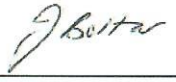
IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION JOHANNESBURG)

Case Number: A3111/2019

REPORTABLE	NO
OF INTEREST TO OTHER JUDGES	NO
REVISED	20 OCTOBER 2020
SIGNATURE	

In the matter between:

FISHER, MARY Appellant

And

SIBISI, THANDEKILE NOZIPHO Respondent

JUDGMENT

HEARD REMOTELY VIA TEAMS PLATFORM

JT BOLTAR AJ (Vally J concurring)

INTRODUCTION

1. On 21 August 2019 the Respondent (Ms Sibisi) applied for a protection order against the Appellant (Ms Fisher), in terms of section 2(1) of the Protection from Harassment Act, 17 of 2011.

2. The background to the application is as follows: The Appellant alleged that the Respondent owed her money for goods, which the Appellant attempted to recover by initiating proceedings in the Small Claims Court. On 23 May 2019, the Appellant went to the Respondent's business premises to serve the Small Claims Court summons on the Respondent and she alleges that she was physically assaulted by the Respondent on that occasion. This is disputed by the Respondent, who alleges that it was she who was in fact physically assaulted by the Appellant. The only significant evidence produced in the court *a quo* in respect of these contradictory allegations is a medico-legal examination report by a health care practitioner dated 23 May 2019, showing that on that date the Appellant opened a physical assault criminal case against the Respondent and that the Appellant had physical injuries.

3. On 19 August 2019, the Small Claims Court found that it did not have jurisdiction to deal with the dispute between the Appellant and the Respondent. On 20 August 2019, the Appellant then personally served a letter of demand in respect of the alleged debt on the Respondent (who did not have a legal representative) at the Respondent's business premises. The Appellant was accompanied by members of the South African Police Service. In her letter of demand the Appellant demanded payment of the disputed amount and stated that failing such payment within a specified period, the

Appellant would bring proceedings in the Randburg Magistrates Court for that amount. The Appellant included (at the end of the letter) a place for the Respondent to sign a confirmation that she had received the letter. The Appellant also inserted the following under such confirmation:

SA. POLICE STAMP *Full Name:*

Signature of Deponent:

There was no police stamp on the letter and there was no signature or details next to the above words.

4. The Appellant testified that she was accompanied by the police because she needed protection from the Respondent. This was based on the Appellant's allegation that the Respondent had previously physically assaulted her (at the time that the Appellant served the Small Claims Court summons). The Appellant testified that she included the above reference to the SA Police in her letter because she wanted to be able to prove that the letter of demand had been served on the Respondent. This testimony accords with the fact that the Respondent herself stated in her application for the protection order that she had refused to *"sign the summons"* for the Small Claims Court when the Appellant delivered it to her.

PROTECTION ORDER

5. The Respondent's application for the protection order was based on three grounds. The first ground is the alleged assault on her by the Appellant on 23 May 2019 (when delivering the Small Claims Court summons). The second ground is the Appellant coming to her premises on 20 August 2019 and delivering the letter of demand, accompanied by the police. The third ground is that the Appellant sent an email to a mutual acquaintance of the Appellant and the Respondent, referring to the Respondent owing her money.

6. The Respondent also alleges that the Appellant telephoned employees of the Respondent and told them they would be summoned to court. This was not a ground on which the Respondent applied for the protection order. In any event, there was no evidence in respect of any such telephone calls before the court *a quo* and basic details, such as the identity of the relevant employees and when such calls allegedly occurred, do not appear from the record. For these reasons, the alleged telephone calls are not a ground for the protection order.

7. After hearing the evidence of the parties, the learned Magistrate granted the protection order, without reasons, against the Appellant. The Appellant sought reasons, but these were not forthcoming. This prompted the Appellant to approach the Chief Magistrate who

intervened and only thereafter did the learned Magistrate furnish reasons for granting the protection order. The reasons are not clearly stated and appear to be summarised in the following passages:

> "*Esngaging in verbal, communication aimed at the Applicant or a related person, by any means, whether or not conversation ensues was it necessary when there is civil judgement in favour of the Respondent, No. It was not because the judgment gives the Respondent power to enforce it by following the right process, there was no need to try again to make call, go to Applicant business and send emails and even send messages to employees and more so to harass. The Respondent was simply to have used the local sheriff or debt collector. Following, watching, pursuing or accosting the Applicant or a related person, or happens to be;*
>
> *Following, watching, pursuing or accosting off the Applicant or a related person, or happens to be was not necessary either because it causes more problems. What Respondent needed to do was to trust the system. She approached Small claims court and was supposed to trust it to end the process. There is no court that will, just leave the winner to see to furnish, obviously it will assist to make sure the order is enforceable."* (The quote is verbatim)

8. The reasons articulated in these passages do not accord with evidence on record. The learned Magistrate is wrong to note that there was *"a civil judgement in favour of the [Appellant]"* which she took upon herself to enforce, instead of using the *"local sheriff or debt collector"*. It is common cause that the alleged harassments that occurred on 23 May 2019 and 20 August 2019 arose at a time when the Appellant was delivering a summons and letter of demand respectively. The factual error is fundamental. It was the basis upon which the order was granted. Accordingly, this finding of the court *a quo* (on which its judgment is premised) must be set aside.

THE RELEVANT CONDUCT

9. As confirmed by the court in *Mnyandu v Padayachi*[1] the Respondent bore the onus of proving that she was entitled to the protection order because there was conduct on the Appellant's part that is *"harassment"* in terms of the Protection from Harassment Act.

10. The Court *a quo* made no finding in relation to the first ground on which the Respondent based her allegation of harassment, namely that the Appellant physically assaulted her on 23 May 2019. Although the evidence showed that on that date the Appellant opened a physical assault criminal case against the Respondent and that the Appellant had physical injuries, there was no evidence to corroborate the Respondent's allegation that *she* (the Respondent) was assaulted. The Respondent did not seek a protection order immediately after the alleged assault on 23 May 2019; such an order was only sought by her on 21 August 2019 *(the day after the Appellant served the letter of demand).* The Respondent did not discharge her onus of establishing on a balance of probabilities that she was assaulted by the Appellant on 23 May 2019. In any event, during the hearing of this appeal it was conceded on behalf of the Respondent that the alleged assault, taken in isolation, did not justify the granting of a protection order. It was contended that it was a combination of all the grounds on which the

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[1] [2016] 4 All SA 110 (KZP) at para [30].

Respondent based her allegation of *"harassment"* that justified such an order.

11. A further ground on which the Respondent based her allegation of *"harassment"* was that the Appellant came to her premises on 20 August 2019 and delivered the letter of demand, accompanied by the police. The question arises as to whether that conduct is *"harassment"* as defined in the Act. The relevant part of the definition reads:

> ***"harassment"*** *means directly or indirectly engaging in conduct that the respondent knows or ought to know—*
>
> *"(a) causes harm or inspires the reasonable belief that harm may be caused to the complainant ... by unreasonably -*
>
> *(i) following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;*
>
> *(ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or*
>
> *(iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person ..."*

12. In order for the Appellant's actions to be *"harassment"* they must have been *"unreasonable"*. They must have also been actions which the Appellant knew or ought to have known would inspire a *"reasonable belief"* on the Respondent's part that *"harm may be caused"* to her.

13. The serving of a letter of demand by the Appellant on the Respondent was not *"unreasonable"*, irrespective of whether the Appellant was correct in alleging that the Respondent was indebted to her. The Appellant's allegation that she was physically assaulted when previously delivering a summons to the Respondent was corroborated by documentary evidence (the medico-legal report). It was consequently also not *"unreasonable"* for the Appellant to be accompanied by police officers when delivering her letter of demand to the Respondent.

14. The fact that the Appellant inserted (at the bottom of her letter) a place for the police to stamp and sign it was not *"unreasonable"* when considered in the context of the Appellant's explanation that she wanted to be able to prove service in circumstances where the Respondent had previously refused to sign for the delivery of the Small Claims Court summons. It may well have been unnecessary for the Appellant to have included the insertion in her letter, but that does not render it *"unreasonable"*. The inclusion caused no *"harm"* to the Respondent. Nor could it have inspired *"the reasonable belief that harm may be caused"* to the Respondent.

15. Therefore, in my view, the Appellant's conduct in serving the letter of demand did not constitute *"harassment"* as defined in the Act. This is irrespective of whether each ground on which the Respondent based

her allegation of *"harassment"* is considered in isolation, or together with any of the other grounds.

16. During the hearing of this appeal it was contended that the debt claimed by the Appellant in the Small Claims Court summons and letter of demand has now been settled, thus making it unnecessary for the Appellant to attend at the premises of the Respondent, in which case the protection order is neither prejudicial to the Appellant nor does it impede the Appellant in any way. It should therefore be allowed to stand. I disagree. The protection order is certainly prejudicial to the Appellant: it damages her reputation and has resulted in a warrant of arrest being issued against her. Further, if there is no fear of her visiting upon the premises of the Respondent to serve any documents relating to the debt then there is no need for the protection order.

17. The only remaining ground on which the Respondent based her allegation of *"harassment"* was that the Appellant sent an email to a mutual acquaintance of the parties. In relation to that email, as stated in *Mnyandu*:[2]

> *"Given the comprehensive ambit of the Act, it is essential that a consistent approach be applied to the evaluation of the conduct complained of, although the factual determination will depend on the circumstances under or context within which the alleged "harassment"*

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[2] Supra at para [44].

occurred. If the conduct against which protection is offered by the Act were to be construed too widely, the consequence would be a plethora of applications premised on conduct not contemplated by the Act. On the other hand, too restrictive or narrow a construal may unduly compromise the objectives of the Act and the constitutional protection it offers. Therefore, the interpretation of the term "harassment" as defined in the Act, is significant."

18. In that case, the court held that even though the appellant's conduct in sending an email may have been unreasonable and the contents of the email may have been untrue, it was not *"objectively oppressive"* and lacked *"the gravity to constitute harassment"*.[3] This was on the basis that:

> *"the offence of harassment is not merely constituted by a course of conduct that is oppressive and unreasonable ... the contemplated harm is serious fear, alarm and distress. The legal test is always an objective one: the conduct is calculated in an objective sense to cause alarm or distress, and is objectively judged to be oppressive and unacceptable."*[4]

19. Judged objectively, the Appellant's email ought not to have caused any serious fear, alarm or distress. It may have caused the Respondent to feel embarrassed, upset and/or humiliated, but that is not of sufficient gravity to constitute harassment (whether considered in isolation or together with another ground or grounds on which the Respondent based her allegation of *"harassment"*).

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[3] At paras [69] – [71].

[4] At para [65].

20. Therefore, the facts of this matter do not sustain a finding that any conduct of the Appellant constitutes *"harassment"* as defined in the Act. For this reason the appeal should succeed.

21. In its notice of appeal, the Appellant included grounds of review set out in the Promotion of Administrative Justice Act, 3 of 2000. In the light of my finding above there is no need to engage with this issue.

22. Accordingly, I propose the following order be made:

22.1 The protection order issued on 23 September 2019 is set aside.

22.2 There is no order as to costs.

JT BOLTAR AJ

I agree and it is so ordered.

Vally J

Date of Hearing: 19 October 2020
Judgment Delivered: 21 October 2020

On behalf of the Appellant: In person
On behalf of the Respondent: N Mthethwa from AA Solwandle Attorneys