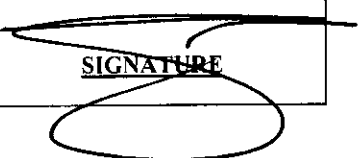


IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	<input checked="" type="checkbox"/> YES / <input checked="" type="checkbox"/> NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	<input checked="" type="checkbox"/> YES / <input checked="" type="checkbox"/> NO.
(3) REVISED.	<input type="checkbox"/>
25/8/2014 DATE	 SIGNATURE

25/8/2014

Case Number: A129/14

In the matter between:

CONSTANCE MUTALE

Appellant

and

PETER GÖLDNER

Respondent

JUDGMENT

POTTERILL J

- [1] The appellant has filed an appeal against an order granted in the Domestic Violence Court dated the 19th of November 2013. This order amended a provisional order

granted on the 8th of April 2013 which was confirmed on the 18th of April 2013. The amendment related to only paragraph 3.1.2.10 of the order granted on the 18th of April 2013 which reads as follows:

"To pay the sum of R3 000 per month to the complainant as an emergency monetary relief with effect from 30 ... (for alternative accommodation and maintenance of complainant and/or children)."

This paragraph was "cancelled" by the court *a quo*.

- [2] The first point of appeal was that the magistrate could not review its own order. If regard is had to section 10 of the Domestic Violence Act, Act 116 of 1998 (hereinafter referred to as "the Act") then this argument is bad in law. Section 10 reads as follows:

"10. Variation or setting aside of protection order

- (1) A complainant or a respondent may, upon written notice to the other party and the court concerned, apply for the variation or setting aside of a protection order referred to in section 6 in the prescribed manner.*

(2) *If the court is satisfied that good cause has been shown for the variation or setting aside of the protection order, it may issue an order to this effect: Provided that the court shall not grant such an application to the complainant unless it is satisfied that the application is made freely and voluntarily."*

It is thus trite that the Magistrate can in fact vary its own order.

[3] The second point raised was that the order was granted without the appellant present and furthermore without the Magistrate reading any affidavits and was thus not on good cause shown amended or varied. The only "record" of the proceedings is the handwritten note of the Magistrate. From this record the respondent requested that paragraph 3.1.2.10 be set aside as it is a maintenance order. "The applicant had applied for maintenance and the maintenance aspect was now in the right forum/court." The Magistrate noted further:

"Blyk geen opponering op 3.1.2.10 te wees nie."

From the Magistrate's note he concluded that there was no opposition to the amendment of the order by deleting paragraph 3.1.2.10. As no reasons were requested from the Magistrate in terms of Rule 51(1) or 51(8) of the Magistrates

Court Act, Act 32 of 1944, this is the only record before us and reliance must be placed thereon. I agree with counsel for the respondent that these grounds relate to review grounds and not grounds of appeal; review grounds relating to irregular steps in the proceedings and not misdirection on the merits by the Magistrate. However even if some leeway is afforded to the appellant whom is a lay person representing herself, this court cannot find that the Magistrate erred in amending the order by setting aside paragraph 3.1.2.10. The Act defines "emergency monetary relief" as being:

".. compensation for monetary losses suffered by a complainant at the time of the issue of the protection order as a result of the domestic violence, including –

- (a) loss of earnings;*
- (b) medical and dental expenses;*
- (c) relocation and accommodation expenses; or*
- (d) household necessities."*

From this definition it is trite that emergency monetary relief cannot be maintenance for an applicant and/or her child on an open-ended basis. This paragraph was not a competent order of the Magistrate and is null and void. On the facts there need

not be good cause shown by the applicant for the variation of the order as the paragraph is *per se* null and void.



[4] The appellant argued that if regard is had to the underlying reason why this paragraph was granted then it was clear that it was not to be maintenance but relocation and accommodation expenses. Even if this court accepts this contention then the order is not reflecting such position and cannot on its ordinary grammatical reading be afforded such meaning.

[5] The appellant further submitted that she did not want this monetary relief, but there was contempt of court proceedings instituted for the breach of the order. She accordingly did not want the order to be set aside preventing the contempt proceedings from proceeding. In *Oudekraal Estate (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) the court found that until invalid administrative action is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. Although this order may not be administrative action it could be argued that the respondent had to comply with the order until it was set aside.

[6] I cannot find that the Magistrate erred in granting the amendment and the appeal must be dismissed.


[7] I accordingly make the following order:

The appeal is dismissed with costs.



S. POTTERILL

JUDGE OF THE HIGH COURT

I agree



J.W. LOUW

JUDGE OF THE HIGH COURT

CASE NO: A129/14

HEARD ON: 21 August 2014

FOR THE APPELLANT: IN PERSON

FOR THE RESPONDENT: ADV. U. LÖTTERING

INSTRUCTED BY: Leistner Attorneys

DATE OF JUDGMENT: 25 August 2014