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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO: 8739/06

2006-04-21

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE	<input checked="" type="radio"/> YES <input type="radio"/> NO
(2) OF INTEREST TO OTHER JUDGES	YES <input type="radio"/> NO <input checked="" type="radio"/>
(3) REVISED	<input checked="" type="checkbox"/>
DATE 12/5/2006	SIGNATURE 

In the matter between

LAW, AMANDA MARLENE

Applicant

and

MASSIMO, IORI

Respondent

J U D G M E N T

WILLIS, J: The applicant has approached the court by way of urgency seeking the following relief:

1. Pending the outcome of section B below, suspending the operation of the order of the second respondent (ie the learned magistrate in Germiston) granted on 20 April 2006 under Case No. 506/06 ("the Germiston order") to the extent that the Germiston order:-

1.1 evicts the applicant from the premises at 8 Van Wyk Street, Elma Park, Edenvale, Johannesburg ("the common home");

1.2 prevents the applicant from entering the common home.

2. Directing that the costs of the A section of this application be determined as part of section B below.

In section B there is an application for the setting aside of the order granted by the second respondent on 20 April 2006.

The order granted by the learned magistrate was a so-called "interim protection order" made in terms of section 5(2) of the Domestic Violence Act No. 116 of 1998. In the order the applicant in this particular application is restrained from physically, psychologically, emotionally and verbally abusing the complainant. She is also restrained from entering the shared residence at 8 Van Wyk Street, Elma Park, Edenvale or entering his place of employment.

In terms of the order the present applicant is advised that she has the opportunity to anticipate the return day of the learned magistrate's order on 24 hours notice. This is a provision that is contained in any event in the Domestic Violence Act.

The gravamen of the applicant in this application's complaint is that she is deprived of a roof over her head and also that her two children who are living in the home occupied by the present respondent will be separated from her. The order granted by the learned magistrate was granted on an *ex parte* basis. The provisions of the Domestic Violence Act seem to me make it very difficult for a magistrate to refuse to grant an interim order when it is brought in

terms of the Domestic Violence Act. In effect, I am being asked to review the decision of an officer of court on an extremely urgent basis without that officer or judicial officer, being given a proper opportunity to set his case before me. Furthermore, I think that as a matter of principle and as a matter of well recognised law, a court which has made an interim order should in the first instance be approached to vary that order before an appeal (in the broad sense of the word) is made to a higher court. In my view, this is especially the case where the order was granted urgently and on an *ex parte* basis.

The respondent in this application has tendered to pay R3 500,00 to the applicant by 18:00 this evening and a further R5 000,00 by 11:00 tomorrow and to pay R3 500,00 per month from 1 June 2006 until 1 January 2007 in order to ensure that the applicant in this application at least is afforded a reasonable opportunity to have a roof over her head. In my view, this tender has been generously made in circumstances where there is no obligation to make it. Nevertheless, it does seem to me that it takes much of the sting out of the complaint of the applicant. The applicant is then afforded an opportunity to have the learned magistrate reconsider his decision in the light of the facts which she will put before him and also secure for the time being her having a roof over her head.

The following order is accordingly made:

1. The application is postponed *sine die*.
2. The respondent is to pay the applicant the sum of R3 500,00 in cash by no later than 18:00 this evening.

3. The respondent is to pay the applicant R5 000,00 in cash by no later than 11:00 tomorrow morning.
4. The respondent is to pay the applicant the sum of R3 500,00 per month on 1 June 2006 and on the first of each successive month thereafter up to and including 1 January 2007.
5. The costs of this application are reserved.