IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR72/2018

In the matter between:

K[….] V[….] Appellant

and

W[….] V[….] Respondent

ORDER

Having considered the matter and after hearing counsel, the following order is made:

1. The appellant's appeal is dismissed with costs.

APPEAL JUDGMENT

Masipa J (Chetty J concurring)

Introduction

[1] The appellant appeals against the judgment of the court a quo handed down on 17 August 2016 in the Durban Magistrate's Court which confirmed an interim order issued in terms of the Domestic Violence Act.

The Facts

[2] The respondent approached the Magistrate's Court for an interim protection order against the appellant who is her husband. In her application, she highlighted the abuse she experienced, including physical, mental and emotional abuse According to the respondent the appellant had threatened both her and their baby and forcefully removed them from their marital home. When she resisted this, he assaulted her.

[3] It is apparent from the record that the relationship between the appellant and the respondent was volatile. He had been evicted from her parental home in [….] on numerous occasions prior to the obtaining of the order appealed against. Pursuant to the last eviction, the appellant secured accommodation in a block of flats at the Bluff which was close to his work and that of the respondent.

[4] After the appellant's relocation to the Bluff, the respondent continued to live in Phoenix with their minor child. Since the child was small and still being breastfed, the respondent took her to a day care centre near her workplace. It became strenuous for the respondent and the child to travel daily from Phoenix to the Bluff since they had to leave early in the morning and drive through heavy traffic. Despite her previous problems with the appellant, when he offered that they move in with him, she accepted this. This was during June 2016. While the parties initially lived as husband and wife, it appears that the respondent soon moved into a separate bedroom.

[5] On or about 5 August 2016, an argument ensued between the parties as a result of the respondent accessing the appellant's bank account and effecting certain transactions from the account. It is common cause that the appellant had previously provided the respondent with his banking login credentials. The appellant contends however that he had not authorised her to effect any payment on that day. The respondent contended that the appellant owed her monies for expenses incurred

when the baby was born and while they lived in Phoenix. Also, that they had agreed to share the expenses of the child equally, which the appellant was not doing. In view of this and on this particular day, she decided to access his bank account electronically and effected some payments which included the child's day care fees.

[6] The appellant confronted the respondent about this and following her response, he left their apartment. There was no further communication between them and the next day, he left for his dayshift. The respondent took the child and went to her parental home and returned on 10 August 2016.

[7] On their return, the respondent took the child to the day care centre and went to the apartment to collect her laptop before going to work. Upon arrival at the apartment, she noticed that her belongings were packed in boxes. She told the appellant that he had no right to evict her from the apartment. In reply, he said 'my love, I am tired' and told her that he was arranging a removal company and sending her back to Phoenix. The appellant left the apartment and the respondent followed shortly thereafter.

[8] It appears that when the appellant left, it was because he went to obtain a protection order against the respondent arising from the incident of 5 August 2016. He went to the police station and he was not assisted. He was directed to court where he obtained a protection order. He could not receive assistance from the police to serve it and returned home. On arrival at the apartment, he went to sleep as he was exhausted. The respondent returned later with the child and went into his bedroom where she started removing his items from the wardrobe.

[9] According to the appellant, since the respondent was behaving irrationally, he slapped her to put some sense into her. However, in his oral evidence, he said she threw a can of deodorant on the floor and when he woke up from the bed to restrain her from throwing his clothes to the floor; he tripped on the can and fell on her. Another version is a complete denial of any assault on the respondent which contradicts the self-defence argument raised by his counsel. The respondent retreated into the second bedroom and on her version, sat on the bed to breastfeed the child. While doing this, the appellant went into the bedroom verbally abusing her.

She retaliated and the appellant continued to assault her. He denies this assault as well. The respondent contends that the appellant forcefully removed the baby from her while she was breastfeeding. She had to beg him to return the baby to her as the baby was crying out of fear. She phoned her brother who arrived and took her to the police station.

[10] While the respondent was at the police station to lay a charge, the appellant approached her with a family friend who is also a police officer to serve a protection order on her. On her version, this was not served as the police officer was not on duty and in uniform and she left the police station and went to Phoenix. She went to court the next day to seek a protection order and was issued with an interim protection order.

[11] The terms of the interim protection order prohibited the appellant from committing domestic violence in the form of physical abuse and verbal abuse. Also, that he was not to enlist the help of another person to commit these acts. The appellant was also interdicted from entering the respondent's residence in Phoenix and not to enter her workplace. The order directed the police to accompany the respondent to collect her personal belongings from the apartment.

The issue

[12] The issue in this appeal relates to whether the decision of the court a quo in confirming the interim order was reasonable and justified.

[13] In considering whether or not to confirm the interim order, the court a quo was guided by the preamble to the Domestic Violence Act 116 of 1998 (the Act). The court also took into account the meaning of domestic violence in the Act being physical abuse, in particular emotional, verbal and psychological abuse, as it is relevant in this case.

'Where such conduct harms or may cause imminent harm to the safety, health or wellbeing of the complainant. Emotional, verbal or psychological abuse means a pattern of degrading or humiliating conduct towards a complainant including repeated insults, ridicule or name calling, repeated threats to cause emotional pain, repeated exhibits of obsessive

possessiveness or jealousy which is such as to constitute serious invasion of the complainant's privacy, liberty, integrity and security.'

The meaning of physical abuse as envisaged in the Act is as follows:
'physical abuse means any act or threatened act of physical violence towards a complainant. And 'emotional, verbal and psychological abuse' means a pattern of degrading or humiliating conduct towards a complainant, including-

(a) repeated insults, ridicule or name calling;

(b) repeated threats to cause emotional pain; or

(c) the repeated exhibition of obsessive possessiveness or jealousy, which is such as to constitute a serious invasion of the complainant's privacy, liberty, integrity or security;'

[14] The court a quo concluded that it was required to determine whether on a balance of probabilities, the evidence proved that the appellant committed domestic violence. It found that there was no dispute that there had been physical contact which was unbecoming which fell within the definition of domestic violence in the Act.

[15] It was argued before the court a quo that unlawfulness was a necessary requirement to determine whether conduct constitutes domestic violence. The court rejected this argument on the basis that there was nothing in the Act to provide for this. Consequently, it rejected an invitation by the appellant to read the requirement of unlawfulness from either the law of delict or criminal law.

[16] The court a quo found it difficult to accept that for a violent act to constitute domestic violence, unlawfulness must be found to exist. It concluded that this was not what was contemplated in the Act and the Constitution. The court found that in any event, the appellant had in his oral evidence admitted to pushing and pulling the respondent leading to her falling to the floor. This conduct it found to constitute domestic violence in the form of physical abuse. The court in confirming the interim order, found that there was insufficient evidence to conclude that there was verbal abuse and therefore discharged the order in this regard.

Submissions by Counsel

[17] It was argued by Mr *Parker*, for the appellant, that it was possible that the actions of the appellant were involuntary and that he slipped, lost his balance and fell onto the respondent. He identified the issue to be determined as being whether the appellant's action on the day can be categorised as physical abuse as required by the Act.

[18] While the Act defines physical abuse as 'any act or threatened act of physical violence towards a complainant', he argued that the proper interpretation should be, 'any act of physical violence towards a complainant or any threatened act of physical violence towards the complainant.' In my view, the distinction he makes between the definition in the Act and his interpretation is of no consequence as the result remains the same.

[19] He relied on the definition of violence in The Concise Oxford Dictionary 7 ed which defines it as 'the unlawful exercise of physical force.' Consequently, he argued that it was incumbent for the court a quo to find that the admitted action by the appellant comprised unlawful exercise of physical force. It was argued further that the findings of the court that unlawfulness was not an element required for domestic violence cases gave the phrase 'physical abuse' a far too wide interpretation.

[20] Mr *Van Reenen*, for the respondent, argued that it was incorrect to conclude that the court a quo granted the final interdict after finding that there was physical abuse. It was submitted that the court had in fact found on a balance of probabilities that the appellant's conduct constituted domestic violence. The evidence before the court was sufficient to justify its conclusion.

[21] Initially, the respondent raised an issue of the appeal having lapsed and after considering the matter, withdrew this point and accepted that proper procedures were followed. Condonation was however required in respect of the appellant's practice note and after considering the matter and the interest of the parties and of justice, this court ruled in favour of granting condonation.

[22] Mr *Parker* submitted that the manner in which the court a quo decided on the matter took away the right of individuals to act in self-defence. He argued that the appellant was protecting his possessions and if he had done so in a public space,

there would be no consequences. It therefore was inexplicable that in a domestic environment, self-defence could not be raised. If the action was lawful by virtue of it being in self-defence, then there would be no abuse. He submitted that the respondent was the aggressor and the appellant used moderate force to protect his property. Consequently, the court erred in finding that because there was force, it followed that there was domestic violence.

[23] Mr *Van Reenen* argued that the definition of domestic violence was clear in the Act and the purpose for which the Act was promulgated was apparent from the preamble. The Act refers to domestic violence as relating to conduct that harms. It is not in the context of assault as envisaged in criminal law.

[24] It was submitted that on the appellant's version, it was improbable that he could have slipped. He accepted that he used moderate force. It could not be said that the respondent was the aggressor as he arrived home and found her belongings packed while the appellant opposed confirmations of the order on the basis that nothing transpired after the interim order was granted. There was no prejudice to the appellant if the order is confirmed as it served to prevent future harm. In support of these submissions, Mr *Van Reenen* relied on *Ndwandwe v Ndwandwe* [2012] JOL 29617 (KZP); *Trainor v S* [2003] 1 All SA 435 (SCA); and *Mnyandu v Padayachi* [2016] 4 All SA 710 (KZP).

[25] As regards the issue of unlawfulness raised by Mr *Parker*, he submitted that the Act specifically referred to harm in respect of domestic violence and that this was consistent with the finding of the court a quo. Consequently, the criminal and delictual tests were not applicable. Mr *Parker* submitted that confirmation of the order served no purpose since it sought to keep the parties away from each other which was already achieved by them living apart.

Analysis

[26] In interpreting a statute, regard is always had to the preamble, where such exists, which sets out the main objects of the Act. The aim is to ascertain the intention of the legislature. The preamble is part of the context of the Act. See: G M Cockram *Interpretation of Statutes* 3 ed Juta (1987) at 62. In *S v Mhlungu* 1995 (7)

BCLR 793 (CC) para 112, Sachs J stated the following in relation to the preamble of the 1993 Constitution:

'The preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretative value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purpose.' (Footnote omitted)

[27] While in the past this, applied in instances of ambiguity or lack of clarity, courts have pursuant to the advent of the 1996 Constitution evidenced readiness to invoke the use of preambles to legislative instruments irrespective of perceived clarity or ambiguity of the language that stood to be construed. See *Gaming Association of South Africa (KwaZulu-Natal) & others v Premier, KwaZulu-Natal, and others* (No 1) 1997 (4) SA 494 (N) at 501B and L du Plessis *Re-Interpretation of Statutes* Butterworths (2002) at 239-242. It is not surprising that the court a quo in its decision, took cognisance of the preamble to the Act in order to arrive at the correct interpretation. It is apparent from the preamble that the intention of the legislature in dealing with domestic violence matters was to apply different principles to those set out in Criminal and Delictual laws.

[28] In defining domestic violence, the Act specifically excluded the phrase 'unlawful (ness)' and referred only to conduct that 'harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant'. When the Act was enacted, the legislature was alive to the criminal and delictual principles dealing with abuse. However, in passing this Act, consideration was given to the rights protected in the Constitution more particularly, the right to equality, freedom and security of person and violence against women and children. The purpose of the Act was dealt with by the Constitutional Court in *Omar v Government of the Republic of South Africa & others (Commission for Gender Equality, Amicus Curiae)* 2006 (2) SA 289 (CC) and I align myself with the views expressed by Van der Westhuizen J in para 13, stating:

'[D]omestic violence in our society is utterly unacceptable. It causes severe psychological and social damage and there is clearly a need for an adequate legal response to it.'

[29] In *Ndwandwe* Steyn J referred to *S v Engelbrecht* 2005 (2) SACR 41 (W), where Satchwell J considered the complexities of domestic violence as follows:

'[341] I agree with the argument that the wide definition of 'domestic violence' in the DVA is unequivocal recognition by the Legislature of the complexities of domestic violence and the multitude of manifestations thereof.

[342] It must be accepted that domestic violence, in all manifestations of abuse, is intended to and may establish a pattern of coercive control over the abused woman, such control being exerted both during the instances of active or passive abuse as well as the periods that domestic violence is in abeyance. (My emphasis)'

[30] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), the court had the following to say about interpretation:

'. . .Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.' (Footnote omitted)

This was followed in *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) at 525-527.

[31] The Act introduced a wider form of protection by making reference to the word 'harm'. In the absence of this wide meaning, all that would have been achieved by the legislature would have been to introduce a law which simply added onto the delictual or criminal principles already in existence and not to achieve the purpose which this Act sought to do. What the appellant seeks to do by adding the requirement of unlawfulness is exactly this. To give this restrictive interpretation to the provisions of the Act would be to defeat the purpose for which it was passed. This was in fact concluded in *Engelbrecht* where Satchwell J held that the wide

definition of domestic violence is an unequivocal recognition by the legislature of the complexities of domestic violence and the multitude of manifestations thereof. On a consideration of the facts and the arguments submitted, I find no reason to interfere with the interpretation by the court a quo.

[32] As set out in *Coetzee v Griessel* (27576/2010) [2011] ZAWCHC 318 (24 August 2011) in determining whether or not to grant a final interdict the following requirements must all be present:

'18.1. A clear right, which the applicant has to prove on a balance of probabilities:

18.2. An act of interference, which is an act constituting an invasion of another's right; and

18.3. Proof that there is no other satisfactory remedy available to the applicant.

(See C B Prest: The Law and Practice of Interdicts Juta Law at pp42-48.)'

[33] In *Minister of Law and Order & others v Nordien & another* 1987 (2) SA 894 (A), the court held that an applicant seeking an interdict is not required to establish on a balance of probabilities that flowing from the undisputed facts, injury will follow. All he has to show is that it is reasonable to apprehend that injury will result. The test for apprehension is an objective one. The court must decide on the facts presented whether there is any basis for the entertainment of a reasonable apprehension by the applicant.

[34] On the facts, it can be concluded that the respondent's protection against physical abuse as set out in the Act evidences a clear right. This right was interfered with when the appellant assaulted her. The argument that she was the aggressor and that the appellant was acting in self-defence cannot be sustained since the test applicable is not the criminal law test. In any event, the appellant admitted that he assaulted her and said this was because she was acting irrationally. It was never his evidence before the court a quo that he acted in self-defence.

[35] There was a history of domestic violence and the respondent felt threatened by the appellant. The only security available to her was therefore the confirmation of the order as this would continue to keep stable relations between the parties. I say this because following from the provision of the interim order, no further incidents occurred. In the absence of the court order, the fact that the respondent relocated back to her parental home would be of little consequence as the appellant had in the

past followed her there and conducted himself in an intimidating or unruly manner in the presence of the respondent's elderly father.

Order

[36] In the result, the following order is made:

1. The appellant's appeal is dismissed with costs.

_____

Masipa J

DETAILS OF THE HEARING

Appearances:

For the Appellant:	Mr G M Parker
Instructed by:	G M Parker Attorneys
For the Respondent:	Mr C Van Reenen
Instructed by:	K Asmal Attorneys
Matter heard on:	17 May 2019
Judgment delivered:	13 September 2019