

SOUTH AFRICA / JUDGMENT

T.N v Z.M (CA114/2022) [2023] ZAECKMKHC 70 (23 May 2023)

[2023] ZAECKMKHC 70

COURT

Eastern Cape High Court, Makhandla

BEFORE

GH Bloem, OH Ronaasen

CASE / FILE NUMBER

CA114/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, MAKHANDA

CASE

NO: CA114/2022

In

the matter between:

TN Appellant
and
ZM Respondent
APPEAL

JUDGMENT

Bloem J

- [1] On 5 January 2022 the respondent made an application for a protection order. On 7 January 2022 the magistrate issued an interim protection order against the appellant wherein he was ordered, pending the return date, not to “abuse, assault, threaten [or] harass [the] applicant in any way possible”. The interim protection order that was served on the appellant called upon him to show cause on the return date, being 11 March 2022, why a protection order

should not be issued. On 11 March 2022 the appellant delivered his answering affidavit wherein he set out the facts upon which he submitted that the interim order should be discharged. The respondent deposed to a replying affidavit on 18 April 2022, which must have been delivered thereafter. On 5 May 2022 the magistrate issued a protection order against the appellant in the following terms:

“(a) Applicant succeeds.

- (b) Respondent is prohibited from visiting the applicant.
 - (c) Respondent is prohibited from entering no. [...] R[...] R[...] G[...] East London.
 - (d) Respondent’s communication with the applicant is limited in the following ways:
 - 1. Communication at work is allowed only for work related matters.
 - 2. Communication outside of work is limited to telephone calls, text messages and/or emails only for purposes related to access to the children or for emergency purposes.
 - (e) Respondent is not to assault the applicant.
 - (f) No order as to costs”.
- [2] The appellant appeals against the issue of the protection order on 5 May 2022.
- [3] Shortly before the hearing of the appeal, the registrar handed a copy of a medical certificate in respect of the respondent to us. For what it is worth, it certified that on 18 May 2023 Dr JA Olabode of East London examined the respondent. He recommended “sick leave from 18/05/2023 to 19/05/2023, both days included”. The medical certificate furthermore stated that “other information/recommendations: medical illness”. That medical certificate was emailed to the registrar by the respondent at 08h50 on the morning of the hearing of the appeal. Therein the respondent stated that “I will not make it to court today. Kindly receive the document attached.”
- [4] The respondent did not file a notice of intention to oppose the appeal. She also did not deliver heads of argument. She did not indicate in the aforesaid email that she intended to apply for the postponement of the hearing of the appeal. It cannot be assumed that, because the respondent emailed a certificate to the registrar, she applied for the postponement of the appeal. Such an application would have required at least an affidavit from the medical practitioner to explain why the respondent could not attend court.[1] The appellant’s legal representatives were made aware of the medical certificate only after the registrar had made it available to counsel shortly before the commencement of the hearing of the appeal. Having taken instructions, counsel informed us from the bar that his instructions were to proceed with the appeal.
- [5] One of the factors that weighed heavily with us was the appellant’s prospects of success on appeal. If the appeal was postponed, the respondent would in all probability have been ordered to pay the costs occasioned by such postponement. The respondent has not

instructed legal representatives to represent her in the appeal primarily because of financial reasons. An order that she should pay the costs occasioned by the postponement would have exacerbated her financial position. That factor and the prospects of success, more particularly the clear misdirections by the magistrate, caused us to proceed with the appeal.

- [6] This matter has an unfortunate and long history, but what prompted the respondent to apply for the protection order are the events of November and December 2021. Before I deal with the facts that the parties placed before the magistrate in support of or opposition of the respondent's application for a protection order, it is important to record that the appellant and the respondent were involved in a romantic relationship from which two children were born during 2014 and 2017 (the children). Their relationship came to an end during 2018, on the appellant's version, or 2019, on the respondent's version. During 2019 and while the parties were residents of Postmasburg, the respondent opened a criminal case of assault against the appellant. The appellant stated that the respondent opened that case against him in retaliation of a criminal

case of assault that he had opened against her in Postmasburg. The public prosecutor refused to prosecute any one of the parties.

- [7] On 8 September 2020, at the instance of the appellant, the High Court in Mthatha ordered the respondent to afford the appellant reasonable contact with the children, pending the finalisation of a parenting plan referred to in section 33 of the Children's Act;^[2] and ordered the respondent's mother to release the children "to the care of the [appellant] whenever he exercises his reasonable contact rights". In paragraph 3 of that order, the respondent's mother was also interdicted and restrained from unlawfully interfering with the appellant in the exercise of his rights of reasonable contact with the children.

- [8] On 6 August 2021, once again at the instance of the appellant, the magistrate in Butterworth ordered inter alia:

"3. The applicant and the respondent are ordered to jointly or severally approach the office of the Family Advocate in the Northern Cape or any other professional service provider to assist them with parenting plan."

4. The parenting plan envisaged in paragraph 3 of this order must be finalised within 6 weeks from the date of this order or unless the professional body contemplated in paragraph 3 of this order states otherwise or unless appeal or review proceedings are launched by either the applicant or the respondent.
5. It is ordered that the children must reside with the respondent in Postmansburg subject to the applicant's contact with the children. In the event the respondent is unable to reside with the children, the applicant is ordered to reside with the children. The relocation of the children from [a specified town in the Eastern Cape] to Postmansburg must be done with due consideration to the schools' academic calendar as the children's schooling should not be abruptly disturbed but this order must be implemented no later than the beginning of the

new school term in 2021.

6. The parenting plan envisaged in paragraph 3 of this order must be finalised within 4 weeks from the date of this order unless professional body contemplated in paragraph 2 of this order states otherwise or unless appeal or review proceedings are launched by either the applicant or the respondent. In addition, pending the finalisation of parenting plan in terms of paragraph 3 of this order, the respondent is ordered to allow the applicant to exercise contact with the children as per High Court Order.”

- [9] For the sake of completeness, the allegations that the respondent made in her affidavit in support of the protection order are reproduced hereunder. They read as follows:

“4.2 How are these persons affected?”

T [the appellant] came to our home and made a mockery of my mother in presence of the two minor children. Intimidate, bully and harass her, using state personnel; the police and sheriff, both from Butterworth. The sheriff will demand my children from my mother telling her they are not hers, while T takes a video of the incident.

5. INFORMATION REGARDING ACTS OF DOMESTIC VIOLENCE

Give full details regarding all incidents of domestic violence and also indicate whether firearms or other dangerous weapons were used, what injuries have been sustained and whether medical treatment was obtained:

T assaulted me while we were staying together with the children in Postmasburg. I opened a case against T at Postmasburg Police station case no 2019/11/26 ref no. 257/11/2019. Because of the issues which I discussed in section 4.2 of this form, I opened a case of Intimidation, abuse and harassment at Butterworth Police station case no 141/4/2021. I have since notified my employer such that in December/late November 2021 I opened a case of harassment against T.

Divorce papers have been served to T case no 335/2021. T is denying the marriage, delaying the divorce process.

6. INFORMATION REGARDING URGENCY OF APPLICATION

Submit the reasons why the Court has to consider the application as a matter of urgency and why undue hardship may be suffered if the application is not dealt with immediately Living in fear, unable to predict when will the next attack come. Emotional and psychological trauma. Children exposed to violence. Anxiety, depression and emotional distress to the elderly. Fear for my life and that of my family.

T disrespects my mother and my home. My mother is a pensioner and has provided my children a home after T chased us from the main house in December of 2019. So this is a way of T to harass and bully my helpless mother from her comfort home.

When T collects the children he brings sheriff and police who will come not as professionals in a way that they discuss this matter as if they are T's family members.

T can come to my home without making an appointment. In November/December of 2021 he wrote me an email saying he will collect the children on the 26 December 2021. On the 26 December, T did not come.

On the 29 December just after 15h30 T came to my home with the sheriff. I informed the sheriff that he was carrying an outdated court order which was issued at Umtata High Court on the 17 September 2020 (case no 2314/2020).

The sheriff went back to T's car and they drove off. After 45 minutes the sheriff and police and T came back, T sat in the car, while the sheriff and two police personnel were talking to me by the gate.

I once again told the sheriff that he was carrying a court order from Umtata High Court which was overruled by the Children's Court in Butterworth. The sheriff asked that I open the gate so that he can search my home together with the police. I informed them that they must produce a search warrant and that T is fully aware of the case which he opened at Butterworth Children's Court where a judgment was made (case no 14/1/4-04/2021).

Every time T collects the children, he sits in the car while the sheriff and police come into my yard to collect. I am now worried about the well-being of these minor children because it is not necessary that they must be collected in this manner.

Page 21 of judgment case 14/1/4-2021 states that the parenting plan must be finalised within four weeks from the date of the order. T never submitted a parenting plan to the Butterworth Children's Court. In addition to this even though T has access to the minor children, he does not provide shelter, education, food and extra mural activities. At the beginning of 2021 T opened a case against me (case no 2314/2020) for contempt of court proceedings.

T uses any opportunity at his disposal to ensure that I miss work. We both work for the same company in Postmasburg, case that he had opened against me require traveling and I am always absent at work. I have to constantly explain to my boss why she must grant me leave.

I made several attempts for T to support the children since he is a father and both of us must uphold the children's right which involve money. T dismissed my plea. He has since decided to pay R6 000 for two children since February 2021. I applied for maintenance in Butterworth, however the magistrate did not want to take the case to trial, since there was a pending case on custody of the same children. I never accepted her reasoning because I have been struggling for some time financially and I believe she use power vested in her.

T asked for invoices for children's costs and he also called both schools. My lawyer at the time provided all invoices and breakdown of the children's monthly costs. T chose not to increase the R6 000. I was getting the money before or on the 4th day of the month. I have not received the money for January 2022."

[10] In his answering affidavit, the appellant alleged that, whenever he wanted to see his minor children, he made an appointment with the respondent. He alleged that on 30 November 2021 he sent an email to the respondent informing her that he would collect the children on 26 December 2021 to spend time with him and his family. The respondent did not respond to that email. The respondent admitted in her affidavit that she received the appellant's email. On 29 December 2021, he called the respondent on many occasions, but she did not respond to those calls or text messages. Out of desperation he approached the sheriff who was unable to locate the respondent or the children. He approached his attorney who made arrangements with the sheriff to assist him to collect the children from the respondent on 29 December 2021. On that day the respondent denied access to the sheriff, who secure the services of the South African Police Service. The respondent denied access to the members of the South African

Police Service to the house in which she was residing at the time. She stated that the children were in Postmasburg. The appellant

denied that he ever went to the respondent's home without being accompanied by the sheriff. He also denied that he intimidated or harassed her. His case was that all he wanted to do was to exercise his right of access to his children.

[11] In response to the above allegations, the respondent deposed to an affidavit on 18 April 2022 wherein she stated the following, albeit that she referred to herself in the first person and the appellant in the second person:

"You know where my home is however on the 26 December 2021 (Sunday) you did not go collect the children. On the 29 December you went to my home without calling or emailing since you missed the initial collection date, you chose to collect the cops and sheriff to do your dirty work. Mr M [the appellant's attorney] must select choice of words which T can use, the marriage still exist, T is refusing to sign for divorce papers, so for now until stated otherwise by Kimberly High Court, T is married to Z. Yes, T committed a crime marrying while married".

[12] It is against the above factual background that it must be determined whether the magistrate's order was supported by those facts. In terms of section 6(4) of the Domestic Violence Act[3] the court must, after considering the evidence and hearing the complainant and respondent or their legal representatives, issue a final protection order if it finds, on a balance of probabilities, that the respondent has committed or is committing an act of domestic violence. In this case, the magistrate was accordingly permitted to issue a final protection order, provided that he found, on a balance of probabilities, that the appellant had committed an act of domestic violence or was committing an act of domestic violence.

[13] In terms of section 1 of the Domestic Violence Act '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-
- (ii) 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.”

[14] In terms of section 1 of the Domestic Violence Act ‘physical abuse’ includes:

- “(a) *physical violence or threats of physical violence towards a complainant;*
- (b) to deprive the complainant of their liberty or threatening to do so;
- (c) to administer, attempt to administer or threaten to administer-
- (i) any drug as defined in section 1(1) of the Drugs and Drug Trafficking Act, 1992 Act 140 of 1992);
- (ii) any Scheduled substance as defined in section 1 (1) of the Medicines and Related Substances Act, 1965 (Act 101 of 1965), that affects or may affect a complainant's judgement or decision-making abilities or is harmful to the health or wellbeing of the complainant; or

(iii) any chemical or other substance that is harmful to the health or wellbeing of the complainant, to a complainant without the complainant's consent; or

(d) withholding or threatening to withhold a complainant's medication”.

[15] The protection order prohibited the appellant from visiting the respondent. There was no evidence, not even from the respondent, to show that the appellant visited her. Her evidence was that, whenever the appellant collected the children, not visiting her, he sat in his vehicle while the sheriff and members of the South African Police Service would enter the premises of her home. There was no evidence that, immediately prior to 29 December 2021, the appellant visited her. The interdict against the appellant in that regard has no factual basis.

[16] On the respondent's own version, the appellant sat in his vehicle while the sheriff and the police collected the children. The magistrate referred to paragraph 7 of the application form for a protection order, wherein the respondent was requested to state the relief sought. She stated that she wanted the respondent to be ordered not to enter 19 Recreation Road, Gonubie, East London (the premises). The magistrate stated that it would be in the respondent's best interests, in the circumstances of the case, that the appellant be interdicted from entering the premises of her home, without giving any reasons therefor. There was no evidence to show that the appellant entered the premises. The relief sought by the respondent in that regard was not supported by any evidence justifying an order interdicting the appellant from entering the premises.

[17] In the protection order, the magistrate regulated the manner in which the appellant should communicate with the respondent (the communication order). The magistrate found that the relationship between the parties was toxic, as a result of which “there was no peace at home”. He found that there was “evidence that the [respondent] does not want the [appellant] to talk to her...”. That finding is incorrect. The respondent did not say in her founding affidavit, which has been quoted in full, that she did not want the appellant to talk to her. She was required to make out at least a prima facie case for a communication order. She did not have any complaint in that regard. Furthermore, there is no indication from the prescribed

form, which the respondent completed to secure the protection order, that she sought the communication order. Courts should decide only issues before it, as pleaded by the parties.[4] The magistrate acted improperly when he granted the communication order despite the fact that neither the respondent nor the appellant

dealt with it in their respective affidavits.[5]

[18] The communication order must be set aside for two reasons. Firstly, the respondent did not apply for the grant of the communication order, with the result that the respondent was not required to make any averments in that regard. The communication order was according granted without the appellant having been heard. Secondly, there was no evidence upon which the communication order was based.

[19] Except for the allegation that the appellant assaulted her at Postmasburg during 2019, the respondent placed no further evidence before the court to the effect that the appellant assaulted her. In this regard, the magistrate stated the following:

“I have clearly stated above that both parties have made allegations against one another related to assault and they even opened criminal cases against each other.

In this regard I am convinced that there is a possibility of these kinds of incidents happening/repeating themselves in the future if they go unchecked. Hence I am of the view that there should be an order in place prohibiting such acts of violence”.

[20] The magistrate seems to have reasoned that, because the parties laid criminal charges against each other in Postmasburg in 2019, he was “convinced that there is a possibility of these kinds of incidents happening/repeating themselves in the future if they go unchecked”. He was of the view that the protection order should be issued “prohibiting such acts of violence”.

[21] There was no evidence before the magistrate that the appellant assaulted the respondent immediately prior to the institution of the proceedings for a protection order. She did not say when, where and under what circumstances the alleged assault occurred. But, even assuming that there were merits in the allegation of an assault on her during 2019, the respondent placed no evidence before the court to indicate that there was a threat of a repeat of such assault on her at the time when she instituted the proceedings for a protection order. Her allegation of a fear or such an assault had no factual basis. In the circumstances, the magistrate should not have granted the protection order. The appeal must therefore be upheld. Mr Mayekiso, counsel for the appellant, indicated that, if successful and because the appellant did not want further acrimony between himself and the respondent, he did not seek a costs order against the respondent. Such an order would be just under the circumstances.

[22] In the result, it is ordered that:

1. The appeal is upheld.
2. The order granted by the magistrate on 5 May 2022 is set aside and replaced with the following order:

“1. The interim protection order be and is hereby set aside.

2. The application for a protection order is dismissed.”

GH Bloem

Judge of the High Court

I agree.

OH RONAASEN

Acting Judge of the High Court

For the appellant: Mr

M Mayekiso, instructed by Mbabane &

Maswazi Inc, East London.

For the respondent: No

Appearance.

Date of hearing: 19 May 2023.

Date of delivery: 23 May 2023.

[1] Hanson, Tomkin and Finkelstein v DBN Investments (Pty) Ltd 1951

(3) SA 769 (N) at 775G-776A.

[2] Children's Act, 2005 (Act 38 of 2005).

[3] Domestic Violence Act, 1998 (Act 116 of 1998).

[4] Fischer and another v Ramahlele and others 2014

(4) SA 614 (SCA) at para 13.

[5] Mthimkulu v Mahomed 2011

(6) SA 147 (GSJ) at para 7.

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