IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, Functioning as MPUMALANGA DIVISION,MBOMBELA)

CASE NO: 403\2016

DATE: 27 October 2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / ~~NO.~~
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO.~~
(3) REVISED.
2016/10/27 .....
DATE **SIGNATURE**

IN THE MATTER BETWEEN

ZACHARIA CORNELIUS JOHANNES VAN DER MERWE — FIRST APPLICANT

HERMANUS JOHANNES WESSELS BOTHMA — SECOND APPLICANT

AND

THE HONOURABLE MAGISTRATE NETSOOKI N.O. — FIRST RESPONDENT

NTOMBI KAYISE ZULU — SECOND RESPONDENT

JUDGMENT

Matter heard on: **18 OCTOBER 2016**
Judgment handed down on: **27 OCTOBER 2016**

LEGODI, J

[1] This is the review and setting aside of a decision of a district court Magistrate sitting at Carolina in terms of which an interim order granted ex-parte on 9 January 2015 in terms of section 3(2) of Protection From Harassment Act no. 17 of 2011 (the Act), was on 6 October 2015 confirmed.

[2] In terms of section 3(2) of the Act if the court is satisfied that there is a prima facie evidence that the respondent is engaging or has engaged in harassment, harm is being or may be suffered by the complainant or a related person as a result of that conduct if a protection order is not issued immediately; and 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] Subsection (1) of section 3 provides that the court must as soon as reasonably possible consider an application submitted to it in terms of section 2 (7) and any, 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 the proceedings. In terms of subsection (7) of section 2, the application to court for protection order in terms of the Act must be lodged with the clerk of the court who must immediately submit the application and affidavits to the court. That is what has happened in the present case.

[4] I do not find it necessary to deal with the merits of the application in terms of which the interim order which was later confirmed, seen in the light of the order which I intend to make hereunder. It suffices however, to mention that interim order granted ex-parte that is, without giving a notice to the respondent or any person likely to be affected by the order, ought to be granted in very deserving cases, for example, where harm is imminent and where indeed if notice is given, the protection to be accorded by the interim order is likely not to be achieved if prior notice of the application is given to the respondent.[1]

[5] The present proceedings have been instituted as a review in terms of rule 53 of the Uniform Rules based on gross irregularity. The grounds of review can be summed up as follows: That the court a quo committed irregularity by not allowing the applicants to

[1] See subsection (2) (c) of section 3

complete cross- examination of the second respondent, Ms Ntombi Kayise Zulu who was the complainant in the court a quo. The second ground appears to be that the court a quo misdirected itself in not affording the applicants, Messrs Zacharia Cornelius Johannes van der Merwe and and Hermanus Johannes Wessels Bothma the opportunity to adduce further evidence in rebuttal or to allow the them to file further affidavits. The present proceedings have been brought on unopposed basis.

[6] Brief outline of what preceded the confirmation of the interim order on 6 October 2015 is necessary. The interim order was to this effect:

6.1 That the applicants in the present proceedings are prohibited from engaging in or attempting to harass the complainant, (the second respondent) in the present proceedings and her family who reside on the farm in question.

6.2 That the applicants are prohibited from enlisting the help of another person to engage in the harassment of the complainant and or related person and or committing any of inter alia, the following acts:

6.2.1 That the applicants must bring back the remaining cattle to the farm;

6.2.2 That the applicants should not harm any members of the second respondent's family who reside within the said farm.

[7] The second respondent had approached the court a quo on the following alleged incidents or acts: She was residing at Bonnefoi Misluke farm together with her family. They had a number of cattle on the farm. She was the one who was looking after the cattle as her grandparents were too old to do anything. Whilst she is staying in Carolina town, she hired someone to look after the cattle. The owner of the farm gave them the permission to live on the farm until land claim was finalized. On 8 January 2015 at about 8h30 three white male persons entered the yard at the farm where the grandmother was staying. They were travelling in two different vehicles and on the other hand, there were about three male persons on horses. They opened the cattle and goats kraal and chased the goats to roam in the veldt and the cattle towards the main road where they were loaded into the trucks.

[8] As I said, I do not have to deal with the merits of the case. The followings transpired after the granting of the interim order on 9 January 2015 with the return date being 28 January 2015: On the latter date, the rule nisi was extended to 10 June 2015. The applicants opposed confirmation of the interim protection order by filing an answering affidavit which was served on the second respondent on 10 June 2016, being the return date of the rule nisi. On that date, the second respondent was directed by the court a quo to give oral evidence and cross –examination by counsel on behalf of the applicants ensued. In the course of cross-examination the presiding officer decided to have the hearing postponed before the conclusion of the cross examination to allow the second respondent an opportunity to get a legal representative and in my view correctly so, seen in the light of the fact that the answering affidavit was served on the second respondent the same date she took the witness stand. As a result, the proceedings were adjourned until 7 July 2015 and thereafter to 6 October 2015. Similarly, I do not have to deal with the issue whether on 7 July 2015 the rule nisi was properly extended or not.

[9] What happened on 6 October 2015 is the subject of great concern in the present proceedings. Neither of the respondents is represented in these proceedings. Whilst the second respondent filed notice to oppose, she however failed to file opposing affidavit. Instead she delivered a notice of withdrawal of her opposition to relief sought by the applicants, which relief is couched as follows:

> *"1. That the order of the First Respondent and proceedings before him under case number 1\4\29-01\2015, also referred to as case number 1\2015, in the Mpumalanga Court for the district of Carolina, be reviewed and set aside;*
>
> *2. That the order of the First Respondent under case number 1\4\29-01]2015 be replaced with the following order:*
>
> *"The application is dismissed and the rule nisi discharged with costs."*
>
> *3. In the alternative, and only if the Honorable Court is not inclined to grant prayer 2, that the proceedings be referred back to the magistrate's court in Carolina to be decided by a different Presiding Magistrate;*
>
> *4. That the second Respondent is ordered to pay the costs of the Application and that the First Respondent is ordered to pay the costs of the Application, only in the event of opposition by him.*
>
> *5. That further and\or alternative relief be granted."*

[10] Subsection (2) of section 9 of the Act provides:

> *"If the respondent appears on the return date and opposes the issuing of the protection order, 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 affidavit or oral evidence as it may direct, which must form part of the record of the proceedings"*

[11] The underlining is my emphasis. The Court a quo on the return date of 10 June 2015 proceeded to hear and elected to consider oral evidence of the second respondent who was the complainant in that court. It also allowed or directed cross –examination of the second respondent and adjourned the matter as indicated in paragraph 8 above before conclusion of cross –examination or evidence of the second respondent.

[12] However, when the hearing resumed on 6 October 2015, the court a quo refused any further cross-examination of the second respondent and articulated its reasoning as follows:

> "*Yes what I am trying to say, Mr van Dyk, is this:*
> *The Applicant was not actually testifying in the true sense. Let me put it more clear. She was confirming the affidavit that she has made which prompted the Court to grant an interim order. She was confirming that after it, which is before Court. The affidavit was furnished, a copy of the application together with the interim application was furnished to the respondent what the time when they served with the interim protection order. So therefore in terms of the law, in terms of Act 17 of 2011- that is the Act of harassment-then on the return date she, the Applicant, has the following to do: The Applicant must be taken to the stand in order to confirm the allegations that she has made in her application which prompted the Court to grant an interim order in her favour. And then that in itself would understand the defence when you say from your point of view you regard that she was defending her application which is now evidence. Is that what you are saying?".*

[13] For two reasons, the reasoning is flawed: The statement: *'in terms of the law, in terms of Act 17 of 2011- the applicant must be taken to the stand in order to confirm the allegations that she has made in her application which prompted the Court to grant an*

interim order in her favour,' is clearly not the correct interpretation of the relevant provisions of the Act.

[14] Section 9(2) as quoted in 10 above is very clear. The court has discretion to direct the hearing of oral evidence. The court is not obliged to do but, rather it should be guided by the nature of evidence placed before it by way of 'affidavits previously received' when it granted the interim order and any other 'further affidavits it received subsequent thereto', for example, the answering affidavit as it was the case in the court a quo. It had the second respondent's affidavit upon which the interim order was granted and the answering affidavit delivered on 10 June 2015 when the application was heard for the first time. Should there be an issue relevant and not captured or not adequately stated in the affidavits, the court hearing the application would be entitled to direct for the hearing of oral evidence. When that happens, the other party should be entitled to cross –examine the witness up to the end. In certain circumstances the court can limit the extent not only of the cross-examination but, also of the evidence to be adduced viva –voce. In the instant case, the oral evidence was not limited to any specific issue and therefore the cross-examination could not have been limited or terminated.

[15] So, the first determination in the exercise of discretion to direct or allow viva-voce evidence is the nature of the evidence which is relevant but not properly captured in the affidavit or on which a dispute arises which can be disposed by a limited oral evidence and cross-examination. Otherwise to turn the whole proceedings into a fully blown trial will defeat the speedy remedy envisaged in the Act.

[16] Furthermore, the statement: *'the applicant was actually not actually testifying in the true sense- she was confirming the affidavit that she has made which prompted the court to grant an interim order. She was confirming which is before the court',* in also wrong, insofar as it meant to suggest that, that is what the Act provides.

[17] The second respondent in her application for the issue of an interim protection or harassment order deposed to an affidavit before commissioner of oath in which she acknowledged to understand the contents of her declaration\affidavit and thus making it unnecessary to confirm her declaration or affidavit again. It is just not correct that *'the applicant must be taken to the stand in order to confirm the allegations that she had made in her application which prompted the court to grant an interim order in her favour'.*

[18] So having directed the second respondent to take the witness stand, having sworn her in and allowed cross-examination and postponed the hearing whilst cross-examination was not completed, on resumption of the proceedings, the attorney for the applicant should have been allowed to complete cross-examination. To refuse completion of cross-examination, but still have regard to the second respondent's evidence or part thereof, amounted to gross irregularity. The court a quo denied the applicants of their right to have the dispute be resolved by the application of law decided in a fair public hearing as they were denied to fully challenge the evidence which was ultimately considered in some respects against them[2].

[19] There was another request which was made, but declined. In the course of oral argument in the court a quo, the attorney for the second respondent was said to be arguing a case not made out the papers. To this, the court a quo stated: "*...the application for postponement is now surfacing and given the nature of the application and the addressed that I heard from both parties, the application for a postponement as made by Mr Van Dyk is hereby refused.*"

[20] There is a background to this postponement application: The court a quo allowed the defence to argue the case on facts which were not in the papers. There were only two set of affidavits before the court a quo. That is, an affidavit on which an interim order was obtained and answering affidavit filed on the date of the hearing of the application on 10 June 2015 when the oral evidence of the second respondent was directed. The second respondent in her affidavit made mention of her grandmother who was allegedly under harassment by the applicants.

[21] However, in argument by the second respondent's attorney a mention was made of a grandfather who was allegedly under threat or harassment by the applicants. That prompted the applicants' attorney to object and or to ask for a postponement to be allowed to file supplementary affidavit. The court a quo declined and in its main judgment stated:

> *"If this court has to conclude that the grandfather or the grandparents in question is a person that is over 80 years, this Court may also be tempted to say that he may be a bit incapacitated in terms of action or movements, even if we can go for a*

[2] See section 34 of the Constitution.

marathon this court can outrun such a person because of the power that it has, including both Defence counsel which I believe none of them is over 80 years or 70 years. But I am not making that a conclusive conclusion, but it is just a perception based on a laymen's focal point. So therefore the Act made provisions to the fact that a person may on behalf of another make an application, which application include an application for protection against harassment or an application against domestic violence. In this regard we are dealing with a harassment application. So therefore the Applicant in this regard is entitled by virtue of the relationship to make an application on behalf of her grandparent in this court and the court is therefore duty bound in terms of this Act to make an order which may therefore be in the interest of the Applicant, which in the civil nature may be referred to as ex parte application as it is an interim application."

[23] Then the court a quo concluded by expressing itself as follows:
."... the respondent in any way should not harass the Applicant and her relative who has now been clearly defined, to wit the grandfather who resides on the farm..."

[24] The difficulty with the ruling and finding by the court a quo in this regard is that the applicant did not file replying affidavit neither did the court a quo allow the oral evidence of the second respondent to be completed and by so doing made such evidence a futile exercise insofar as the court a quo might have wanted to have any regard thereto. To allow such evidence and other averments made during argument, without giving the applicants an opportunity to challenge the evidence, flouted the applicants' right to a fair hearing and thus amounted to gross irregularity.

[25] Coming to the relief sought, the applicants in a draft order proposed that the decision by the court a quo should be reviewed and set aside. In addition they want the matter to be referred to the court a quo to start de novo before another judicial officer. I do not think that a case for de novo hearing before another magistrate has been made.

[24] The critical concern in these proceedings is the court a quo refusal to allow the attorney for the applicants to complete the cross examination of the second respondent. If that had happened, it could well be that the court a quo might have directed to hear the oral evidence of the applicants in which event the need to file any supplementary affidavit would not have been necessary. Both parties would have had the opportunity to ventilate

issues relevant to the essence of the dispute, although a fully blown type of a trial under the Act is not encouraged. Put differently, the proceedings in the court a quo are part-heard and there will be no need to cause the case to start de novo. A case has not been made for a de novo hearing.

[25] Consequently an order is hereby made as follows:

25.1 The order of the first respondent (Court a quo) refusing the attorney for the applicants to complete cross-examination of the second respondent, allowing arguments on matters not made in the papers, refusal of postponement to file supplementary affidavit and confirming the interim order made on 9 January 2015 in terms of section 2 of Act 17 of 2011 are hereby reviewed and set aside.

25.2 The matter is referred to the court a quo to enable the applicants' attorney to complete the cross examination of the second respondent and thereafter to direct the proceedings to continue as the Court a quo may deem necessary and appropriate, such consideration to include but not limited to affording the applicants the opportunity to tender oral evidence or to file an affidavit to deal with new relevant evidence that might have been raised during the oral evidence of the second respondent.

25.3 The second respondent to pay the costs of the unopposed application on a party and party scale.

M F LEGODI
JUDGE OF THE HIGH COURT