

SOUTH AFRICA / JUDGMENT

J.M v Z.M (R10/2022) [2022] ZAMPMHC 29 (11 November 2022) [2022] ZAMPMHC 29

COURT

Middelburg High Court, Mpumalanga

BEFORE

Langa

CASE / FILE NUMBER

R10/2022

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

JUDGES CHAMBERS

MIDDELBURG HIGH COURT

11/11/2022

R10/2022

Magistrates case no:DV238/2022

In the Matter between

J [...] M [...]

APPLICANT

AND

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

RESPONDENT

JUDGMENT

REVIEW

Langa J

Introduction

and background

- [1] This matter arises out of the so-called domestic violence court in the Evander Magistrates Court. The matter was referred to this court for review by the senior Magistrate ostensibly on the basis of section 22 of the Superior Court Act 10 of 2013. The senior Magistrate recorded that she noted that the application for a protection order was dismissed on grounds which appear in her view to be contradictory to the spirit of the Domestic Violence Act 116 of 1998, (“the DVA”) as well as the Constitution.
- [2] After perusing the record when it was initially placed before me, I returned it to the presiding Magistrate in order to afford the learned presiding Magistrate the opportunity to file the reasons for her decision in the light of the query raised by the senior Magistrate. In response to the said query the learned Magistrate indeed filed the reasons for judgment on 27 May 2022 which I deal with hereunder in the course of this judgment.

Brief

facts

- [3] The parties in the domestic violence application are wife and husband and the husband, Mr M [...], is the complainant in this matter. According for Form J480E completed by the complainant in line with the DVA, the complaint essentially alleges that he was assaulted by his wife, her brother and her children and evicted from the common home. Consequent to that incident the complainant not only approached the Magistrates court for an interdict against his wife Ms Z [...] K [...] M [...], but he also reported the matter to the police.
- [4] In addition to the assault Mr M [...] alleges that his wife also refuses to give him access to their common home. He states that he cannot afford another place as he is unemployed and does not have a place to sleep as a result. He states in section 6 of the form that he wants to be allowed access back into his house. This application for a protection order was made ex parte.

The Senior Magistrates Query

- [5] It is clear from the record that after she received a letter of complaint from Mr M [...] regarding the dismissal of his application for a protection order, the Senior Magistrate on 25 March 2022 directed a letter to the presiding Magistrate requesting an explanation for the decision taken. In this letter the senior Magistrate requests the presiding magistrate to explain whether the application was dismissed due to the fact that the applicant is a man and whether if this is so it implies that only wives in a relationship are entitled to protection under the DVA.

- [6] On the same date the presiding Magistrate, in a curt three sentence reply referred the senior Magistrate to appeal procedure provided for in Rule 51 stating further that she is only obliged to furnish reasons if the applicant has dealt with the matter according to the correct rules of procedure. Consequent to this response the learned senior Magistrate decided to refer this matter to this court for review as she was of the view that the decision was flawed. When the record was laid before me I directed that the learned presiding Magistrate be requested to provide me with her reasons for decision

which she did as stated above.

- [7] In her reasons the presiding Magistrate seems to query the manner in which her senior referred this matter to this court and suggest that this was incorrect and that such a matter could only be referred to and be dealt with by the High Court in terms of section 21 of the Superior Court Act 10 of 2013. She submitted that the applicant should have lodged an appeal as the matter cannot be dealt with by the High Court in terms of section 21 of the Superior Court Act. She

submitted further that on this ground the review should be dismissed. Considering the letters by the senior Magistrate, there is nothing untoward with the referral of this matter to the High Court for review. Having been unsuccessful in obtaining a proper response from the presiding Magistrate, the senior Magistrate had no option but to refer the matter as she was of the view that the decision was incorrect. In terms of section 22 of the Superior Court Act 10 of 2013 one of the grounds on which a matter may be reviewed is gross irregularity in the proceedings a quo. In this judgment the court will deal with the question whether the proceedings were irregular.

- [8] It is important to mention at this stage that although the application was ex parte and the respondent was apparently not present at court, the learned presiding Magistrate nevertheless deemed it fit to deal with the application immediately and dismissed it without further ado. The finding of the presiding Magistrate, which is made the same date as the date of the application, is reflected as follows in the record.

“Dismissed-purpose of DV-Act is to protect vulnerable groups, namely wives (sic) in marital relationships”

I shall revert to this finding shortly.

- [9] The applications for a protection order in terms of this Act are regulated by Section 4 thereof which provides that any complainant may in the prescribed manner apply to the court for a protection order in person or through a legal practitioner or other person acting on their behalf.

- [10] Section 5 and 6 comprehensively deal with the procedure to be followed. Section 5 (1) provides inter alia that “the court must as soon as is reasonably possible consider an application submitted to it in terms of section 4 (7) and may, for that purpose, consider such additional evidence as it deems fit, including oral evidence or evidence by affidavit, which shall form part of the record of the proceedings.
- [11] Section 5 (2) provides that if the court is satisfied that there is prima facie evidence that the respondent is committing, or has committed an act of domestic violence; and undue hardship may be suffered by the complainant as a result of such domestic violence if a protection order is not issued immediately, 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 against the respondent, in the prescribed manner.
- [12] Section 5 (3) (a) provides for the service of the interim protection order the respondent calling upon the respondent to show cause on the return date specified in the order why a final protection order should not be issued. In the alternative Section (4) provides that if the court does not issue an interim protection order in terms of subsection (2), the court must direct the clerk of the court

to cause certified copies of the application concerned and any supporting affidavits to be served on the respondent in the prescribed manner, together with a prescribed notice calling on the respondent to show cause on the return date specified in the notice why a protection order should not be issued.

- [13] It is clear from section 4 of the DVA that any person, including Mr M [...] who is a male person, can apply for a protection order in terms of the DVA. From her reasons for judgment the presiding Magistrate concedes that the complainant and the respondent, his wife, were in a domestic relationship as husband and wife and shared the same residence. She also notes that the complaint by the complainant is that he was assaulted by the respondent, her brother and children. She notes further that the complainant alleges that he has been evicted from the house, the common home by the respondent.

- [14] The presiding Magistrate further recognizes that the DVA is meant to, in her words, to protect the victims of domestic violence. She, however, proceeds to make the following statement which seems to be at the core of her understanding of the provisions of the DVA.

“The legislature is of the view that domestic violence is such a serious social evil in our society that the State has already committed itself internationally to offer maximum protection to the vulnerable groups identified, namely women and children. I submit that the legislature has decided that it is reasonable and justifiable in our open and democratic society to limit the application of the Act 116 of 1998 and narrow protection down to the most vulnerable groups in our society, namely women and children.”

- [15] While it is not clear to me what the import of the above paragraph is, it would seem that the presiding Magistrate is of the view that the application of the DVA is limited to women and children and this appears to be consistent with the decision made in this case which I deal with hereunder.
- [16] After making the above statement the Magistrate continues to state that the application by the complainant is not saying anything about the urgency of the matter and in her view the complainant is satisfied with the pending criminal matter and “therefore he is not in need of additional temporary protection by means of a prohibitory interdict against the assault.”
- [17] The Magistrate then continues and states that she further “considered that the applicant is not a member of one of the vulnerable groups identified by the legislature and to whom the State has committed itself to offer maximum protection. If there was any doubt the presiding Magistrate dealt with it in this statement by categorically stating that the complainant is not entitled to and interdict under the DVA as he is not part of the identified vulnerable groups. She states further again that she accepted that subjectively the applicant was satisfied with the pending criminal matter as sufficient protection of the alleged violation of his right to security of the person.
- [18] This issue is at the centre of issue raised by the senior Magistrate. This brings me to the finding made by the presiding Magistrate. It is very clear that the application was dismissed because the presiding Magistrate is of the view that the purpose of the Act is to protect vulnerable groups, namely wives in marital relationships.
- [19] There are two issues of concern to me in this matter which I intend dealing with as I do. The one is the procedure followed by the Magistrate and the second is the merits of the final decision by the magistrate as articulated above.

Procedure

- [20] I have in the preceding paragraphs deliberately referred to sections 4, 5 and 6 of the DVA as these sections deal with the process and procedure to be followed in these applications. What concerns me is that according to Form 2, application in terms of section 4 of the DVA was made on 24 March 2022 by the complainant. It is signed and commissioned on the same date. It is however clear that the presiding Magistrate after receiving the application, made her decision essentially dismissing the application of the same date without the hearing of any evidence.
- [21] It is important to note that the provisions of the DVA are peremptory. In terms of Section 5 (2) once the court is satisfied that there is prima facie evidence that the respondent is committing, or has committed an act of domestic violence; and undue hardship may be suffered by the complainant as a result of such domestic violence if a protection order is not issued immediately, 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 against the respondent, in the prescribed manner.

- [22] In this matter it is clear that the presiding Magistrate did not adopt this procedure. Despite the fact that there was prima facie evidence that the respondent committed acts of domestic violence in the form of assault, the presiding Magistrate decided to dismiss the application without even following the procedure by issues an interim protection order which had to be served on the respondent. It is clear that this constituted a gross misdirection of the part of the presiding Magistrate. The Magistrate not only failed to follow the procedure as stipulated by the DVA, but she also failed to apply one of the basic rules of natural justice, which is to at least hear both sides before making a finding. What is even more concerning in this matter is that the Magistrate does not reject the averments made by the complainant regarding the assault and there was no evidence before her to refute the allegations of assault. It would seem that the Magistrate dismissed the application because the complainant had
- also lodged a criminal complaint with the police.
- [23] The Magistrate stated further that she was of the view that the complainant was satisfied with the pending criminal matter and therefore he is not in need of additional temporary protection order by means of a prohibitory interdict against the assault. It is not clear on what basis the presiding Magistrate arrived at this decision as the complainant has nowhere stated that he does not need the interdict. In fact the application made by the complainant and laid before the Magistrate was for an interdict in terms of the DVA. There was just no ground to conclude that the complainant was not interested in the protective interdict.
- [24] Secondly, the fact that the complainant has simultaneously lodged and criminal complaint should not negatively impact on his application for a protection order. It is clear from Section 4 (2) of the DVA that in addition to the relief available in terms of this Act, the complainant also has the right to lodge a criminal complaint against the respondent if the conduct complained of also constitutes a criminal offence. So the fact that the complainant had lodged a criminal complaint did not render his application redundant as the Magistrate seems to reason. In fact, the fact that the conduct complained of is prima facie criminal should be another factor to support the granting of at least the interim order. One can imagine what the consequences would be if courts were to refuse granting interim orders based on this reasoning adopted by the Magistrate in this matter.
- [25] It was therefore a gross misdirection for the Magistrate to conclude that the complainant did not need or deserve a protection order as he had lodged a pending criminal complaint in respect of the same complaint. However, most importantly, it was a gross irregularity for the Magistrate to dismiss the application as she did without hearing further evidence. The Magistrate simply noted that the applicant was absent and there is no indication whether any attempt was made to at least hear his evidence. One can only assume that he was available as the application was dealt with by the Magistrate on the same day it was lodged. However, even if the Magistrate was reluctant to grant the interim order, she could have at the most ordered that the papers be served on the respondent with a return date and then deal with the matter on that date after hearing or considering evidence. To summarily dismiss the application in the fashion that the Magistrate did is a cause of concern and has

to be properly addressed.

- [26] I now revert to the order made by the Magistrate and the underlying reasons. Although on the face of it, it would appear that the Magistrate did not find the interim order necessary because there was a pending criminal case, it is however clear from her decision that the main reason underpinning the dismissal of the application is that the application procedure for a protective order under the DVA is only meant for wives in marital relationships. The presiding Magistrate apparently bases her reasoning on her interpretation and understanding of the Act and its preamble.
- [27] It is correct that the purpose of this Act, according to the preamble thereof, is 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. It is also absolutely correct and accepted that women and children are the most at risk and are generally regarded as the vulnerable group and this also includes the aged.
- [28] This however does not by any means exclude people who are not wives or women from approaching court as the Magistrate seems to suggest. Men who are in abusive relationships are also equally entitled to protection under the DVA even though it is a fact that their numbers pale in comparison to those of women and children exposed to domestic abuse. What is important to remember is that Section 1 of the DVA defines a complainant as 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. From this definition it is clear that everyone fitting this definition can approach court for an interdict. This view is amplified by Section 4 referred to above which expressly states that any complainant may apply to the court for a protection order in the manner prescribed by the Act.
- [29] It was therefore with respect a gross misdirection by the Magistrate to dismiss the application on the basis that only wives in a marital relationship are entitled to apply for a protection order under the DVA. It is clear from the Act that anybody, as long as they are in a domestic relationship as envisaged by the Act, can approach court in terms of Section 4 for interdictory relief. The complainant in this matter as the husband of the respondent with whom he lived, clearly

qualified to apply to court for the interdictory relief. This interpretation suggests that even unmarried women who are not in a marital relationship would probably not get help in this court.

[30] The Magistrate therefore erred in law in arriving at the decision that the purpose of the Act was to protect wives in marital relationship. This is not only incorrect but it is also dangerous as it tends to deny many others their right to rely on the provisions of the Act. Although the Magistrate in her reasons referred to some rights in the Bill of Rights including the limitation right provided for in section 36 of the Constitution, her submissions did not add any value to the

question before court.

[31] The Magistrate further raised procedural issues and criticised the affidavit by the complainant for not being compliant in that it lacked the necessary averments for such an application. She states inter alia the complainant lacked bona fides as he failed to disclose that he also wants the respondent to be interdicted from evicting him and the children. Although she concedes that the complainant complained of eviction, the presiding Magistrate for some reason states that the complainant failed to mention the eviction in his application, which is incorrect.

[32] The Magistrate, however, continues in her reasons and states that if she had granted the application the respondent would have become a victim of domestic abuse at the hands of the complainant who would be armed with a court order. She states further that the respondent would have suffered more hardships had she granted the application as the order would have exacerbated the already unhealthy matrimonial relationship. It is not clear where the Magistrate obtained information that the respondent was abused or about to be abused by the complainant from. There is nothing on record to support these views by the Magistrate which appear to be mere speculation. But whether or not they are speculation the Magistrate clearly did not rely on these factors in arriving at the decision that she did. She simply held a view that only the wives are entitled to protection as expressly stated in her finding. It is therefore clear that the decision arrived at by the Magistrate was based on a flawed understanding and interpretation of the legal provisions involved.

[33] In conclusion I find that that the finding made by the Magistrate was erroneous and that there is therefore a cause for interference with the decision of the Magistrate which stands to be overturned.

Order

[34] In the result I make the following order.

The finding and order made by the Magistrate on 25 March 2022 is hereby set aside. The matter is remitted to the Magistrates Court Evander to proceed de novo before another Magistrate.

[35] Lastly, Magistrates are at the coal face of the administration of justice and deal with many of these matters on a daily basis. I am therefore very concerned and hope that the understanding and interpretation of the Act reflected in this matter is not a prevalent one. While I know for a fact that many Magistrates have a solid and better understanding of the Act, I nevertheless, believe that this matter raises a need for the consideration of further

workshops in order to ensure that the new and even old Magistrates are kept abreast with the interpretation and application of this important legislation. This is particularly so given the prevalence of cases of domestic violence in the country in general. I therefore order that the Registrar must bring this judgment to the attention of the Chief Magistrate, Mpumalanga Province for her information and attention.

Middelburg High Court

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Prepared on 9 October 2026 · Esheria