

SOUTH AFRICA / JUDGMENT

T.W.R v Q.E.T (A164/2024) [2024]

ZAGPPHC 1319 (10 December 2024)

[2024] ZAGPPHC 1319

COURT

North Gauteng High Court, Pretoria

BEFORE

N G M Mazibuko, E Van Der Schyff

CASE / FILE NUMBER

A164/2024

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: A164/2024

1.

REPORTABLE: YES / NO

2.

OF INTEREST TO OTHER JUDGES: YES/NO

3.

REVISED: YES/NO

DATE

10 December 2024

SIGNATURE

In

the matter between:

T[...]

W[...]

R[...]

Appellant

and

Q[...]

E[...]

T[...]

Respondent

Summary:

1. Section 6(4) of the Domestic Violence Act 116 of 1998- The court can consider evidence both on affidavit and other, including oral evidence. 2. Justices of Peace and Commissioners of Oaths Act 16 of 1963-non-commissioned 'replying affidavit' struck out since no condonation granted – 3. Court of first instance misdirected itself when it subsequently considered same when delivering its written reasons, whereas it had initially excluded it in its initial judgment- 4. The essence of the provisions of Rule 51(1) of the Magistrates Court Rules is to expound on the order-the appeal is upheld. The matter was heard in open court. The judgment is handed down electronically by circulation to the parties' legal representatives by email and uploading to the electronic file of this matter on Caselines. The date of the judgment and order is deemed to be December 2024.

ORDER

1.
The appeal is upheld.

JUDGMENT

Mazibuko AJ (Van Der Schyff J concurring)

INTRODUCTION

[1] This appeal is against the judgment and order of the Pretoria North magistrates court, in which the magistrate issued a final protection order in favour of the respondent, Q[...] E[...] T[...] (T), in terms of section 6 of the Domestic Violence Act, 116 of 1998 (the Act). T brought an ex parte application for a protection order against the appellant, T[...] W[...] R[...] (R), pursuant to section 4(1) of the Act. The appeal is not opposed.

BACKGROUND

[2] The factual background as it emanates from the papers from the court a quo are as follows:

[2.1] The parties were involved in a romantic relationship. A child was born, and the parties stayed together.

[2.2] On 7 February 2023, an argument about T's entitlement to occupational rental from her brother, who occupied her property, ensued. The incident lead to T being granted an interim protection order on 8 February 2023 against R by the court a quo.

[2.3] Based on the interim protection order, R was ordered not to assault, insult or threaten T nor to communicate with her. The interim protection order, among others, informed R to appear in court on 24 March 2023 to show cause why it should not be confirmed and made final.

[2.4] On the return day, R was legally represented by Mr Sambo. T's legal representation rights were explained by the court a quo, she was to consider all the options and decide whether she would have legal representation.

[2.5] In opposing, R, in his answering affidavit, denied being violent to T, alleging that T was the one shouting during the argument.

[2.6] T responded to R's answering affidavit by delivering a 'replying affidavit'. R dispatched an email through his attorneys complaining that the 'replying affidavit' was non-compliant as it was not commissioned.

[2.7] The interim protection order was extended a few times before Ms Mynhardt legally represented T. The court did not accept any replying affidavit into evidence.

[2.8] On 10 November 2023, the court a quo handed down its judgment and confirmed the interim protection order. Written reasons were furnished in February 2024, subsequent to R's request. Aggrieved by the court a quo's decision, R appealed the issue of the final protection order and judgment of the court a quo.

THE DECISION OF THE COURT A QUO

[3] What was before the court a quo was whether or not T's "replying affidavit" was defective. Further, whether on the return date, T presented evidence

on a balance of probabilities that R committed acts of domestic violence and that she was entitled to a final protection order.

[4] R, through Mr Sambo, submitted that T's "replying affidavit" was non-compliant as it was not commissioned. He argued for the strike-out of the "replying affidavit" due to its defectiveness. The court a quo ruled that there were two affidavits before it, viz, the founding and answering affidavits, thereby striking out the 'replying affidavit' as non-compliant with the regulations to qualify as a replying affidavit.

[5] Nevertheless, the court a quo confirmed the interim protection order, as it found merit in T's complaint and issued a warrant of arrest. Notwithstanding its finding regarding the non-compliant earlier, in its written reasons for the judgment, the court a quo referred to the struck-out 'replying affidavit' and indicated that it relied on its content.

APPELLANT'S ASSERTIONS

[6] It was argued, among others, by Mr Sambo, on behalf of R, that the court a quo erred when:

[6.1] It rejected and struck out T's non-compliant replying affidavit as it had not met the requirements of a valid affidavit stipulated in the Justices of Peace and Commissioners of Oaths Act[1]. and still referred to and considered the same in its judgment.

[6.2] Despite the absence of evidence (word[s], phrase or sentence)

used/uttered, which constitutes an insult, the court a quo found that the appellant had committed an act of domestic violation by insulting the respondent.

[6.3] It found R had assaulted T, thereby ignoring the documentary proof presented by R showing he was the victim of assault.

[6.4] Despite the absence of probative evidence and any other corroborating or documentary evidence the court a quo granted a final protection order against the appellant.

[6.5] It found R had acted in a hostile and violent manner.

ISSUE

[7] The issue before this court is whether the Court a quo was correct to confirm the interim protection order based on the evidence contained in T's founding and replying affidavits.

DISCUSSION

[8] Applications in terms of sections 4 and 6 of the Act are considered on paper. However, the court may consider additional evidence as it deems fit, including oral evidence, which shall form part of the record of the proceedings.[2]

[9] In casu, the application was decided only on papers filed. That requires of the parties to file affidavits. Since final relief is granted when the order is confirmed, the Plascon-Evans rule applies. In the absence of a replying affidavit, the respondent's claim

that he was the one who was assaulted stands uncontradicted.

[10] To the extent that the filing of the non-commissioned "replying affidavit" was not condoned, I agree with the court a quo's finding that there were only two affidavits before it, viz, the founding and answering affidavits.

[11] In terms of rule 51(1) of the Magistrates' Court Rules, the reasons furnished by the court provide the rationale for the order and expound on it. Such reasons cannot be detached from the order or judgment already given to avoid them marring the already granted order and or judgment.

- [12] In my respectful view, the effect of a struck-out, be it of the whole or part of the record, must be its non-existence in the court's mind as if it was never filed and never formed part of the record. In casu, it meant no affidavit was filed after R's answering affidavit. Consequently, T relied on her founding affidavit only to prove her case, which means she was barred from referring to the 'replying affidavit' and the content thereof. Such a position was not avertable for the court a quo.
- [13] The disparity or disconnect between the judgment and the written reasons amounts to a misdirection as the subsequent reasons vitiate the judgment. For these reasons alone, the appeal ought to succeed. I need not evaluate the other grounds raised by the appellant reasons.
- [14] Concerning costs, section 15 of the Act provides that the court may only make an order as to costs against any party if it is satisfied that such party has acted frivolously, vexatiously or unreasonably. T did not oppose the appeal. The court a quo initially found in her favour when it confirmed the interim protection order prior to its written reasons. These written reasons vitiated the judgment when the court referred to parts of pleadings that it had previously ruled against when it upheld the point of law regarding non-compliance of the 'replying affidavit' with the regulations. Thereby precluding itself from considering it in its judgment. Consequently, I find no justification to award costs against T.
- [15] As a result, I propose the following order.

Order:

[15.1] The appeal is upheld.

[15.2] The court a quo's order is set aside and replaced with the following order:

'The application is dismissed.'

[15.3] No order as to costs.

N G M MAZIBUKO

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree, and it is so ordered

E VAN DER SCHYFF

JUDGE OF THE HIGH COURT

Date of hearing:

24 October 2024

Judgment

delivered:

10 December 2024

Appearances:

For the appellant: Mr P Sambo Attorney for the appellant: Sambo Attorneys For the respondent:

No appearance

[1] Act 16 of 1963.

[2] Section 5(1) of the Act.

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Prepared on 9 October 2026 · Esheria