

SOUTH AFRICA / JUDGMENT

N.H v S.N (EL583/2020) [2020] ZAECELLC 14 (3 September 2020) [2020] ZAECELLC 14

COURT

Eastern Cape High Court, East London Local Court

BEFORE

I.T. Stretch

CASE / FILE NUMBER

EL583/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

EAST LONDON CIRCUIT

LOCAL DIVISION

Case no. EL583/2020

In the matter between:

N[...]

H[...]

Applicant

and

S[...]

N[...]

Respondent

JUDGMENT

STRETCH J.:

- [1] This is the return date for confirmation of a rule nisi issued on 11 June 2020 interdicting the respondent from entering the applicant's residence at 7[...] M[...] Street, B[...] B[...], East London.
- [2] The interim relief which forms the subject matter of the rule was granted on the basis of a certificate of urgency and the applicant's founding affidavit wherein the following averments were made:
- a. The parties were divorced in the East London Magistrates' Court and a forfeiture order was made in the applicant's favour.
 - b. Thereafter they reconciled and lived together for a couple of months.
 - c. The blissful post divorce co-habitation was short lived, resulting in the applicant approaching the magistrates' court for variation of a domestic violence order which she had obtained against the respondent previously, this time requesting that he be interdicted from entering her residence at 7[...] M[...] Street, where they had been living together until then.
 - d. The order was varied accordingly whereafter the interim relief granted in terms of this variation was extended from time to time.
 - e. On 11 June 2020 the magistrate to whom the matter had been allocated expressed the opinion that there was no interim order in existence, interdicting the respondent from entering the premises at 7[...] M[...] Street. The applicant (being an admitted and practising attorney of this court conducting her own litigation) was of the view that the magistrate was wrong, and that the property had, in any event been forfeited to her.
 - f. Notwithstanding this, and having been so informed, the respondent expressed his intention to move back into the property that same day, which intention, if it materialised, would, in the applicant's opinion, expose her to danger, as the respondent was an abusive person, who had subjected her to violent conduct and had exposed their child and the childminder to aggressive behaviour.
 - g. The applicant accordingly elected to approach the high court forthwith for an interim interdict, alleging that she qualified for this interlocutory relief, having met all the requirements therefor.[1]
- [3] On the return date,[2] it was contended on the applicant's behalf that the interim relief served to be made final as the applicant had proved that she has a clear right to the relief sought, that she harboured a reasonable apprehension of injury, and that there was no other satisfactory remedy available to her.

[4] Save to mention that the application is riddled with material disputes of fact which are prima facie incapable of resolution on the papers[3], I do not intend traversing each and every issue raised by the parties. In my view, the crisp issue is whether the applicant

had no other satisfactory remedy available to her when she approached this court. The answer to this question is determinative of the application.

[5] The applicant avers on oath that on 23 August 2018 she caused an interim protection order which she had against the respondent, to be varied interdicting the respondent from entering her residence at 7[...] M[...] Street, B[...] B[...]. A copy of the varied interim order is annexed to her application papers. The respondent does not dispute that the applicant obtained the varied interim order. His contention is that the varied interim order has not been served on him.

[6] The applicant is adamant that an interim variation was granted, and that the magistrate who had perused the file was wrong when he stated in writing that an interim variation order did not exist. Due to the fact that the applicant has not approached this court to review the magistrate's decision, the magistrate has not been joined in these proceedings. This court

is accordingly not in a position to determine whether the magistrate was wrong or not.

Fortunately it is not necessary for me to do so in order to decide the fate of this application. I say this for the following reasons: The email reflecting the magistrate's view has been annexed to the applicant's affidavit which was deposed to on the same day that the email was read or paraphrased to the parties, and on the same day on which the applicant (without service) obtained her interim relief in the high court. The respondent does not dispute that both parties were made aware of the fact that the magistrate was of the opinion that there was no interim relief in existence pertaining to 7[...] M[...] Street. The matter does not end there however. The email goes on to say the following:

'The legal position then is that the original domestic violence order as amended by the first variation application [not pertaining to 7[...] M[...] Street] is the only court order that the respondent is required to adhere to and the applicant may enforce. If the applicant wish to further vary the existing order she must bring a new application for variation of the order using the forms and the process prescribed by the domestic violence act. ... Kindly advise us if either the applicant or respondent wish to further litigate in this matter, if so you are required to immediately [emphasis added] forward the application to my office in order for me to provide the documents to Mrs Govender who was assigned by me to deal with the matter following agreement in this regard with the Chief Magistrate.'

[7] The respondent, in his answering affidavit, agrees that both he and the applicant were duly advised by the chief magistrate to make a new application for a variation of the previous order. Indeed, the respondent adds that he has been advised that bringing an application to vary an existing order before the magistrates' court could not have taken more than 20 minutes on 11 June 2020 (the day on which the applicant approached the high court), and that an interim protection order could even have been granted after hours. These averments

are not disputed by the applicant in reply, and are, in my view, factually correct.

- [8] Instead, the applicant in reply merely emphasises the averments made in her founding papers, viz, that the respondent is not entitled to go back to 7[.] M[...] Street because the house belongs to her by virtue of a divorce decree forfeiture clause, and because she is in possession of an order in the magistrate court which precludes him from coming anywhere near her property, and also that the magistrate's opinion that an interim protection order did not exist with respect to 7[...] M[...] Street was "wrong on a point of law".
- [9] It does not require further analysis to conclude that the respondent has in essence agreed with the applicant on each of these points[4]. He also avers (which is not disputed) that she has agreed to a rescission of the forfeiture order, and points out that she lied on oath in order to have the latest protection order confirmed, inter alia stating that as at 12 October 2018 they were still married to each other.
- [10] In my view then, the applicant has failed to show that there was no satisfactory alternative remedy available to her. There were a number of remedies available to her. She could have caused the interim order upon which she was relying (and still seems to rely) to be served on the respondent there and then when they were in each other's company at the magistrates' court on 11 June
2020. Alternatively, she could have taken the magistrate up on his invitation to forthwith vary, what he had interpreted as the only existing order relating to a different property. Thirdly, having been of the view (as a lawyer) that the magistrate of an inferior court was clearly wrong in his approach to what she deemed to have been the status quo, she could have approached the high court there and then with an urgent review application to have his decision set aside, with appropriate interim relief designed to protect her interests and that of her household.[5]
- [11] The applicant failed; alternatively, elected not to exercise any of these options. The application is dismissed with costs, and the rule nisi is discharged.

JUDGE I.T. STRETCH

JUDGE OF THE HIGH COURT

Date heard: 20 August 2020

Date handed down by way of electronic mail: 3 September 2020

For the applicant: S. Nzuzo

Instructed by: Hexana Attorneys

Ref Ms Hexana; tel no 043 743 2606

For the respondent: T. Sellem

Instructed by: Don Maree Attorneys

D A Maree; tel no 043 727 0882

- [1] See *Setlogelo v Setlogelo* 1914 AD 221 at 227 for the four requirements of an interim interdict, being a prima facie right, a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is, a balance of convenience in the applicant's favour and the absence of any other satisfactory remedy.
- [2] Ibid for the three requirements of a final interdict.
- [3] See however *Plascon-Evans Paints v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634
- [4] Thus *Plascon-Evans* (above) applies.
- [5] See *Ntuli v Zulu* 2005 (1) SA 456 NPD (when such an approach was successfully followed) and *Ntuli v Zulu and Others* 2005 (3) SA 49 NPD, where costs were awarded on review against the judicial officer in her official capacity.
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