REPUBLIC OF SOUTH AFRICA

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

CASE NO: A3084/2019

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

…… ……..
DATE SIGNATURE

In the matter between:

N[....] E[....] C[....] Appellant

and

L[....] J[....] C[....] Respondent

J U D G M E N T

Coram: **SENYATSI, J et NOKO, A.J.**

Noko AJ

Introduction

1. This appeal lies against the judgment and order of Magistrate H Banks of the Magistrate's Court for the district of Johannesburg North, Randburg. The Magistrate having dismissed on 2 July 2019 an application to confirm an interim order granted against the respondent granted in terms of section the Domestic Violence Act 116 of 1998 (Act).

2. The interim order granted in favour of the appellant prohibited the respondent from committing acts of domestic violence, namely, physical or verbal or threats of violence and from entering the complainant's residence at [….]. This order was granted in terms of section 5 (2) of the Domestic Violence Act, which provides that:

> "If the court is satisfied that there is a *prima facie* evidence that-
>
> a. the respondent is committing, or has committed an act of domestic violence;
>
> and
>
> b. undue hardship may be suffered by the complainant as a result of such domestic violence if a protection order is not issued immediately,
>
> the court must, notwithstanding the fact that the respondent has not been given notice of the proceedings contemplated in subsection (1), issue an interim protection order against the respondent, in the prescribed manner,

3. Magistrate Banks was seized with the matter on the return date being 2 July 2019. At this hearing the magistrate was to consider the application in accordance with sections 6 (2) and (4) of the Act. Section 6 (2) provides that:

"if the respondent appears on the return date in order to oppose the issuing of a protection order, the court must proceed to hear the matter and:-

a. Consider any evidence previously received in terms of section 5 (1); and

b. Consider such further Affidavits or oral evidence as it may direct, which shall form part of the recordings."

4. Section 6 (4) provides that-

"The court must after a hearing as contemplated in subsection (2), issue a protection order in the prescribed form if it finds, on a balance of probabilities, that the respondent has committed or is committing an act of domestic violence."

5. The magistrate after considering arguments presented on the return date decided to discharge the interim order as he was not persuaded that the evidence presented warranted the confirmation of the order.

Background

6. The appellant and the respondent had an intimate relationship which started in February 2019. They both went to a birthday celebration of a mutual friend, D[....] Z[....] (Z[....]) on 10 May 2019 at around 08:00 at a club called Hogg Heads in Honey Dew. They drove to another night club, called Chicago in Randpark Ridge around 22:00 where they continued with the celebration. They subsequently went to third night club called Full

Moon at around 23:00 where the celebration continued. It is in dispute as to the quantity of the alcohol they both consumed except that they were drinking at all clubs they went.

7. They continued with the birthday celebration and at some stage whilst at the dancing floor the appellant was spotted kissing a certain lady, named Y[....]. Y[....] and the appellant proceeded to the ladies room and the Respondent after some time followed them. Through his other female friend he managed to get into the ladies rooms and found the appellant and Y[....] conducting a sexual act. This is disputed by the appellant who stated that Y[....] forced herself onto the appellant whilst at the dance floor and that she, the appellant also resisted the kiss. Further that Y[....] then requested her to accompany her to the ladies room as she wanted to throw up. They both got into the cubicle, Y[....] took off her shirt and bra as she did not want to vomit on them. It is somewhat strange that she refused to kiss her but accompanied her to the ladies room and even entered the cubicle together.

8. Being aware that the respondent did see both appellant and Y[....] they immediately left the cubicle. Noting that the respondent was visibly infuriated and displayed aggressive gestures the appellant conveyed to the respondent that she will call Uber cab to take her home. The respondent objected and insisted that they drive together in his car.

9. The appellant contended in her affidavit that she opted to seat in the front seat and the respondent forced her into the back seat and slammed her head into the window of the car and in the process she suffered injuries. The respondent started throttling her and hitting her on her face. At one of the robots the appellant opened the door and attempted to run away having threatened to go to the police. The respondent forcibly dragged her

back into the car. The respondent in turn stated that he was fending off the punches and slapping from the appellant and in fact defending himself against the assault by the appellant.

10. On reaching closer to home of the appellant Z[....] who was driving them stopped and opened the back door and both the Respondent and the appellant fell on to the ground. In the process appellant sustained injuries of her lips. The respondent stated further that the appellant punched him, grabbed his necklace which was torn. The appellant states that the respondent was on top of her and at some stage kicked her on her ribs and this was only when Z[....] intervened to separate the two. When she tried running away the respondent grabbed her belt and it gotten broken and the respondent followed her and tried to tackle her down.

11. Z[....] followed them in the respondent's car. The appellant then got into the neighbor's house, borrowed neighbor's phone and called her mother who opened the gate for her. The respondent followed her into her house and collected his belongings.

12. The respondent's mother was called by the appellant's mother the following day and invited her over to resolve the problem. The respondent's mother proceeded to appellant's home where they discussed the events of the previous night. The respondent was called by his mother to join them. Both parties and their mothers had discussion and ultimately the two were requested by their mothers to go outside and discuss their issues between themselves.

13. The appellant proceeded on 14 May 2019 and applied for a protection order against the respondent. The delay in reporting was due to the reluctance pursuant to the death threats made by the respondent if she reported the case. The appellant believed such threats especially as the respondent had another pending criminal case of assault at the time. The appellant ultimately summoned up courage to proceed and applied for the protection order. The appellant presented photos depicting injuries sustained on the eventful night of 10 May 2019 and also WhatsApp messages exchanged between appellant's father and the respondent in terms of which the respondent apologized for what transpired on the night of 10 May 2019. An interim order was duly granted with the return day being on 2 July 2019.

14. The legal representatives of both parties made oral representation before the magistrate court. The appellant's legal representative contended that section 6 (2) of the Domestic Violence Act enjoins the presiding officer to confirm the interim order if an balance of probabilities the presiding officer is persuaded that there was indeed domestic violence committed against the appellant. The appellant's legal representative in the process referred the court to the photos which were presented by the appellant and argued that with that evidence it is clear than an act of domestic violence was accordingly committed.

15. The respondent's attorney on the other hand argued that this was just an incident of drunken youngsters misbehaving. Both parties in the process suffered some bruises. If there was any possibility of threats the appellant could not have agreed to be with the respondent in the absence of any other party. They both had a cordial discussion and agreed to go separate ways at the meeting which took place at the appellant' home on 11

May 2019. In view of the relationship having terminated, so argued the respondent's Attorney, there was therefore no need for an order to be confirmed.

16. The magistrate held that this was just a fight between the two youngsters who were under drunken stupor and there is no justifiable basis to confirm the interim order. Based on the facts presented before him it did not appear that there was a need to interdict the respondent as the parties are no longer involved and there is no possibility of any interaction between them. The magistrate whilst appreciating the importance of the Domestic Violence Act stated that the Family Violence Court cannot replace the criminal courts and this matter was more suited to a criminal court. In his conclusion the magistrate stated, strangely so, that it is not always the case that the act of violence should constitute domestic violence further that in his view had the respondent seriously intended to inflict injuries such injuries would have been serious regard had to the fact that the respondent was a big man and the appellant was tiny. In his understanding the question was whether "a person need protection and in this instance he does not feel that the appellant need protection from the respondent.

Before this court

17. This court dispensed with the requirement for oral arguments in terms of the directives of the court. The appellant's heads of argument referred to the injuries which were inflicted and specifically the following, that the respondent slammed the appellant's head, appellant attempted to escape and was thrown back into the car and the respondent climbed on top of her and straggled her, her shirt was torn and she was also kicked on her ribs. The photos were part of the record and depicted the appellant's injuries. The WhatsApp messages also demonstrated that the respondent did apologize

to the appellant's father. The appellant's representative further contended in the papers before the court that the magistrate erred and misdirected himself in the conclusion that the test is to determine possibility of future violence whereas the section of the Act clearly requires of the presiding officer to confirm the interim order in instances where a finding on balance of probabilities showed that an act of violence was committed. Further that the reasoning that it was a once off drunken incident and the injuries would have been serious had the respondent really wanted to assault the appellant should be frowned upon as flying in the face of the ethos of the Act.

18. The respondent's counsel contended in the heads of argument that it is questionable why the appellant needs a final order as there were no previous repeated history of abuse and further that the parties' intimate relationship has ended. He further submitted that this incident was preceded by a consumption of a copious amounts of alcohol. He agreed with the magistrate that though there were bruises and the injuries would have been serious if the appellant was intend at injuring her. If the appellant was severely abused she could have laid a criminal charge. Further that the evidence presented by the appellant does not suggest that there is a continual threat or even reasonable apprehension of harm.

19. Section 6 (4) of the Act is so glaring that the court should consider whether on a balance of probabilities that act of domestic violence as committed. All parties including the appellant are at *ad idem* that the appellant sustained injuries/bruises except that the presiding officer and respondent harbours the belief that the injuries should have been serious to warrant confirmation of the interim order alternatively that the parties were just drunk. Further that there are no chances of future violence since the parties are no longer

in a relationship. These pointers are irrelevant for the purpose of what is envisaged in section 6 (4) of the Act. The question should be whether was there an act of violence visited on to the appellant? If the answer is in the affirmative the order must be confirmed. Being in a drunken stupor cannot be invoked as a refuge to justify violence by one party to the other and simultaneously less serious injuries will not assist the respondent to run away with the proverbial murder. It is palpable from the records that the respondent was angered by the appellant who appears to have been cheating with Y[....]. This is what infuriated the respondent which preceded the acrimonious fight with the appellant. It is also obviously incredible that the appellant who claims to have resisted the kissing advance from Y[....] but nevertheless accompanied her into the ladies room and further proceeded into the cubicle with her. This does not however give the respondent or any partner the right to inflict injuries to the appellant or any other person. Being angry or disappointed cannot be used as an excuse for being violent.

20. The conclusion by the magistrate that the appellant should have been seriously injuries to deserve of the court protection demonstrate an utter failure to appreciate the ethos underlying the *raison d'tre* of the Act which has as its prelude being to "To afford the victim of domestic violence the maximum protection from domestic abuse that the law can provide". This Act, as was reaffirmed by Molahlehi J in KS v AM[1] that it was promulgated by the parliament as enjoined to ensure that guaranteed right enshrined in section 12[2] of the Constitution is protected.

[1] A3032/2016, at para 29,

[2] Section 9 provides for the equality, full right to quality protection and the benefit of the law.
Section 12 provides everyone with the right to freedom and security of the person including being free from all forms of violence from either public or private

21. The judgment by the magistrate present an epitome of a failure to acknowledge the scourge of violence visited to women and it also engender the patriarchal tendencies which practice is inimical to the democratic principles.

22. It is acknowledged that ordinarily the appeal court should adopt a slow approach to interfere with the decision of the court a quo, except in instances where such a discretion was exercised capriciously. The constitutional court stated in *Trencom Construction Pty Ltd v Industrial Development Corporation of South Africa Limited and Another*[1] that interference must be preceded by court's conclusion that it was not exercised "*judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or 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*." The magistrate was clearly misdirected in believing that the protection order is available to only those who still have an intimate relationship or those who are seriously injured (and not mere bruises) or those who were not drunk at the time when violated. The judgment is left to stand will contribute to the abuse of women and encourage drunken big man to assault without leaving visible injuries or just inflict minor injuries. In the circumstances interference is warranted and the judgment should be set aside.

Costs

23. There appears no reason why the costs should not follow the cause.

24. I therefore make the following order:

a. That the appeal is upheld;

[1] 2015 (5) SA 245 CC

b. The magistrate decision is replaced with the following:

The respondent is ordered not to commit acts of domestic violence namely, physical or verbal or threats of violence and ordered not to enter the appellant's residence at [….]"

c. The respondent is ordered to pay the costs including costs of appeal.

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NOKO MV
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

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SENYATSI M.L
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

FOR THE APPELLANT	:	ADV BD STEVENS
INSTRUCTED BY	:	HESSELINK KONIG INCORPORATED
FOR THE RESPONDENT	:	AD G OLWAGEN-MEYER
INSTRUCTED BY	:	RIAAN LOUW ATTORNEYS
DATE OF HEARING	:	14 APRIL 2020
DATE OF JUDGMENT	**:**	10 DECEMBER 2020