IN THE HIGH COURT OF SOUTH AFRICA
(BOPHUTHATSWANA PROVINCIAL DIVISION)

CASE NO. 1614/2007

In the matter between:

RIEK IMMELMAN APPLICANT

and

LANDROS I.W.O. MORAKE, LICHTENBURG 1ST RESPONDENT

SANDRA RIANA IMMELMAN 2ND RESPONDENT

JUDGMENT

MOGOENG JP.

INTRODUCTION

[1] This is a review application brought on an urgent basis. The Applicant seeks an order setting aside the interim order made in terms of the Domestic Violence

Act, No. 116 of 1998 ("the Act"). This judgment could have been handed down on 20 September 2007 but for the fact that my Secretary was indisposed for the whole week of 17 September 2007.

BACKGROUND

[2] Applicant and the second Respondent are husband and wife, married out of community of property. A minor child was born out of this marriage relationship.

[3] The first Respondent is the Magistrate who made the order which is the subject-matter of this application.

[4] The relationship between the Applicant and the second Respondent is strained. Divorce action has been instituted and this matter is somehow related to that action.

[5] On 16 July 2007 the second Respondent applied for an interim protection order in terms of s 4(1) of the Act. The grounds relied on by the second Respondent for the application were that the Applicant wanted the baby to be taken to the dam in cold weather; that could make her ill; such conduct also amounts to emotional and psychological abuse; the second Respondent needed maintenance for herself and for the baby; and she wanted the Mercedes Benz C240 to be returned to her. This application was eventually withdrawn, but the right to reopen the case was reserved. The withdrawal was influenced by the discussions which were then taking place about the maintenance of the second Respondent and the child as well as the possible return of the vehicle on 10

August 2007. That maintenance case was postponed to 02 November 2007 without any mutually acceptable position having been reached.

[6] As a result of the parties' failure to reach an acceptable agreement on maintenance, the second Respondent saw herself as someone who was facing an economic crisis in view of the desperate financial situation in which she found herself. Consequently, on the same 10 August 2007 the previously withdrawn application in terms of s 4 (1) of the Act was reopened under the same file and reference number. An application was made for essentially the same order as before, which would be effective immediately. The first Respondent made an order as prayed for.

[7] The first Respondent also made an order authorising the issue of the warrant for the arrest of the Applicant, which was suspended pending compliance with it. Armed with the order and the warrant of arrest, the second Respondent and her attorney approached the police, gave them the documents so that they could serve them on the Applicant.

[8] When the police, the second Respondent and her attorney eventually found the Applicant, after looking for him for some time, he not only refused to be served with the papers but he also made it clear that he would not comply with the interim order. As a result the police, the second Respondent and her attorney returned to the police station and made a statement to the effect that the Applicant has refused to comply with the court order. The first Respondent was approached with the aforegoing statements and he authorised the immediate execution of the warrant for the arrest of the Applicant.

[9] The warrant of arrest was taken to the police and the Applicant was then arrested and locked up. He has since been released on bail.

[10] As a result of his unpleasant experience, the Applicant brought this review application on a semi-urgent basis. The grounds on which the review is based follow below.

THE ISSUES

[11] The order granted against the Applicant on 10 August 2007 is attacked on the grounds that:

a) No prescribed application form was completed for the protection order of 10 August 2007 and no oath was administered to the second Respondent when the forms were completed on 16 July 2007;

b) The interim order was not served on the Applicant; and

c) The Magistrate acted ***ultra vires*** his powers and in any event was ***functus officio*** when he issued the warrant of arrest as a result of which the Applicant was arrested and detained.

[12] The second Respondent on the other hand took three points in ***limine***:

a) Urgency was not proved;

b) The Applicant ought to have anticipated the return date of the interim protection order; and

c) The matter is pending in the Magistrate's Court and the High Court will only interfere with matters pending in the lower courts under exceptional circumstances.

I will now deal with the above points in ***limine*** as set out below.

POINTS IN *LIMINE*

Urgency and the anticipation of the return date

[13] It is both convenient and logical to discuss the questions of urgency and the anticipation of the return date, together.

[14] The interim protection order and the warrant of arrest which are the subject-matter of this application, were issued and put into operation on 10 August 2007. That was some 26 days before this application was heard on 06 September 2007. The papers were filed of record on 04 September 2007 which was some 24 days from 10 August 2007.

[15] The reasons advanced for urgency are that the Applicant is not prepared to give a vehicle to the second Respondent, since that must be part of the settlement discussions in the divorce action. He also says that he cannot afford to pay an amount of R3 500.00 for the accommodation of the second Respondent and their daughter and has, therefore, not made any payment in that regard. For these reasons, so contends the Applicant, the second Respondent may well adopt the attitude that the Applicant is acting in contravention of his obligations in terms of the interim order issued on 10 August 2007. The fear is that that

may result in the Applicant being arrested in terms of s 17(a) of the Act. He is worried that he is at risk of, as he puts it, again being irregularly arrested and detained. These are the grounds for the semi-urgent application to prevent any further violation of the Applicant's right to liberty.

[16] The aforegoing must be considered with reference to the provisions of s 5(5) of the Act, which provides that:

> "The return dates referred to in subsections (3)(a) and (4) may not be less than 10 days after service has been effected upon the respondent. **Provided that the return date referred to in subsection (3)(a) may be anticipated by the respondent upon not less than 24 hours' written notice to the complainant and the court**"
> (My emphasis)

The return date may be anticipated by the Respondent on at least 24 hours written notice.

[17] The Lawmaker has provided an exceedingly cheap and most expeditious way imaginable for the Applicant in this matter to have followed in order to demonstrate to the Magistrate why (i) the interim protection order and the warrant of arrest that landed him in prison, should not have been issued in the first place; (ii) why the interim order should not be confirmed; and (iii) why the warrant for his arrest should accordingly be withdrawn or cancelled. No explanation has been forthcoming regarding why he had to wait for more than 10 days before affidavits were even settled.

[18] On the facts before me, I am satisfied that a case has not been made out for urgency. The Applicant expressed his unwillingness or inability to make the vehicle available to the second Respondent and his inability to pay the amount

of R3 500.00 to the second Respondent in terms of the Court order on 10 August 2007. It is not as if the Applicant has just realised that he does not intend to comply with the interim order. Since his intention to disregard the interim protection order is the basis for the urgency, it defies logic that the matter should be considered to be any more urgent on 06 September 2007 than it was on 10 August 2007 when he was arrested and detained. It is extremely difficult to understand where the urgency is.

[19] Even if I am wrong in finding that this application is not urgent at all, s 5(5) of the Act is the remedy immediately available to the Applicant without any need to make out a case for urgency. All he should have done was to give written notice to the second Respondent of not less than 24 hours, that the return date of 17 September 2007 be anticipated. He chose a more expensive and cumbersome route. The second Respondent has succeeded to show that this matter is not urgent at all.

Should the High Court interfere?

[20] Ms Zwiegelaar, for the Applicant, submitted that the anticipation of the return date was not an appropriate remedy for the Applicant, because the first Respondent has committed irregularities which he cannot correct. Only this Court can give the Applicant the relief that he seeks. Mr Ackerman, for the second Respondent, on the other hand contended that the Magistrate's Court was the best forum to consider the relief sought by the Applicant. He further submitted that the High Court is reluctant to interfere in proceedings which are

pending in the lower Court, and would only do so under exceptional circumstances. He placed reliance on the following dictum in the case of *Walhaus v Additional Magistrate, Johannesburg* 1959 (3) SA 113 (A) at 119H to 120A–B:

> "It is true that, by virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may, in a proper case, grant relief–by way of review, interdict, or *mandamus*–against the decision of a magistrate's court given before conviction. (See *Ellis v. Visser and Another*, 1956 (2) S.A. 117 (W), and *R. v. Marais*, 1959 (1) S.A. 98 (T), where most of the decisions are collated). It is impracticable to attempt any precise definition of the ambit of this power; for each case must depend upon its own circumstances. The learned authors of *Gardiner and Lansdown* (6th ed., vol. I p. 750) state:
>
> > 'While a superior court having jurisdiction in review or appeal will be slow to exercise any power, whether by *mandamus* or otherwise, upon the interminated course of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained. . . . In general, however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available.'
> >
> "

The question is whether this is a proper case for the interference of this Court.

[21] Applicant's case is that an oath was not administered to the second Respondent for the purpose of obtaining the interim protection order in consequence of which he was arrested and detained. The second Respondent has pointed out that her application of 16 July 2007 for the interim protection order was relied on and the same file and reference number used when she applied for a similar order on 10 August 2007. The last page of the prescribed form (page 9) is missing from the application of 16 July 2007. As a layperson, she does not even remember whether or not an oath was administered to her

on 16 July 2007. I may add that it is not known whether oral evidence was led under oath on 10 August 2007 or not. The golden rule for applications is that he who alleges must prove. The Applicant chose to bring a rule 53 application and still not require of the decision-maker in the Court *a quo*, the Magistrate, to make available to the Registrar and eventually to the parties and to the Court, the record of the proceedings which culminated in the decisions that have aggrieved him. He now seeks to exploit the product of his own deficient preparation to his advantage. He should have ensured that the entire record of the proceedings was placed before this Court by simply asking the first Respondent to do so. He failed to do so. Crucial information seems to be missing, apparently as a consequence of the Applicant's failure to fully comply with the provisions of Rule 53. He cannot, therefore, be heard to be blaming anybody for the incomplete record, but himself.

[22] Assuming though that this was a complete record which shows that no oath or affirmation was administered to the second Respondent and that no case was made for the granting of the interim order, it is not clear to me, why counsel for the Applicant contends that the Court *a quo* is somehow debarred from entertaining the matter. All that the Applicant had to do was bring the mistakes made to the Court as the grounds for the setting aside of the interim protection order. This attempt to cloud the issues in the name of irregularities cannot be countenanced. It is even more difficult to consider the issue of the oath when the Applicant either chose not to or neglected to make the record, which could have settled this issue, available.

[23] This Court should only interfere in proceedings pending before the Magistrate's

Court sparingly and only when grave injustice is likely to result from its refusal to interfere. The same applies to the question whether the first Respondent had the authority to authorise the warrant or the arrest of the Applicant. It is a question of the Applicant or his legal representative looking at the Act, s 8 in particular, and making such submissions with respect to the question whether a Magistrate has the statutory power to issue a warrant or whether that power is vested in a police officer, as Ms Zwiegelaar submitted. Section 8(1) and (2) of the Act provides that:

> "8. **Warrant of arrest upon issuing of protection order**–
>
> (1) Whenever a court issues a protection order, the court must make an order–
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> (a) authorising the issue of a warrant for the arrest of the respondent, in the prescribed form; and
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> (b) suspending the execution of such a warrant subject to compliance with any prohibition, condition, obligation or order imposed in terms of section 7.
>
> (2) The warrant referred to in subsection (1)(a) remains in force unless the protection order is set aside, or it is cancelled after execution."

The point taken by Ms Zwiegelaar is that s 8(4) and (5) vests the power to issue the warrant of arrest that would actually effectuate the arrest, in the police officers. The Magistrate, so runs the argument, is ***functus officio*** after issuing the warrant of arrest referred to in s 8(1) and (2) of the Act. A superficial reading of s 8 may well seem to support this submission. Section 8(4) and (5) must, however, be interpreted and understood within the context in which it is used in this legislation. This legislation was enacted to facilitate the victim's access to protection 24 hours per day. Consequently, it was ensured that the

fact that there might be no Magistrate readily available at any hour of the day should never be a bar to obtaining an urgently and desperately needed protection from the police. For this reason, the very people with the capacity to offer protection were given the power to issue warrants of arrest which they ordinarily do not have the power to issue. Under normal circumstances, the power and authority to issue, cancel and re-issue the warrant of arrest vests in judicial officers. They can never be ***functus officio*** and it can never be an irregularity for them to issue another warrant of arrest. Section 8(1) and (2) conveys a clear message that it is the Court that issues the warrant, which is then suspended and come into operation if a person behaves in the manner that the Applicant in this matter is said to have behaved himself.

[24] Mr Ackerman submitted that in fact the issue of the further or second warrant never arises. It is merely a question of the same warrant of arrest that would have been authorised in terms of s 8(1) being put in operation. I agree. How else and when is that suspended warrant of arrest ever put into operation and who does so? It appears that the Magistrate authorises that a warrant be issued and the Clerk of the Court or the police officer then issues a warrant as permitted or authorised by the Magistrate. Nothing forbids the Magistrate from issuing the warrant that he or she himself or herself has authorised others to issue. In sum, there is no substance in the Applicant's interpretation of s 8 of the Act. Such an interpretation would in fact give rise to an absurdity. For the purpose of this case, it should, therefore, not matter whether the correct position is that the Magistrate actually issues the warrant of arrest or merely authorises others to issue it when the need arises. The original authority is vested in the Magistrate and not the police officer. The police officer only exercises delegated authority.

[25] There is, therefore, no satisfactory explanation for the Applicant's failure to allow the proceedings in the Court *a quo* to run their normal course, and only thereafter if the need arose, to either note an appeal or launch a review application. There is absolutely nothing to suggest that the Applicant would not be able to obtain any relief that he might be entitled to in the Court *a quo*.

[26] In the result, the application is not urgent, but even if it was, nothing stopped the Applicant from anticipating the return date of the interim protection order. No sound reason was advanced as to why this Court should interfere in the proceedings that are pending in the Magistrate's Court. I am satisfied that there are no exceptional circumstances occasioned by whatever illegality or gross irregularity there might be, which makes it impossible for the Applicant to get the fairness and justice that he needs from the Court *a quo*, therefore justifying this Court's interference.

[27] In the view I take of this matter, it will not be necessary to deal with any of the issues raised by the Applicant in support of this application. It is also not advisable to address them for it is the Court *a quo* that is seized with those issues and should be allowed to consider and pronounce itself upon them. The application then stands to be dismissed.

ORDER

[28] Accordingly, the application is dismissed with costs.

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M.T.R. MOGOENG
JUDGE PRESIDENT OF THE HIGH COURT

APPEARANCES

DATE OF HEARING	: 06 SEPTEMBER 2007
DATE OF JUDGMENT	: 27 SEPTEMBER 2007
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ATTORNEYS FOR APPLICANT	: NIENABER & WISSING (Instructed by HANNES VAN WYK INC.)
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