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

Case number: A3117/2021

REPORTABLE: **YES**
OF INTEREST TO OTHER JUDGES: **YES**
20 APRIL 2022

In the matter between:

POTTAS, RUDI Appellant

and

PLATH, SHAUN Respondent

JUDGMENT

[1] This appeal revolves around the question whether a court may dismiss an *ex parte* application for a protection order against harassment launched in terms of section 2(1) of the Protection from Harassment Act 17 of 2011 ("the Act") without the application having been considered on a return date. The answer is: No.

[2] The Act provides in relevant part:

> "1. (1) In this Act, unless the context indicates otherwise –
>
> …

‘complainant’ means any person who alleges that he or she is being subjected to harassment;

‘court’ means any magistrate’s court for a district referred to in the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944);

…

‘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) …

(ii) engaging in verbal, electronic or any other communication aimed at the complainant …, by any means, whether or not conversation ensues; or

(iii) …

…

‘harm’ means any mental, psychological, physical or economic harm;

…

‘respondent’ means –

(*a*) any person against whom proceedings are instituted in terms of this Act; and

(*b*) …

…

2. (1) A complainant may in the prescribed manner apply to the court for a protection order against harassment.

…

(6) Supporting affidavits by persons who have knowledge of the matter concerned may accompany the application.

(7) The application and affidavits must be lodged with the clerk of the court who must immediately submit the application and affidavits to the court.

3. (1) 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.

(2) If the court is satisfied that there is *prima facie* evidence that –

(*a*) the respondent is engaging or has engaged in harassment;

(*b*) harm is being or may be suffered by the complainant … as a result of that conduct if a protection order is not issued immediately; and

(*c*) 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,

the court must, notwithstanding the fact that the respondent has not been given notice of the proceedings referred to in subsection (1), issue an interim protection order against the respondent, in the prescribed manner.

(3) (*a*) Upon the issuing of an interim protection order the court must direct that the interim protection order be served on the respondent in the prescribed manner by the clerk of the court, sheriff or peace officer identified by the court.

(*b*) A copy of the application referred to in section 2(1) and the record of any evidence noted in terms of subsection (1) must be served on the respondent together with the interim protection order in the prescribed manner.

(*c*) An interim protection order must call on the respondent to show cause on the return date specified in the order why the interim protection order should not be made final.

(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 a 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.

(5) The return dates referred to in subsections (3)(*c*) and (4) may not be less than 10 days after service has been effected on the respondent, but a return date referred to in subsection (3)(*c*) may be anticipated by the respondent on not less than 24 hours' written notice to the complainant and the court.

…

9. (1) If the respondent does not appear on a return date referred to in section 3(3) or (4), and if the court is satisfied that –

(*a*) proper service has been effected on the respondent; and

(*b*) the application contains *prima facie* evidence that the respondent has engaged or is engaging in harassment,

the court must issue a protection order in the prescribed form.

(2) If the respondent appears on the return date and opposes 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 3(1); and

(*b*) consider any further affidavits or oral evidence as it may direct, which must form part of the record of proceedings.

…

(4) Subject to subsection (5), the court must, after a hearing as provided for in subsection (2), issue a protection order in the prescribed form if it finds, on a balance of probabilities, that the respondent has engaged or is engaging in harassment."

[3] On 28 July 2021, the Appellant (who is an attorney) applied *ex parte* in the prescribed manner to the Magistrate's Court for the District of Randburg for a protection order against harassment in terms of section 2(1) of the Act. That application ("the application") was accompanied by a supporting affidavit deposed to by the Appellant.

The alleged acts of harassment were set out in the supporting affidavit as follows in relevant part:

> "CURRENT SITUATION
>
> 13. … [T]he Respondent … persists in contacting me telephonically on a daily basis.
>
> 14. During the period 20 July 2021 – 27 July 2021, the Respondent has attempted to call me as follows:
>
> 14.1 20 July 2021 – 28 calls
>
> 14.2 22 July 2021 – 68 calls
>
> 14.3 23 July 2021 – 17 calls
>
> 14.4 26 July 2021 – 167 calls
>
> 14.5 27 July 2021 – 68 calls
>
> 15. …
>
> 16. On one or two occasions, I would answer the call. The Respondent would then not speak or engage in any type of conversation and simply remain silent. I humbly submit that such conduct is a clear indication of the Respondent's stratagem to harass me with continuous phone calls.
>
> 17. The aforementioned is simply a summary of the calls over the last few days. The harassing conduct of the Respondent has continued for may months. The position has now become so intolerable that I require the assistance of the Honourable Court.

18. On 26 July 2021, I again requested the Respondent to cease from harassing me ... Notwithstanding my request and subsequent to my request, I have received 68 calls.

PREJUDICE

19. I am unable to conduct consultations as my phone keeps ringing from the Respondent's incessant calls.

20. My battery life on my phone is drained prematurely from the Respondent's continuous calls.

21. I am unable to send messages to clients as the calls interrupt the process and causes frustration and delays.

CONCLUSION

22. The Respondent has illustrated his harassing conduct by continuously attempting to contact me telephonically.

23. In conclusion, I humbly pray that the Honourable Court orders the Respondent to refrain from:

23.1 Contacting me via telephone or whatsapp whether calling or dispatching messages.

24. I humbly request the above Honourable Court to grant a protection order against the Respondent as prayed for."

[4] On the same day, i.e. 28 July 2021, an additional magistrate at the Randburg Magistrate's Court wrote this query on the court file containing the application:

"Q – I don't understand why the applicant cannot resolve the matter by simply blocking the Respondent's number. Please explain."

[5] On 28 July 2021, the Appellant filed the following written response to the magistrate's query:

"1. We refer to the above matter and to the query raised … when considering the ex parte application, to wit:

I don't understand why the applicant cannot resolve the matter by simply blocking the Respondent's number.

2. First and foremost, there exists no rule, regulation or section in any Act which grants a presiding officer the authority to raise a query in respect of an ex parte application in terms of the Domestic Violence Act or The Protection from Harassment Act ('the Act').

3. The Act is clear in that section 3 stipulates what guidelines a Court ought to follow, that being, *inter alia*, is there prima facie evidence that the Respondent has engaged in harassment. If the answer is affirmative, then the Court should grant an interim order as prayed for. (The Founding Affidavit clearly sets out the harassing conduct of the Respondent – 167 phone calls in a single day as example)

4. A Court cannot, with respect, suggest in what manner an Applicant should resolve the impasse. The Court should simply ascertain whether the Respondent has engaged in harassing conduct or not.

5. Notwithstanding the above, there exists no duty on an Applicant to take any preventative steps in order to curtail the harassing conduct of a Respondent or perpetrator. …

6. … There exists no duty on a victim to mitigate or stop the harassing conduct of a perpetrator.

7. Should this be the position, each and every matter would be resolved on the basis that the victim can simply mitigate or prevent the wrongful conduct of a perpetrator. Moreover, and having regard to the 'query', each and every matter (whether in terms of the Domestic Violence Act or the Protection from Harassment Act) would be resolved on the basis that the victim is being labelled as the wrongdoer and should change their conduct in order to counteract the unlawful actions of the perpetrator. Such an ideal or theory is ludicrous in the extreme and holds absolutely no water.

8. Notwithstanding the above, the Act specifically records that a court may not refuse to issue an interim order premised on the fact that there exist other legal remedies for a victim.

9. The aforementioned means that a victim cannot be deprived of an order even when there are other legal remedies available. The fact that the act refers to 'legal remedies' places a more onerous obligation on a Court. The 'query', at best, refers to another remedy which is one step below a legal remedy, being the blocking of the perpetrator's number. The act novates the 'query' by referring to 'legal remedies'. Put differently and very simply, even if there exists other remedies (not to even mention legal remedies), the court should still grant an interim order.

10. We trust the above has adequately answered the 'query'."

(Underlining appears in the original text)

[6] Two observations should be made about the above-quoted response. First, this judgment is not intended to deal with the contentions advanced by the Appellant in his response. No findings are made in respect thereof. Second, the response did not

answer the magistrate's query, but advanced contentions as to why the query was a misdirection. This fact was decisive in the outcome of the application.

[7] On 29 July 2021, the magistrate dismissed the application on the basis that the Appellant refused to answer the query. The magistrate's order reads:

> "Application dismissed
>
> Refused to comply with my query"

[8] It is apparent from the provisions of sections 3(2) and (4) of the Act that a court has two options upon considering an application for a protection order against harassment. If the court is satisfied that there is *prima facie* evidence regarding the issues contemplated in sections 3(2)(*a*), (*b*) and (*c*) of the Act, an interim protection order must be issued against the respondent and the process provided for in section 3(3) of the Act must be followed. Alternatively, if the court does not issue an interim protection order, the process provided for in section 3(4) of the Act must be followed.

[9] Section 3(1) of the Act provides that a court may, for purposes of considering an application for a protection order against harassment as soon as is reasonably possible, consider any additional evidence it deems fit, including oral evidence or evidence by affidavit, which must form part of the record of proceedings. This means that the magistrate did not err by addressing the query to the Appellant.

[10] The magistrate erred by dismissing the application without it having been considered on a return date. The Act does not provide that a court may dismiss an *ex parte* application for a protection order against harassment without it first having been considered on a return date. Quite the contrary. It is evident from the provisions of sections 3(3)(*c*) and 3(4) of the Act that a return date must be determined irrespective of whether an interim protection order is issued against the respondent in terms of section 3(2) of the Act or whether the process provided for in section 3(4) of the Act is followed. The purpose of a return date is clear. First, in terms of section 3(3)(*c*) of the Act, the

purpose of a return date is to provide the respondent with an opportunity to show cause why the interim protection order, where granted, should not be made final. Secondly, if the process provided for in section 3(4) of the Act is followed, the purpose of a return date, where an interim order was not granted, is to provide the respondent with an opportunity to show cause why a protection order should not be issued.

[11] It is only on a return date that the court may dismiss an *ex parte* application for a protection order against harassment. If the respondent does not appear on a return date, a court may dismiss an application if it is not satisfied that proper service has been effected on the respondent or if it is not satisfied that the application contains *prima facie* evidence that the respondent has engaged or is engaging in harassment. This is clear from the provisions of section 9(1) of the Act. If the respondent appears on a return date and opposes the issuing of a protection order, the court may dismiss the application if, after a hearing as provided for in section 9(2) of the Act, the court finds, on a balance of probabilities, that the respondent has not engaged or is not engaging in harassment. The provisions of section 9(4) of the Act are relevant in this regard. The court never considered the application on a return date because the magistrate dismissed it without determining a return date. As alluded to above, the magistrate erred by doing so.

[12] The Appellant cited the respondent in the application as the Respondent in this appeal. However, the Appellant failed to serve the notice of appeal on the Respondent at the time when he noted the appeal. The Appellant also failed to comply with the provisions of rule 50(4)(*a*) in that he failed to give notice to the Respondent when he applied to the registrar for the assignment of a date for the hearing of the appeal. As such, it was not surprising that the Respondent was not present when the appeal was called for its hearing. It was argued on behalf of the Appellant at the hearing of the appeal that he did not need to cite the Respondent in the appeal because the application was launched *ex parte*. In other words, since the Respondent was not a party in the application, it was not necessary or a requirement to cite him in the appeal. It is not necessary to consider the merits of these contentions in light of the order.

However, based on the Appellant's irregular conduct of this appeal, he shall not be allowed to recover any of his costs in respect of this appeal from the Respondent. As far as any prejudice is concerned that the Respondent might have suffered as a result of the Appellant's irregular conduct of this appeal, such prejudice should be cured by the order.

[13] In the circumstances, the following order is made:

1. The appeal is upheld.

2. The Appellant shall not recover any of his costs in respect of this appeal from the Respondent.

3. The order made by the magistrate on 29 July 2021 in the application under Randburg Magistrate's Court case number 762/2021, is set aside.

4. The application under Randburg Magistrate's Court case number 762/2021 is remitted to the Magistrate's Court for the District of Randburg to be considered *de novo* by another magistrate in terms of section 3(1) of the Protection from Harassment Act 17 of 2011.

This judgment is handed down electronically by uploading it on CaseLines.

L.J. du Bruyn
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

I agree.

G. Malindi

Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

Date heard:	12 April 2022
Judgment delivered:	21 April 2022
For the Appellant:	Ms R. Adams briefed by Pottas Attorneys
For the Respondent:	No appearance