re-enter the home, remove any further items, or take the dog. The domestic worker furnished a brief confirmatory affidavit, confirming the founding affidavit insofar as it relates to her.

[11] The appellant's version is that he attended the premises on the morning of 9 September 2024 to remove his belongings after it became apparent that the

settlement had failed. He explained that he had to park alongside the house because he had a trailer, so he entered the house through the garden gate. He submits that he told the domestic worker he would be moving out, asked her not to inform the respondent immediately because he wished to do so himself. He denies threatening or intimidating the domestic worker, and denies saying that he would return to take the dog. He says he removed only items belonging to him, save for a photo frame that the movers removed in error, which he tendered for return.

[12] In a letter exchange between the two attorneys, the appellant indicates that he has never and will never threaten or intimidate the respondents.

[13] On 18 September 2024, the appellant's attorneys responded at some length to the respondent's attorney's letter. In essence, the appellant maintains that all removed items, save for the bouquet frame, belonged to him. He gives an undertaking to return the bouquet frame and records that the photo album was a wedding gift to him, but that he will return it at the respondent's request. He then proposes that the parties exchange the goods at a mutually convenient time and place in the presence of witnesses, stating that he does not wish to be alone with the respondent. He denies intimidating the respondent or the domestic worker. The letter also records that, once the docket is available, and to the extent that the respondent has perjured herself by falsely claiming ownership of his property, appropriate criminal charges will be laid.

[14] The appellant says that, by this letter, he made it clear that he would not return to the erstwhile matrimonial home without the respondent's knowledge or consent or a court order, and that there was thus no reasonable apprehension of future harm.

[15] On 20 September 2024, the respondent launched an urgent application in the magistrates' court for a protection order in terms of section 4 of the Domestic Violence Act. Her founding affidavit identifies the domestic relationship, records that the parties are "in the throes of an acrimonious divorce", and alleges that the appellant has escalated his conduct to the level of domestic violence "in an attempt to make me so fearful that I will accept his settlement proposal".

[16] She describes the 9 September incident substantially as summarised above, annexes the confirmatory affidavit of the domestic worker, and adds that the appellant owns several firearms, which were normally kept in a safe installed at her home, to which she does not have keys. She alleges that he abuses alcohol and narcotics, that his personality changes when intoxicated, that he becomes threatening and insulting, and that he has threatened to have her "arrested and thrown in jail" for perjury because she laid the criminal charge. She says that she fears he will again enter her residence, in her absence or while she is there, and that she no longer feels safe in her home.

[17] In the standard form application she seeks, inter alia, orders that the appellant be prohibited from committing emotional, verbal or psychological abuse, intimidation, harassment, threatening and humiliating behaviour, that he not enter her residence at the complex, that he not remove her possessions, and that he not remove her dog.

[18] The matter initially came before the magistrate ex parte. The appellant states that at that ex parte hearing, the respondent did not bring the letter of 9 September 2026, where he states that he will not threaten or intimidate the respondent, to the attention of the magistrate. An interim protection order was granted in extensive terms, including the orders sought regarding conduct and access to the residence.

[19] After service, the appellant, in his capacity as respondent a quo, delivered an answering affidavit. He denied that the respondent had made out a case for domestic violence, contended that her allegations were vague, bald and lacked particulars, and said that, properly analysed, the dispute was about property and the dog, not about her safety or wellbeing. He alleged that the respondent and her attorneys had failed to place before the magistrate the material correspondence of 9 and 18 September 2024, thereby misleading the court at the interim stage. He provided his version of the 9 September incident, denied intimidation, drug abuse and negligent firearm handling, and dealt with the earlier alleged incidents.

[20] The magistrate heard the argument and, on 4 April 2025, granted a final protection order, albeit in a narrowed form. As appears from the transcript and the written order, the magistrate confined the operative terms to an order that the appellant: (a) not emotionally, verbally, or psychologically abuse or harass the respondent, nor enlist others to do so; and (b) not enter her residence without her consent. The magistrate declined to include specific restrictions on firearms but directed the court clerk to forward the order to SAPS in accordance with the Firearms Control Act 60 of 2000. No order as to costs was made.

[21] At the request of the appellant, the magistrate furnished brief written reasons in terms of rule 51(1) and (8). She recorded that she had considered the pleadings as exhibits, the domestic relationship, the statutory definitions of domestic violence, the test for reasonable apprehension, the duty of good faith in ex parte applications and the standard of proof on a balance of probabilities, and that she granted the final order having regard to the relationship, the seriousness of the allegations and "the consistency of facts".

[22] The present appeal lies against that final order.

The appellant's case on appeal

[23] The appellant appeals against the judgment and order of the court a quo in their entirety. In his notice of appeal, he advances a multitude of grounds which, in substance, can be grouped under four headings

- a. First, that the magistrate misapplied the definitions in the Act, in particular the concepts of "domestic violence" and entry into a complainant's residence, where the parties do not share the same residence";
- b. secondly, that the magistrate failed to apply the Plascon-Evans rule in the face of material disputes of fact on the papers;
- c. thirdly, that no harm or reasonable apprehension of harm, as required by the Act, was established; and
- d. fourthly, that the respondent failed to disclose material correspondence when seeking the interim order, and that this non-disclosure should

have resulted in the dismissal of the application and an adverse costs order.

[24] The appellant admits he left the unit on 20 August 2024 but maintains that this was initially a temporary separation, as he left a significant amount of his belongings, including his passport, at the property and continued to access the unit with the respondent's tacit permission. He records that on 3 September 2024, he was there with his dog (the ownership of which is in dispute), while the respondent was also there.

[25] He contends that, when properly understood, the parties still "shared" the residence as meant in the Act at the time of the 9 September incident, meaning that the statutory requirement of entering without consent where parties do not share the same residence was not met.

[26] He further contends that, even if access to the complex was revoked on 6–9 September, this was not communicated to him or his legal representatives. He says that on the morning of 9 September, he entered as he had previously done, believing that he had tacit consent to attend to fetch his belongings, and that he did not appreciate that his access had been withdrawn.

[27] The appellant emphasises that he went to the home when the respondent was not there, and that family members and movers accompanied him. He did not seek to confront or threaten her. The purpose was to remove his own furniture and effects in the wake of failed settlement discussions, and that any dispute over ownership of particular items falls to be determined in the divorce action and in the accrual calculation, not via the Act.

[28] He denies intimidating the domestic worker, telling her to hide his presence, or saying he would return for the dog. He states he merely asked that he inform the respondent that he was moving out his belongings.

[29] The appellant also disputes the claims of verbal abuse, habitual intoxication, and negligent handling of firearms, asserting that the alleged incidents in January,

March, and April 2024 are uncorroborated, undated, or lacking in detail. He highlights that no protective relief was sought at the time of those incidents and contends that they have been raised retrospectively to strengthen a case that, on the accepted facts, is more closely connected to property disputes arising from the divorce than to the harm the Act is intended to address.

[30] He also states that the respondent did not act with the utmost good faith when she applied for the interim protection order. Central to his argument is the contention that the respondent did not place before the magistrate, when seeking the interim order, the letters of 9 and 18 September 2024, which he describes as "pertinent" to the allegations now relied upon. He says that these letters demonstrate that he claimed ownership of the removed goods, tendered to return the bouquet frame and later the photo album, proposed an exchange of items at a mutually convenient time with witnesses present, and denied intimidating the respondent or threatening to have her arrested. He also gave an undertaking that he would not, without court authorisation or her consent, return to the erstwhile matrimonial home, or take possession of the dog and disputed movables. By withholding these documents, he says, the respondent misled the court *ex parte* and violated the duty of full disclosure in *ex parte* proceedings. The letter ended as follows:

9. We must make it clear that insofar as your client attempts to lay any criminal charges against our client, she will have perjured herself and our letters will be provided to the police in this regard.

10. Lastly, with regards to the requested undertaking from our offices, our client records that he has never and will never threaten and/or intimidate your client or any of her family members or any of her employees. This is not made as an admission but rather as a statement that no such intimidation/threats have ever occurred or will occur.

11. In the Interim, all our client's rights remain strictly reserved.

[31] The appellant submits that, once these letters are taken into account, it becomes apparent that his conduct did not constitute domestic violence and that there was no reasonable apprehension of future harm. He further argues that genuine disputes of fact arise on the papers in relation to the circumstances of the 9

September entry, the alleged threats to return for the dog, and the alleged threats to have the respondent jailed, and that under *Plascon-Evans*, his version ought to have been preferred. Thus, he states, the magistrate erred by failing to engage with the *Plascon-Evans* approach and by simply weighing probabilities on the respondent's narrative.

[32] On this footing, the appellant contends that the magistrate misdirected herself both on the facts and in law. He asks that the appeal be upheld, that the final protection order be set aside and the application under the Act be dismissed, and that the respondent be ordered to pay the costs of the proceedings in the court a quo and on appeal, having regard to what he characterises as vexatious and unreasonable use of the Act and the alleged non-disclosure.

The respondent's case on appeal

[33] The respondent supports the judgment and order of the court a quo, contending that the narrowed final order is justified on the facts and within the scheme of the Act. She maintains that the appellant moved out of the matrimonial home on 20 August 2024 and that, whatever his subjective intentions may have been, the parties did not, as a matter of fact, share a residence after that date. She points to his residence in hotels and Airbnbs, and to the subsequent lease of alternative accommodation, as objective indicators that the separation was real. In a WhatsApp message dated 27 August 2024, he asks, "So I presume I can go ahead and sign my new lease tomorrow?"

[34] While she accepts that he returned to the property on several occasions to collect laundry and clothing, she says this was with specific permission and that she felt anxious and unsafe about his presence. She contends that by early September, he required her consent to enter the premises, and that she withdrew that consent by arranging for his access to be revoked on 6 September 2024.

[35] The respondent emphasises that the case before the magistrate centred on the 9 September incident. Her version is outlined above. She states that she perceived this as a serious invasion of her privacy and security, as well as a form of

intimidation in the context of an acrimonious divorce, especially given the firearms kept in a safe at the unit.

[36] She submits that these facts, taken with the confirmatory affidavit, bring the matter squarely within the definition of domestic violence in the form of "entry into the complainant's permanent or temporary residence without their consent, where the parties do not share the same residence", coupled with conduct which harms or inspires a reasonable belief that harm may be caused. She further relies on the earlier alleged incidents of verbal abuse and intoxication not as standalone bases for relief, but as part of the context in which the 9 September entry should be assessed.

[37] As to apprehension of harm, the respondent says that her fear is not limited to the removal of movables or the dog. She says that she is afraid of further unauthorised entries, that she is aware that the appellant possesses firearms, that she feels intimidated by his threats of criminal charges and arrest, and that, as the judgment of the court a quo records, she is "too scared to be at my residence" and that she fears that he will return to the residence. She contends that this apprehension is objectively reasonable in the circumstances.

[38] The respondent concedes that the letters of 9 and 18 September 2024 were not annexed to her founding affidavit. She points out, however, that by the time the final order was granted the letters formed part of the record, that the appellant's complaint about non-disclosure was ventilated, and that the magistrate expressly referred to the duty of good faith in ex parte applications and exercised her discretion nonetheless to grant a final order on the basis of all the evidence then before her. She submits that this context distinguishes the matter from purely ex parte commercial interdicts and that she is not compelled to set aside a final protection order which has been confirmed after an inter partes hearing.

[39] In relation to the appellant's reliance on *Plascon-Evans*, the respondent argues that the disputes of fact are limited. She says that the following matters are either common cause or insufficiently disputed: that the appellant no longer resided at the unit, that his access was revoked on 6–9 September, that he entered the property in her absence on 9 September and removed substantial items, and that he

did so in the context of a collapsing marriage and a looming divorce. She submits that, even giving the appellant the benefit of any bona fide disputes, these facts justify the narrow relief granted.

[40] The respondent submits that the magistrate approached the matter in accordance with the Act, had regard to the objective test for apprehension of harm, and tailored the order narrowly to what she considered necessary: namely, protection against further emotional, verbal or psychological abuse and against further unauthorised entry into the respondent's residence. She submits that, on a proper reading of the record, no material misdirection has been shown, and that this court should not lightly interfere with the exercise of the court a quo's powers in a matter of this nature.

[41] Finally, the respondent submits that even if this court were minded to amend or further limit the order, there is no basis to alter the costs order made by the magistrate or to saddle her with the costs of the appeal. She points to the general caution expressed in the case law regarding costs in domestic violence proceedings and says that her resort to the Act was neither frivolous nor vexatious.

Legal analysis

The Domestic Violence Act: Purpose of the Act

[42] The preamble of the Act states:

[...]

IT IS THE PURPOSE of this Act to afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide; and to introduce measures which seek to ensure that the relevant organs of state give full effect to the provisions of this Act, and thereby to convey that the State is committed to the elimination of domestic violence,

[43] In other words, the Act seeks to give maximum protection from domestic violence. It was necessary to enact specific legislation dealing with domestic violence because such violence has a complex private and public character: it

concerns conduct occurring mostly in private spaces, out of public view, between persons who are or were in intimate relationships. This has traditionally led to a justification of non-interference in the private sphere, and victims are often reluctant to resort to criminal prosecution precisely because of that intimacy. For this reason, the Act includes measures that enable a complainant who has obtained an order to call on the police to arrest the perpetrator without a warrant if the order is contravened.¹ This is a drastic remedy for a very prevalent and serious problem.

[44] In *S v Baloyi*² the Constitutional Court, with reference to the predecessor, the Prevention of Family Violence Act,³ described the purpose of this genre of legislation (own emphasis):

[17] The ambivalence of the victim and the reluctance of law enforcement officers to 'take sides' in family matters, coupled with the intimate and potentially repetitive character of the violence, is highly relevant to the creation of a special process for the issuing of domestic violence interdicts. The interdict process is intended to be accessible, speedy, simple and effective. The principal objective of granting an interdict is not to solve domestic problems or impose punishments, but to provide a breathing-space to enable solutions to be found; not to punish past misdeeds, but to prevent future misconduct. At its most optimistic, it seeks preventive rather than retributive justice, undertaken with a view ultimately to promoting restorative justice.

[18] The involvement of the courts in this realm represents an extension of the law into an area where lawlessness has long been sustained by interlaced notions of patriarchy and domestic privacy. It encourages recourse to law for spouses who might otherwise suffer mutely because of unwillingness to invoke more drastic criminal proceedings. Although their reluctance to see the person they married and the parent of their children going to jail and losing employment is understandable, the community is affronted by the violence and neighbours, hospitals and police are directly implicated. Further, it offers physical protection to the weaker party in the period when other legal mechanisms, such as divorce proceedings or criminal charges, are being pursued. The overall purpose, then, is to protect the victim of

¹ See *Omar v Government of the Republic of South Africa* [2005] ZACC 17; 2006 (2) BCLR 253 (CC); 2006 (2) SA 289 (CC); 2006 (1) SACR 359 (CC) para 18.

² [1999] ZACC 19; 2000 (1) BCLR 86 (CC); 2000 (2) SA 425 (CC); 2000 (1) SACR 81 (CC).

³ 133 of 1993.

domestic violence, uphold the respect for the law, and indicate that organised society will not sit idly by in the face of spousal abuse.

[19] The Act does not purport to oust existing family and criminal law remedies and penalties, but to supplement and reinforce them. It presupposes an interactive relationship between victim and law enforcement agencies, where she initiates and retains some measure of control over the process, while the state ensures that at the end of the day the orders of the court are respected. The form of proceedings is neither that of a normal civil trial, nor that of an ordinary criminal trial, but of a special enquiry involving elements of both.

[45] The purpose of the Act must be understood in the same vein. It is to provide an accessible, speedy, simple and effective remedy that creates a breathing-space and prevents future misconduct, rather than to punish past misdeeds. The court is entitled to have regard to past conduct in deciding whether an order is warranted, but the focus is on the risk of future harm and the necessity of intervention to prevent it.

[46] *Baloyi* also makes clear that the Act stands alongside criminal and family law remedies, not to oust them, but to supplement and reinforce them. The Act should thus not be used to resolve patrimonial issues arising from divorce, which are best dealt with within those proceedings themselves. It is rather an additional safety mechanism to protect vulnerable parties during a period of heightened emotion and increased risk of violence.

[47] This was reiterated by the Constitutional Court in a later judgment dealing with the current Act. In *Omar v Government of the Republic of South Africa*⁴, the Constitutional Court said:

[61] It is crucially important for lawyers as officers of the court with a responsibility to uphold the Constitution and the law not to exploit or manipulate the Act to gain a tactical advantage in divorce litigation and custody battles, because this could well be at the cost of the effectiveness of the Act. As stated by this Court in *Baloyi*, legislation

⁴ [2005] ZACC 17; 2006 (2) BCLR 253 (CC); 2006 (2) SA 289 (CC); 2006 (1) SACR 359 (CC) para 61.

of this kind does not purport to oust existing family and criminal law remedies and penalties, but to supplement and reinforce them.

[48] Applying the Act in this context is often challenging. The parties are usually in a close, often deteriorating relationship, and any protection order will inevitably impact it. Judicial decisions under the Act do not operate in isolation: they influence that relationship, including how each party perceives the home and their sense of security. That is all the more reason to ensure that the Act is utilised for its protective purpose: to prevent future domestic violence and provide maximum protection to victims, rather than serve as a forum for resolving patrimonial or strategic disputes that properly belong in divorce proceedings.

[49] For the Act to be applicable, the actions complained of must amount to "domestic violence", which is broadly defined as (with own emphasis on the parts relied on by the magistrate):

"domestic violence" means—

- (a) physical abuse;
- (b) sexual abuse;
- (c) emotional, verbal or psychological abuse;
- (d) economic abuse;
- (e) intimidation;
- (f) harassment;
- (fA) sexual harassment;
- (fB) related person abuse;
- (g) spiritual abuse;
- (h) damage to property;
- (hA) elder abuse;
- (hB) coercive behaviour;
- (hC) controlling behaviour;
- (hD) to expose a child to domestic violence;
- (i) entry into the complainant's—

(i) permanent or temporary residence without their consent, where the parties do not share the same residence; or

- (ii) workplace or place of study, without their consent, where the parties do not share the same workplace or place of study; or
- (j) any other behaviour of an intimidating, threatening, abusive, degrading, offensive, or humiliating nature towards a complainant, where such conduct harms, or inspires the reasonable belief that harm may be caused to the complainant;"

[50] There are then further definitions of the actions mentioned above, namely, "coercive behaviour", which means

"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;"

[51] "emotional, verbal or psychological abuse" is defined as

"degrading, manipulating, threatening, offensive, intimidating or humiliating conduct towards a complainant that causes mental or psychological harm to a complainant, including—

- (a) insults, ridicule or name calling;
- (b) threats to cause emotional pain"

[52] These definitions must then be evaluated within the factual context to establish their meaning. For instance, in *T v T*,⁵ the parties were in a fiercely contested divorce. During the Rule 43 proceedings, the wife obtained primary care of the minor child. The husband, aggrieved by the unfolding divorce and interim relief, applied for a protection order under the Act based on a series of SMS messages sent by the wife over 20 months. He considered these messages provocative, vulgar, verbally abusive, and alienating, and claimed they proved emotional, verbal, or psychological abuse and harassment. The Supreme Court of Appeal, after analysing these messages, found that, in context, they reflected anger, bitterness, and harsh language typical of a "fiercely contested divorce". However, they did not amount to repeated insults, ridicule, or name-calling as contemplated by the Act. The messages were sporadic, with long intervals between them, mainly expressing the

⁵ [2022] ZASCA 109; 2022 (2) SACR 233 (SCA); 2022 (6) SA 93 (SCA).

respondent's distress over the marriage breakdown and her desire to divorce. The court held that, in that case, on a reasonable interpretation, the contents of the messages were too harmless to constitute domestic violence, and that the husband failed to demonstrate that he would suffer hardship from domestic violence if a protection order was not granted immediately.

[53] Similarly, in *Daffy v Daffy*⁶ the Supreme Court of Appeal, after analysing the facts, held that the single incident of throwing a vodka bottle a year before the application, is not evidence that, having regard to the appellant's actions objectively, justified him fearing for his life, and that while he might have been annoyed or irritated by his conduct, the behaviour does not justify a finding that he was harmed or threatened to be harmed.⁷

[54] I am loath to lay down a general requirement that behaviour must be repetitive before it amounts to "domestic violence". However, because the Act is aimed at preventing future harm, there must, even in a once-off case, be some indication on the facts that the complained-of behaviour is likely to be repeated or that its consequences will endure in a way that causes the complainant further harm. This follows from the wording of sections 5 and 6.

[55] For the granting of an interim order, section 5 (2) of the Act states (own emphasis):

If the court is satisfied that-

(a) there is prima facie evidence that the-

- (i) respondent is committing, or has committed an act of domestic violence;
- (ii) complainant is suffering or may suffer harm as a result of such domestic violence; and

(b) The issuing of a protection order is immediately necessary to protect the complainant against the harm contemplated in paragraph (a) (ii), the court must, notwithstanding the fact that the respondent has not been given notice of the proceedings contemplated in subsection (1), issue an interim protection order in the prescribed form against the respondent.

⁶ [2012] ZASCA 149; [2012] 4 All SA 607 (SCA); 2013 (1) SACR 42 (SCA).

⁷ Paras 15 and 16.

[56] All three elements must be present before an interim order can be granted. The first element, in s 5(2)(a)(i), concerns a factual question about whether there is prima facie evidence of an act of domestic violence. The second, in s 5(2)(a)(ii), considers whether there is prima facie evidence that the complainant is suffering, or may suffer, harm as a result of that violence. The third, in s 5(2)(b), involves an objective assessment of whether it is immediately necessary to issue an order to protect the complainant from that harm, whether the harm, viewed objectively, is of such a nature that protection is justified.

[57] In *Silberberg v Silberberg*,⁸ the court gave guidance on what a "reasonable apprehension of harm" is, presumably a reference to section 5(a)(ii). The court indicated that it is an objective test, and one which a reasonable person might entertain when faced with the fact that the court finds to exist on a balance of probabilities.

[58] On the return date, if the respondent appears, section 6(2) is applicable. It states:

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.

⁸ [2013] ZAWCHC 5 Para 24.

6(4) The court must, after a hearing as contemplated in subsection (2), issue a final protection order in the prescribed form if it finds, on a balance of probabilities, that the respondent has committed or is committing an act of domestic violence.

[59] Section 6 no longer expressly repeats the "harm" requirement. It simply authorises a final order if the court finds that the respondent "has committed or is committing an act of domestic violence". That provision must, however, be read in the light of section 5(2) and the purpose of the Act: a final order remains a protective remedy, justified only where past domestic violence gives rise to a real risk of future harm.

Dispute of fact: Plascon-Evans

[60] From the discussion above, it becomes evident that there are disputes of fact. Firstly, the appellant's access to the matrimonial home is in dispute. The respondent makes it clear that she denied him access, while the appellant asserts that he had standing permission to collect laundry and clothing twice weekly. Secondly, the respondent states that she revoked his access on both 6 and 9 September 2024, while the appellant does not so much deny that as say that he was not informed of the withdrawal of permission. Thirdly, on the entry of the premises on 9 September 2024, both parties agree that the appellant entered the property. He states that he did so to fetch property that is lawfully his. She states that he entered the property without proper authorisation and took property that did not belong to him. Fourthly, he denies having said he would come back for the dog. And lastly, there are likewise allegations of prior abusive behaviour that the appellant denies or recharacterises.

[61] While the magistrate correctly recorded those disputes and referred to authority on apprehension of harm and the standard of proof, she did not expressly engage with the tests for a "real, genuine and bona fide" dispute of fact or apply the Plascon-Evans rule. Instead, she approached the matter as weighing the competing versions "in their totality" and assigning probabilities, as if sitting as a trial court.

[62] An appeal court is ordinarily slow to interfere with factual findings. However, where the court a quo has misdirected itself on the legal approach to disputed facts

in motion proceedings, its factual conclusions are not insulated from scrutiny.⁹ In such a case, the appeal court is entitled to re-evaluate the evidence on the record by applying the *Plascon-Evans* and *Wightman* framework, accepting the respondent's version together with those parts of the applicant's case that are admitted or not genuinely disputed unless the respondent's denials are not real, genuine and bona fide, or are so far-fetched or clearly untenable that they may be rejected on the papers.

[63] When a court is confronted with a dispute of facts on the papers in motion proceedings, *Plascon-Evans*¹⁰ as elaborated on in *Wightman*¹¹ laid down the test:

"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the [Plascon-Evans] test is satisfied."

[64] In other words, a court must first decide whether there is a real, genuine and bona fide dispute of fact. It does so by identifying the specific allegation the respondent says is in dispute, and then assessing how the respondent deals with it: does the answering affidavit seriously and unambiguously address the allegation by giving an explanation, an alternative version or counter-evidence, or does it merely offer a bald denial? Where the facts are plainly within the respondent's knowledge,

⁹ *R v Dhlumayo* 1948 (2) SA 677 (A) 705-706.

¹⁰ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E 635C.

¹¹ *Wightman t/a J W Construction v Headfour (Pty) Ltd* [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA).

one would expect a detailed account if the allegation is untrue. If the respondent engages with the allegation in a detailed, coherent manner, and there is thus a genuine dispute, the court must then apply *Plascon-Evans*: for purposes of final relief, the respondent's version, together with those parts of the applicant's version that are admitted or not genuinely disputed, forms the factual basis, unless the respondent's version is so far-fetched or untenable that it can be rejected on the papers alone.

[65] Against that framework, the factual context remains relevant. The events in issue occurred shortly after the parties' separation in the course of an impending divorce action, when the respondent had recently left the matrimonial home. The respondent raised two main issues: what she experienced as an invasion of her privacy and security in her home, and a dispute over the removal of furniture and personal items during the divorce.

[66] There is, first, a dispute about whether, as of 9 September 2024, the parties still "shared" a residence. The respondent says that by then, they no longer did so. The appellant, however, gives a detailed account: he left on 20 August 2024 with a small bag, stayed in hotels and Airbnbs, regularly returned to the unit to drop off washing and collect clean clothes, and only decided to move out permanently on 9 September 2024 after receiving the 3 September 2024 letter from her attorneys. On his version, which is neither bald nor inherently implausible, the separation was gradual. At the very least, he continued to treat the unit as a place he could lawfully access. It is not difficult to see why the respondent experienced this as an invasion of her privacy and security in her home, particularly against the backdrop of an acrimonious separation. However, applying *Plascon-Evans*, I cannot reject that version as so improbable as to be ignored. On that accepted factual matrix, it cannot be found that, as a matter of definition, it has been proved that the parties did not share the same residence on 9 September 2024 in the sense required to trigger the "entry into the complainant's residence where the parties do not share the same residence" limb of the definition of "domestic violence" in subsection (i). As to the ownership of the furniture removed, that is a patrimonial question for the divorce

court to determine in the accrual and any redistribution proceedings, and not one on which I can, or should, make a definitive pronouncement here.

[67] Secondly, there is a dispute about the lawfulness and character of the entry into the complex and the unit on 9 September. The appellant states that, by then, his access to the complex had been revoked and relies on written confirmation to that effect. The respondent accepts that his electronic access was removed, but explains that this was done administratively and not communicated to him or his attorneys. When he entered the complex and unit, he did so as he had before, believing he still had tacit consent to access the property to collect his belongings, and that neither the respondent nor her attorneys ever advised him to the contrary. That account is detailed, plausible, and firmly within his knowledge, not a bare denial. In his accepted version, the objective fact that access has been revoked does not imply an intention to overpower the respondent's will or to engage in coercive or intimidating behaviour. It reflects a once-off entry by someone who, albeit mistakenly, believed he still had permission to be there to remove his property. When he came to appreciate how his conduct was interpreted, he promptly undertook in correspondence not to return to the premises, not to be alone with her, and to arrange any exchange of items at a neutral venue in the presence of witnesses. That combination, a single entry in these circumstances and clear undertakings not to repeat it, significantly reduces, on an objective view, any ongoing concern about future harm or coercive entry for purposes of the Act as will be discussed below.

[68] Thirdly, there is a dispute over what was said and done regarding the domestic worker. The respondent alleges that he intimidated her, instructed her not to use her phone and told her that he would return to take the dog and further possessions. The appellant, by contrast, gives a specific alternative account: he informed the domestic worker that the marriage was over and that he was moving out, asked her not to inform the respondent immediately because he wished to do so himself, explained why he could not take the dog that day, and says that they said an emotional goodbye, during which she cried and they hugged. He denies any threat or intimidation and denies saying he would return for the dog. The domestic worker's confirmatory affidavit is very brief and largely adopts the respondent's version by reference, without adding independent detail. In these circumstances, and on these

papers, the respondent's account cannot be dismissed as so far-fetched or untenable that it should be rejected out of hand. Applying *Plascon-Evans*, I must therefore proceed on his version of the encounter, together with the limited common-cause facts that he spoke to the domestic worker and removed items from the home.

[69] Fourthly, there is the allegation that he threatened to have her "thrown in jail". The respondent links this to the perjury remark in the 18 September letter. The appellant explains that the reference to perjury was a legal warning conveyed by his attorney: if she laid false theft charges in relation to goods he could prove were his, she risked perjuring herself. He denies making any personal threat to have her jailed. The text of the letter bears out that explanation and is neither evasive nor inherently improbable. On a proper application of *Plascon-Evans*, there is no sufficient basis on these papers to find that he threatened to have her imprisoned. The accepted fact is that his attorney warned her, in legal terms, of the consequences of false statements in the criminal process.

[70] The earlier incidents in January and March/April 2024 do not materially advance the respondent's case on the accepted version of the facts. She alleges a series of arguments in which the appellant became verbally abusive and shouted at her. He, in turn, gives a detailed contrary account, saying that on these occasions she was heavily intoxicated, became extremely angry and abusive towards him, and pushed him to retaliate. He does not recall the fight she describes on the counselling day. In reply and supplementary reply, the respondent persists with her version but adds no independent detail beyond correcting one date. On these papers, there is thus a genuine dispute of fact, and, applying *Plascon-Evans* and *Wightman*, I am bound to proceed on the appellant's version together with the limited common-cause facts that there were arguments in the context of a failing marriage. These facts understandably caused the respondent distress, but they do not, on the accepted version of the facts, establish a pattern of coercive, intimidating or controlling conduct of the kind contemplated by the Act, or an objectively reasonable apprehension of future harm as will be discussed below.

[71] These, then, are the facts that must be taken as established for purposes of deciding whether the jurisdictional requirements in sections 5(2) and 6(4) of the Act are met: that the parties were in the throes of a divorce; that the appellant left the home in August 2024 but continued to access it intermittently until 9 September 2024; that on 9 September he attended with family and movers to remove furniture and personal effects he regarded as his; that he did so believing, albeit mistakenly, that he still had tacit consent to enter; that he spoke to the domestic worker in the manner he describes; that he did not threaten to have the respondent jailed; and that, once the dispute arose, he undertook not to return to the premises, not to be alone with her, and to deal with any exchange of items at a neutral venue with witnesses. On that factual foundation, the question is whether the appellant's conduct, read in the context of the relationship and the purpose of the Act, amounts to domestic violence and gives rise to an objectively reasonable apprehension of future harm that justifies the grant of a final protection order.

Application of the definition to the accepted facts

[72] Against the factual matrix set out above, I turn to the central question: whether the magistrate was correct in finding that the appellant's conduct amounts to domestic violence within the meaning of the Act. This requires a consideration of whether, on the accepted facts, there is an objectively reasonable apprehension of future harm sufficient to sustain a final protection order.

[73] The magistrate confined this inquiry to two issues: the emotional, verbal or psychological abuse and harassment as defined, and the entry without consent under the definition of "domestic violence".

[74] As far as the "entry without consent" is concerned, the definition of "domestic violence" refers to entry into the complainant's permanent or temporary residence without their consent, "where the parties do not share the same residence". The *Plascon-Evans* analysis above established that the appellant's version should have been accepted. The parties may not have shared a residence in the strict sense of him sleeping in the home in the evenings, but the evidence did establish that he had access to the house to do washing, and that the bulk of his belongings were still in

the home. It might be that they no longer shared the residence, but it cannot be said that he lacked consent. Any consent that was withdrawn was not communicated to him at the time that he entered the home.

[75] Even if I am wrong on the "without consent", uninvited entry in the context of domestic violence must have the hallmarks of domestic violence: coercive, intimidatory or threatening behaviour, in a manner that creates a reasonable apprehension of harm to the complainant. In this regard, the appellant's entry into the home must be regarded in its full context: his access being revoked administratively without communicating the revocation to him; his entering the house in the respondent's absence with other people, including his family members and movers; and his removing what he regarded as his property. On his version, the farewell to the domestic worker was emotional, and he did not want her to tell the respondent he moved out because he wanted to tell her himself. This does not point to the conduct of someone who seeks to overpower the complainant or harm her. At worst, it is a poorly communicated move and an opportunistic retrieval of what he, rightly or wrongly, regards as his property during the breakdown of a marriage, when people are often not the best versions of themselves.

[76] The issue of the items removed and to whom they belong is a patrimonial question for determination by the divorce court. The Act is not an alternative forum for resolving property disputes. On these facts, characterising the retrieval of items as 'theft' or as an act of domestic violence appears to be more a reflection of the parties' fractured relationship, and of the wider property disputes between them, than of the kind of conduct the Act is designed to address.

[77] Turning to the emotional, verbal or physical abuse. The definition of emotional, verbal or psychological abuse refers to degrading, manipulating, threatening, offensive, intimidating, or humiliating conduct that causes mental or psychological harm to the complainant, including insults, ridicule, name-calling, and threats to cause emotional pain. The accepted facts do not establish this. The earlier incidents in January and March/April 2024, while unkind, amount to arguments in the context of a failing marriage. It speaks to occasions where both parties lost their tempers, and by his account, she was the more abusive party. Still, it is not crystal

clear what transpired, and the evidence is thin. As the Supreme Court of Appeal held in *T v T*,¹² in circumstances that were arguably far more worrisome than these, anger, bitterness and harsh language typical of a fiercely contested divorce do not, without more, constitute emotional, verbal or psychological abuse as contemplated by the Act. There is no established pattern of systematic insult, ridicule, or name-calling of the kind the definition suggests. The perjury remark was a legal warning conveyed through attorneys, not a personal threat. None of the accepted conduct, on these facts, reaches the threshold of the definition.

[78] What is worth a specific mention and a concern is the intimate photo album. I am not insensitive to why the possession of intimate photographs by an estranged spouse during a fractious divorce may give rise to genuine fear. In an appropriate case, where there is evidence of threatened dissemination or of an intention to use such images as leverage, or of conduct that falls within the definition of harassment, this could well constitute domestic violence under the Act. But this is not the case here. On this record, the appellant has not threatened to distribute the photographs. He describes them as a wedding gift, and even before these proceedings were launched, he offered to return them at a mutually convenient time in the presence of witnesses. That does not indicate exploitation. While the respondent's anxiety in relation to the photographs is understandable, it is not grounded in any concrete threat or behaviour. It therefore cannot, objectively, support a finding of domestic violence or a reasonable apprehension of future harm in that respect.

[79] That brings me to the question of what to do with the apprehension of future harm. The test, as set out above, is objective. It asks whether a reasonable person, placed in the complainant's position, and based on these facts, would entertain a genuine apprehension that the conduct complained of will be repeated or will cause continuing harm. The respondent submits that she fears further unauthorised entries, that she is aware of the appellant's possession of firearms, and that his threats of criminal charges leave her fearful. However, the risk of further entry is addressed in the undertakings in the 18 September 2024 letter, in which the appellant clearly records that he will not return to the former matrimonial home. His firearms were

¹² [2022] ZASCA 109; 2022 (2) SACR 233 (SCA); 2022 (6) SA 93 (SCA).

surrendered to a licensed third party for safekeeping before the interim order was granted, without being ordered to do so. I have dealt with the "threat of arrest" above. Viewed objectively, and taking into account the undertakings, this does not amount to an apprehension of future harm.

[80] Based on this, it follows that the jurisdictional requirements for a final protection order under section 6(4) have not been established. The respondent has not proved, on a balance of probabilities, that the appellant has committed or is committing an act of domestic violence as defined in the Act, nor is there an objectively reasonable apprehension of future harm that warrants a final order. The appeal must, accordingly, succeed.

Material non-disclosure – interim order set aside independently

[81] The application for an interim protection order was initially brought ex parte, meaning that at the interim stage, the magistrate had before her only the respondent's version. Where a court is asked to grant urgent relief with serious consequences, including the issuing of a protection order coupled with a suspended warrant of arrest in the event of non-compliance, our law has long required applicants to observe the utmost good faith and to disclose all facts that might reasonably influence the court in deciding whether to grant relief, even if those facts do not favour the applicant. This was articulated in *Schlesinger v Schlesinger*¹³ and *Logie v Priest*,¹⁴ and applies in domestic violence matters as well, given the hybrid character of the process and the potential impact of even an interim order on the respondent's rights and reputation.

[82] In principle, a material non-disclosure at the interim stage could justify setting aside an order, even on appeal. But the authorities make clear that this is a matter of discretion, not an automatic sanction. Here, by the time the final protection order was granted, the undisclosed correspondence formed part of the record, the appellant's complaint about non-disclosure was squarely raised, and the magistrate expressly considered the *Schlesinger* and *Logie* line of authority and chose, nonetheless, to

¹³ 1979 (4) SA 342 (W).

¹⁴ 1926 AD 312.

grant a narrowed final order. In these circumstances, the question before me is not whether the interim order ought initially to have been granted, but whether, on the full record, the jurisdictional requirements for a final order were satisfied. For reasons set out above, I found that it was not.

[83] Before deposing her founding affidavit and obtaining the interim protection order, the respondent's and appellant's attorneys exchanged detailed correspondence on 9 and 18 September 2024, addressing the very events that form the crux of her complaint. In none of this correspondence was the appellant warned that his behaviour was viewed as domestic violence. He also gave a clear undertaking that he will not remove any more furniture or the dog and will return the photo frame and the photo album. None of this was before the magistrate when the interim order was sought. The question is whether this omission amounted to a material non-disclosure at the interim stage, of the kind that could, in principle, have affected the magistrate's decision to grant an *ex parte* order.

[84] The magistrate deals with this in her judgment, citing various cases. However, there is no real engagement with whether she thinks there is a material non-disclosure. Instead, she moves on to the law and practice of interdicts and emphasises that the test for apprehension of harm is objective, and that mere assertions of fear are not sufficient; there must be facts grounding the apprehension. At the end of her analysis of the facts, namely that the appellant spent 2 weeks in hotels and Airbnbs, and the communication on 27 August 2024 indicating, in effect, that he moved out, she exercised her discretion under section 15 of the Act. She concludes:

"The Court then, having due regard to the relationship shared between the parties, the seriousness of the allegations, the consistency of facts, and on judicial consideration of the matter in its entirety, on a balance of probabilities, is satisfied that a final order be granted herein with no order as to cost."

[85] The correspondence of 9 and 18 September 2024 was plainly material. It directly bore on the very incident and the risk of future harm that grounded the

application. It should have been disclosed at the interim stage. The duty of utmost good faith in ex parte applications under the Act was not complied with.

Conclusion

[86] Protection orders are often sought during pending divorce proceedings, and rightly so: the Act aims to provide immediate, civil protection precisely when tensions are high, and abuse could escalate. However, the Act must not be exploited or misused to gain a tactical advantage in divorce or custody disputes, and courts have consistently warned against using domestic-violence proceedings to obtain relief beyond the statute's protective intent. Section 5(2) requires not only prima facie evidence of domestic violence but also that significant hardship would result if an order is not granted immediately. Hostile communications and financial frustrations common in acrimonious divorce proceedings, on their own, do not meet this threshold.

[87] In the result, the appeal succeeds, and the final protection order is set aside. In relation to costs, section 15 of the Act provides that a court may make such order as to costs as it deems just and equitable, having regard to the respective means of the parties. The authorities counsel caution before imposing costs against complainants in domestic violence proceedings, given the Act's protective purpose and the risk that costs orders may deter genuine complainants from seeking protection. The respondent's perception of threat, however exaggerated in the context of a contentious divorce, was not frivolous. In all the circumstances, I make no order as to costs in the court a quo. As for the appeal, however, I see no reason to deviate from the rule that costs follow the result.

Order

[88] The following order is made:

1. The appeal is upheld.
2. The respondent is to pay the costs of this appeal
3. The final protection order granted by the Germiston Magistrate's Court on 4 April 2025 under case number 1/4/9-923/2024 is set aside in its entirety.

WJ du Plessis

Judge of the High Court, Gauteng Division,
Johannesburg

Date of hearing:	2 February 2026
Date of judgment:	16 March 2026
For the appellant:	G Kinghorn instructed by Ramos Attorneys Inc
For the respondent:	T Odendaal instructed by Geniv Wulz Attorneys Inc