

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

- (1) REPORTABLE: ~~NO~~ yes
(2) OF INTEREST TO OTHER JUDGES: ~~NO~~ yes
(3) REVISED: YES

Date

11/4/19

SIGNATURE

JULIAN NETSAI CHILOWORE
And
AMUKELANI MENYAKA

CASE NO: 63/19

MATLHOGONOLO EVELYN PHIRI
And
MARIA SANDALA

CASE NO: 64/19

SUZAN PHIRI TERBALANCHE
And
NADINE

CASE NO: 67/19

SAREL BESTER
And
MARIE M KEMP

CASE NO: 70/19

JULIA MAKGAREETSA
And
THERESIA MOLAPISI

CASE NO: 71/19

CLINTON JOSEPH KOLOBI
And
SEITEBALENG

CASE NO: 72/19

REVIEW JUDGMENT

MUDAU J

- [1] These matters were referred to this court on review by the Senior Magistrate, Krugersdorp, who had concerns whether they were properly dealt with by an acting additional magistrate in not granting an interim order, alternatively; in not issuing a notice to show cause under the Protection from Harassment Act 17, of 2011 (the Act). Comments from the additional magistrate were also sought. The magistrate stated the following:

- (a) *"The matters we decided on papers in chambers by using provided forms in ex parte harassment application hereby attached for the honorable judge's attention.*
- (b) *After perusal of the contents of the ex parte application I made an extempore decision by using the guidelines of the attached prescribed form". (My emphasis)"*

- [2] Section 17 of the Act specifically provides that the provisions in respect of appeal and review as provided for in the Magistrates' Courts Act 32 of 1944 and the Supreme Court Act 59 of 1959 (now the Superior Courts Act No. 10 of 2013) apply to any proceedings in terms of this Act.
- [3] The Act came into effect on 27 April 2013 to provide adequate recourse to victims of harassment who are not in a domestic relationship as required in the Domestic Violence Act 116 of 1998. The Act provides for inexpensive civil remedy to protect a person from behavior which may not constitute a crime but may impact negatively on various rights of an individual.¹ Such conduct includes the following, watching, pursuing or accosting of the complainant or someone in a close relationship with the complainant such as a spouse or family member.² Harassment under the Act includes both direct and indirect contact that either causes harm or that inspires the person complaining of harassment to reasonably believe that harm may be caused.³ The Act also recognises electronic communication that causes harm or makes the complainant feel in danger of being harmed as harassment.⁴ Harm under the Act includes an extremely wide range of categories being mental, psychological, physical and economic harm.⁵
- [4] Anyone who believes they are being harassed by another person can apply for a protection order under the Act at a magistrate's court where they or the respondent live or work or where the alleged harassment took place. Legal representation is not necessary.⁶ The process for applying for a protection order is by completing an application form and where necessary with the assistance of the clerk of the court, where the complainant is required to set out the reasons why a protection from harassment order is required and listing full details of incidents complained of or experienced.⁷
- [5] The court may, in terms of the Act, after considering the application from the complainant; issue an interim protection order against the respondent notwithstanding the fact that the respondent has not been given notice of the

¹ Preamble to the Act.

² Section 1 of the Act.

³ Id.

⁴ Id.

⁵ Id.

⁶ Section 2 read with section 14 of the Act.

⁷ Section 2 of the Act read together with regulation 3 of the Protection from Harassment Regulation, 2013.

proceedings.⁸ The court must, however, be satisfied that there is evidence that the respondent is engaging, or has engaged in harassment; harm is being or may be suffered by the complainant as a result of such conduct if a protection order is not issued immediately; the protection to be accorded by the interim protection order is likely not to be achieved if prior notice of the application is given to the respondent.⁹ The interim protection order together with the record of evidence must be served on the respondent, calling upon the respondent to show cause on the return date why a final protection order should not be issued against him or her.¹⁰

[6] Section 3 (1) of the Act provides that:

“The court must as soon as is reasonably possible consider an application submitted to it in terms of section 2 (7) and may, for that purpose, consider any additional evidence it deems fit, including oral evidence or evidence by affidavit, which must form part of the record of proceedings”.

In terms of section 3 (4) “if the court does not issue an interim protection order in terms of subsection (2) the court must direct that the certified copies of the application concerned and any supporting affidavits be served on the respondent in the prescribed manner by the clerk of the court, a sheriff or peace officer identified by the court, 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 (my emphasis). The service of the application on the respondent with a notice to show cause on the return date is peremptory.

[7] After receipt of an application in terms of subsection 3 (b), section 5(4) of the Act provides that the court-

- (a) must consider the application;
- (b) may, in the prescribed manner, request such additional evidence by way of affidavit from the station commander as it deems fit;
- (c) must give a decision in respect thereof; and
- (d) must inform the station commander, in the prescribed form and in the prescribed manner of the outcome of the application.

[8] Section 7 of the Act empowers the court in the prescribed manner and at any stage of proceedings under the Act to cause to be subpoenaed any person as a witness at those proceedings or to provide any book, document or object if the evidence of that person or book, document or object appears to the court essential to the test decision of the case. This is governed in terms of regulation 19 of the Protection from Harassment Regulation, 2013.

⁸ Section 3(3) of the Act.

⁹ Section 3(2) of the Act.

¹⁰ Section 3(3)(a) of the Act.

[9] The application for a harassment order by an educator against a pupil in matter no 63/19 was dismissed because as the magistrate puts it, there was no supporting evidence; lacked of merits (sic); no complaints from other educators; respondent suspended from school ; it was a once off incident and complainant should lay charge of assault. In matter number 64/19 the application was also dismissed for lack of sufficient evidence, lack of merits, applicant was the aggressor and according to the magistrate this was a once off incident. Matter number 67/19 was also dismissed for the reason that there was no surname of the respondent furnished, no sufficient evidence and lacked merit. Matter number 70/19 was also dismissed for lack of sufficient evidence, lack of merits, was a once off incident in respect of which the respondent (presumably applicant) can lay charge of *crimen injuria*. Matter number 71/19 was dismissed for the reasons that it was a once off incident and lacked merit. But also that, the applicant must lay charge of assault. Matter number 72/19 was dismissed as was no surname or fix addressed provided; it was a once off incident; lacked merit and that the applicant committed a criminal offense. How the learned magistrate arrived at this finding without evidence from the respondent is unclear.

[10] Section 22 of the Superior Courts acts 10 of 2013 outlines the grounds upon which the proceedings of inferior courts may be brought under review before a provincial division. The section provides as follows:

“Grounds of review of proceedings of Magistrates’ courts

- (1) The grounds upon which the proceedings of any Magistrates’ court may be brought under review before a court of a division are –
 - (a) . . . ;
 - (b) interest in the cause, bias, malice or the commission of an offence . . . on the part of the presiding judicial officer;
 - (c) gross irregularity in the proceedings; and
 - (d) . . . ’

Van Loggerenberg et al interpret the ‘gross irregularity’ ground of review to refer to ‘an irregular act or omission by the presiding judicial officer in respect of the proceedings of so gross a nature that it was calculated to prejudice the aggrieved litigant, on proof of which the court would set aside such proceedings unless it was satisfied that the litigant had in fact not suffered any prejudice.’¹¹ An important consideration regarding the merits of the review application is Rule 31(1) of the Magistrates’ Court Rules which provides:

“The trial of an action or the hearing of an application or matter may be adjourned or postponed by consent of the parties or by the court, either on application or request or of its own motion.”

¹¹ DE van Loggerenberg, PBJ Farlam, MJ Bishop & JR Brickhill: Erasmus: Superior Court Practice (2013) at A1-71.

In *Momentum Life Assurers Ltd v Thirion Momentum Life Assurers Ltd v Thirion*¹² the court outlined the circumstances under which such an order may be granted as follows:

“Rule 31(1) clearly provides for an unfettered judicial discretion by furnishing the magistrate with the power to adjourn or postpone a matter *mero motu*. There is no suggestion that he may exercise this power only under prescribed circumstances. There may, in fact, be any number of reasons for his decision to follow this route. It may be for personal reasons or in response to the demands of public interest, for example as a result of the state of the court roll or because of an emergency situation. An unassailable reason would be if it should appear to be in the interests of justice that he do so.”

Of importance regarding this matter, the power to adjourn is sanctioned by the Act.

- [11] It is clear from some of the applications that reliance by applicants was on statements by other persons whose statements were not in the applications and needed to be verified. In the *Public Protector v Mail & Guardian Ltd & Others*¹³ at paragraph 14 Nugent JA explained as follows:

“Courts will generally not rely upon reported statements by persons who do not give evidence (hearsay) for the truth of their contents. Because that is not acceptable evidence upon which the court will rely for factual findings such statements are not admissible in trial proceedings and are liable to be struck out from affidavits in application proceedings”.

In none of the matters however, the magistrate did not use the powers he is enjoined to exercise in terms of the Act to call for additional evidence, but dismissed the applications without issuing a notice to show cause.

- [12] Section 10 subsection 5 provides that:

“(5) (a) Provided that the complainant is not in possession of or not in the process of applying for a protection order against harassment or stalking as provided for in the Domestic Violence Act, 1998 (Act No. 116 of 1998), the court may not refuse- (i) to issue a protection order; or 45 (ii) to impose any condition or make any order, which it is competent to impose or make under this section, merely on the grounds that other legal remedies are available to the complainant (my emphasis).

(b) If the court is of the opinion that any provision of a protection order deals with a matter that should, in the interests of justice, be dealt with further in terms of any other 50 relevant law, the court must order that that provision remains in force for the limited period as the court determines, in order to afford the party concerned the opportunity to seek appropriate relief in terms of that law.”

- [13] It is trite that a court of appeal or review court can only interfere with the exercise of discretion by the lower court if it has not been exercised judiciously

¹² [2002] 2 All SA 62 (C) at paras 16-22; 25 and 34.

¹³ 2011 (4) SA 420 (SCA).

or was influenced by wrong principles or misdirection on the facts. This principle was laid down in an earlier judgment of the Constitutional Court in *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & Others*¹⁴. In paragraph 11 of that judgment, Ackermann J stated the following with regard to the exercise of discretion by a court:

"A court of appeal is not entitled to set aside the decision of a lower court granting or refusing a postponement in the exercise of its discretion merely because the court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles." (My emphasis)

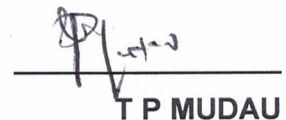
[14] In all these matters, I am satisfied that the decision by the magistrate falls to be reviewed for gross irregularities in that, the summary dismissal of the applications were not consistent with the general purport and the relevant provisions of the Act with regards to calling for additional evidence where necessary. The fact that the applicants in certain instances had options to lay criminal charges in place of bringing the harassment applications and using that as a reason amongst other considerations, to dismiss the applications, is in my view, a misdirection. The discretion by the magistrate was exercised injudiciously in that the applications were all dismissed without adherence to the *audi alteram partem* principle.

[15] Order

[15.1] The orders by the magistrate in all the above-mentioned six matters are set aside.

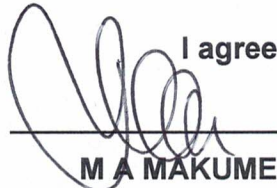
[15.2] The applications are to be considered de novo before another magistrate.

[15.3] Guidance is to be derived from this judgment in the adjudication of protection from harassment disputes in relation to Act 17 of 2011.


T P MUDAU

[Judge of the High Court,
Gauteng Local Division,
Johannesburg]

¹⁴ 2000 (2) SA 1.

I agree

M A MAKUME

[Judge of the High Court,
Gauteng Local Division,
Johannesburg]