

SOUTH AFRICA / JUDGMENT

Barker v S (A35/2022) [2023] ZAMPMBHC 55; 2024 (1) SACR 666 (MM) (25 October 2023) [2023] ZAMPMBHC 55

COURT

Mbombela High Court, Mpumalanga

BEFORE

Kgoele, Shai

CASE / FILE NUMBER

A35/2022

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IN THE HIGH COURT OF SOUTH AFRICA MPUMALANGA DIVISION (MAIN SEAT)

CASE NUMBER A35/2022

- (1) REPORTABLE: YES
- (2) OF INTEREST TO OTHER JUDGES: YES
- (3) REVISED.

DATE: 25/10/2023

SIGNATURE: KGOELE J

WAYNE BARKER

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

KGOELE J

Introduction

- [1] This appeal involves a dispute between two neighbours. Their personality and the way they conduct their life is strikingly different and it is the author of the dispute between them. Mr Flemix, the complainant, is a former battalion commander, a devout Christian and he does not like swearing. Mr. Barker, the appellant, is an artist. One gathers an impression from the record of proceedings that, like many artists, he might be somewhat eccentric. This is informed by the fact that he described himself as “a little bit dyslexic”. He furthermore indicated that as a result of the fact that he cannot read and write, he does painting as it is his form of communication. It is common cause that he wears a sarong when in his yard most of the time and loves music and swearing.
- [2] Their neighbourhood started after the complainant sold a portion of his family’s land to the appellant in 2021. It does not appear that there were any disputes during this sale. The evidence before the Nkomazi Magistrate’s Court (the trial court) did not reveal the date when their relationship began souring but it appears that it erupted at the time the appellant began some construction on the property. The closest that one can deduce from the record of proceedings because of the paucity of information relating to the time factor is that it appears that as the COVID-19 pandemic swept across the world, the relationship also soured because, within months after the appellant moved into the property, the complainant obtained a protection order against him. Not long after that, the appellant was arrested for allegedly contravening the protection order, culminating in him being convicted

and sentenced for violating the protection order. The appellant appeals against both the conviction and the resultant sentence with leave of the trial court.

History of the litigation

- [3] On 02 February 2021, the complainant applied for a protection order against the appellant claiming amongst others that the appellant disturbed him; defamed him; disturbed his peace; violated building laws and by-laws; walked around his property naked or while being ‘improperly dressed with only a wrap-around sarong without underwear’. The specifics regarding these complaints reported were that the appellant:
- disturbed him by screaming and shouting eight times between 08 November 2020 and 30 January 2021;
 - defamed him with allegations of theft on 10 December 2020 and 26 January 2021;
 - disturbed the peace with loud music and noise 11 times between 13 December 2020 and 24 January 2021;
 - violated the building laws and by-laws six times between 27 December 2020 and 22 January 2021; and

· walked around his property naked on 15 December 2020 and 4 January 2021 while also being ‘improperly dressed in only a wrap-around sarong without underwear’ around ‘30% of the time.

- [4] As a result of these complaints, an interim protection order was granted on 2 February 2021 against the appellant in his absence. It imposed a number of conditions that he was to comply with. Whilst it is common cause that the complainant and two police officers went to the appellant’s place the following day to serve the interim protection order on the appellant, the appellant and the complainant gave different renditions of how the interim protection order was served. This resulted in one of the issues the trial court had to grapple with among others during the trial, after he was arrested for contravening the final protection order which was granted on the date of the return date, 25 February 2021.
- [5] It appears from the record of the trial proceedings that the final protection order was also granted in his absence as he failed to come to court despite being allegedly served. The alleged contravention of the protection order that led to the appellant’s arrest allegedly took place on 24 March 2021. The complainant alleged this time around that the appellant shouted at his employee, Erik, for demolishing a bee’s nest on his(the appellant) property. He (the complainant) intervened by coming out of his house and climbing onto a chair to look over the garden wall. He shouted at the appellant to stop swearing. According to the complainant, the appellant also shouted in response to his intervention by saying: “Arthur, fuck you.” This led to the complainant subsequently laying a charge against the appellant for contravening the protection order. He was eventually arrested and granted bail. The trial was set for 21 September 2021.
- [6] Before the trial court, the appellant denied being served with a protection order. He indicated that the police only told him to be in court on 25 February 2021 without giving him the reasons why. He indicated that the date slipped his mind. He was fortunate as his wife reminded him of the date. As it was already late in the

afternoon, he went to the police station to ask what he should do in the circumstances. The police told him to go to court on the following day. He went to court and it is not clear on record as to what happened on the 26th save to say that it appears from the record that the interim protection order had already been made final in his absence on 25 February 2021. The J15 indicates that he was arrested on 30 March 2021.

- [7] The trial court rejected the appellant’s assertions that he was only told to come to court on 25 February 2023 by the police; that they did not give him the protection order nor explain the contents thereof; that he signed the return of service only as it contained a date of court; that the complainant was, in fact, harassing him. The trial court convicted him as charged and sentenced him to a fine of R3000.00 or six months imprisonment which was wholly suspended for 3 years on appropriate conditions. The trial court also rejected his version that he did not swear or harass the complainant.

Conviction

- [8] In this appeal, the appellant submitted that the appeal should succeed on two grounds. First, that he did not contravene the protection order because his utterance did not amount to harassment. Second, that even if this Court can find that his utterance amounts to harassment, he did so without fault on his part because the protection order was not served on him at all, alternatively not properly served.

The law

- [9] Parliament passed the Protection from Harassment Act 17 of 2011 (the Act) to afford victims of harassment an effective remedy against such behavior in order to uphold the Constitutional right to dignity, equality, privacy, freedom, and security of the person[1]
- [10] Parliament made it easier for victims of harassment to obtain relief. They need only to establish a prima facie case to obtain an interim protection order. The hearing can be granted even if it is unopposed on the return date. When it is opposed, the complainant can only succeed if he proves his/her case on a balance of probabilities. Then a final protection order can be granted.
- [11] When an application for a protection order is made, a court must consider it expeditiously[2] and must grant an interim protection order ex parte if it is satisfied that there is a prima facie case.
- [12] Given the importance of ensuring that a harasser ceases their harassment, but also to alert them to the risk of criminal prosecution, the Act takes care to ensure that protection orders are served. The Act provides that a court “must direct that that interim protection order be served on the respondent in the prescribed manner by the clerk of the court, sheriff or peace officer identified by the court.[3] Unlike civil proceedings, a complainant need not pay for the service of the order.
- [13] When the final order is granted, the court must direct that the order be served in two prescribed manners by the clerk of the court, sheriff, or peace officer identified by the court[4].
- [14] Equally important to consider when dealing with matters of this nature is the definition of the word harassment in the Act. It provides that harassment is:
- “direct 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-
- (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[5]
- [15] The Act also provides for hefty criminal consequences:

16.1 whenever a court issues a protection order, it must issue a warrant of arrest for the respondent suspended pending compliance with the order; and

16.2 any person who contravenes a protection order commits an offence and is liable to a fine or imprisonment not exceeding five years.[6]

[16] For the reasons that will be apparent later in the judgment, I chose not to deal with the first ground of appeal.

Service of the protection

orders

[17] It was common cause between the State and the appellant during the trial that the final protection Order was not served on the appellant before he was arrested. The only service that remained a thorn in the case of the State was the service of the interim protection order. The State led evidence of the complainant only during the trial who testified that the interim order granted on the 2nd was served on the appellant properly and the police officer explained the contents to him. As already indicated above, the appellant, although admitting having signed a document that was handed in court labelled Exhibit “A”, disputed the fact that the interim order was delivered to him, and the contents thereof explained to him. His testimony is that he was only requested to sign Exhibit “A” and then was told to appear in court on the date stipulated on it as the court date. The State did not call any of the two police officers who allegedly served the protection order. There was therefore a dispute before the trial court as to whether the interim protection order was served or properly served.

[18] On the service of this interim order, the State has a huge mountain to climb as it relied on it to prove the contravention the appellant was charged with. This is so because, as already indicated above, it is common cause between the parties that the final order was not served on the appellant. First, the Act criminalises the failure to comply with the court order. This means that the State bore the onus to prove its case beyond reasonable doubt that the appellant failed to comply with the court

order. Second, the contents of Exhibit “A” matches the appellant’s version of what happened on that day as the first sentence thereof requests him to appear before a court on the date written towards the end. In the same breath, Exhibit “A” somehow matches the explanation of the complainant in that there is a typed inscription

where the police officer who made him sign, filled in his name alongside where it says “I certify that I have delivered the

copy of the interim protection from harassment order personally.”

- [19] A fundamental difficulty with this certification is that it is not under oath. It is widely accepted that a written certification of a fact can only carry weight if it is made under oath. What made matters worse is the fact that this police officer was not called to testify, therefore his assertion in the alleged certification was not tested. The complainant's assertion did not breathe life in my view, into the problem the State was facing, instead, it exacerbated the issue as it emerged during cross-examination that he made a terrible blunder of testifying about a wrong date which according to him was the date the appellant was allegedly served with the interim order. The State did not correct this date up until it was raised during cross-examination. But when the questions heated up regarding the contents of the protection order, the complainant ended up saying that he does not know court orders, what he knows is that "a document" was delivered there. I may hasten to say that this concession unfortunately tallies with the version put by the appellant.
- [20] The upshot of all the above is that the trial court was faced with a doubt as to whether the interim order was served or properly served. Instead of benefitting the appellant from this doubt, as it is one of the hallmarks of a criminal trial, the trial court found that the appellant must have received the documents relating to the interim protection order, otherwise, he would not have signed the return of service (Exhibit A). The judgment does not reveal the basis for this finding. The trial court thus erred in its application of the law. Putting this anomaly aside, there are further critical flaws regarding the issue of the service of the order, which in my view, as it will be apparent below, are dispositive of the entire appeal.
- [21] A fundamental crisis in the case presented by the State appears from the documents filed as the record of the proceedings before the trial Court. The affidavit supporting the contravention of the Protection Order, which is the epicenter of the contravention of the protection order, was signed on 11 October 2021[7]. The date of the breach has been described therein as 29 July and 8 October 2021[8]. The charge sheet (J15) indicates the date of the first appearance in court as 31 March 2021 and the date of arrest as 30 March 2021[9]. The Annexure to the charge sheet indicates that the contravention occurred on 24 March 2021 and that he contravened an order that was granted on 25 February 2021[10].
- [22] The dates of the commission of the offence in the affidavit thus contradict the one in the charge sheet and the one adduced in evidence. As to how this affidavit became a basis for the arrest of the appellant on 31 March 2021 is a mystery. It also baffles one's mind as to how the appellant contravened an order on 24 March 2021 according to the charge sheet before the order was made on 25 March 2021. As if this was not enough, the State, upon realising this conundrum, submitted to the trial court that it relied on the interim order that was issued on the 2nd February 2023 for the offence the appellant was charged with. The State was in addition to this, trying to run away from the fact that it is common cause that the final protection order granted on 25 February 2023 was not served on the appellant and therefore the appellant would not have been aware of the court order if this is accepted.

[23] The State's submission in this regard threw its case from the frying pan into the fire. This is so because it prompted the trial court to conclude in its judgment that the protection order that was contravened was the interim order. This finding by the trial court made its way into its reasons for judgment, but the pronouncement of the order at the end of the judgment threw the baby completely out with the bathwater when it concluded "The accused in this case are guilty as charged". Sight should not be lost that the words "as charged" refer to the contents of the charge sheet and the Annexure thereto which referred to the final protection order in the circumstances

where no formal application was made by the State to amend same. But this is not the end of the crisis, as this pronouncement is not only a contradiction of the reasoning of the trial court but also brings in the argument as to how the appellant contravened an order into complete disarray by a reference to a conduct which was allegedly perpetrated on 24 March 2021 when the final order, he was charged with was granted on 25 March 2021 and was not even served on him.

[24] There is no way in which the State can salvage itself from this legal quagmire. It is clear that the State failed to meet the threshold in establishing fault on the part of the appellant. This is so irrespective of whether the State relied on the interim or final protection order that was granted. The State needed to prove that the protection order (whichever it was) that they relied upon for the contravention was served properly. The trial court also made a material misdirection by not applying the law correctly as it should have afforded the appellant the benefit of the doubt. The trial court furthermore pronounced a verdict that was not supported by its reasoning in the circumstances where it is common cause that the final order, which the appellant was "charged" with, was not served.

[25] The appeal must succeed on this basis alone. The need to deal with the sentence falls away.

[26] The following order is made:

26.1 The appeal is upheld.

26.2 The order granted by the trial court is hereby set aside and it is substituted by the following:

'The accused is found not guilty and discharged'

I agree

SHAI AJ

DATE OF HEARING: : 28 JULY 2023

DATE OF JUDGMENT : 25 OCTOBER 2023

This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 12h00 on 25 OCTOBER 2023.

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- [1] Preamble of Harassment Act
- [2] Section 3(1) Harassment Act
- [3] Section 3(3)(a) Harassment Act
- [4] Section 9(6) Harassment Act
- [5] Section 1 of the Harassment Act
- [6] Section 18(2) of the Harassment Act
- [7] J608 on paginated page 28 of the record
- [8] J608 on paginated page 28 of the record
- [9] J15 on paginated page 1 of the record
- [10] Paginated page 6 of the record

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Prepared on 10 October 2026 · Esheria