IN THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG DIVISION, GAUTENG

29/7/2016

CASE NO: A608/2015

In the matter between:

S A OLIFANT — Appellant

And

THE STATE — Respondent

JUDGEMENT

MBONGWE, AJ:

[1] The appellant stood trial in the Magistrate Court, Klerksdorp, on the 2 June 2014 charged with the contravention of a domestic violence protection order that was granted against him on the 6th April 2005 in terms of section 5(2) read with sections 1,6 and 21 of the Domestic Violence Act 116 of 1998. This order prohibited the appellant from threatening or assaulting the complainant who was then his wife.

[2] According to the charge sheet, the appellant had on the 13 July 2013 contravened the said prohibition order in that he insulted and threatened the complainant. The appellant was represented throughout the proceedings. He pleaded not guilty to the charge without giving any plea explanation. He was in the end found "guilty as charged" and sentenced to payment of a fine of R2000-00 or eight months imprisonment. The sentence was wholly suspended for five years on specified conditions. This appeal is against the conviction and is with the leave of the trial court.

THE GRAVAMEN OF THE APPEAL

[3] The appellant's appeal is not directed at the evidence relating to his commission of the offence with which he was convicted, but the validity of the protection order on which the charge sheet was formulated as well as the specific conduct the order sought to prohibit. The argument raised on behalf of the appellant in challenging the conviction is consequently two-fold, namely, that the relevant protection order issued in terms of Section 5(2) of the Domestic Violence Act 116 of 1998 in April 2006 was an interim measure and could not have remained in force seven years and three months later, that is as at the 13 July 2013 when the transgression is said to have occurred. The appellant relied on the judgment in S v ZONDANI 2005 (2) SACR 304 (CK) in support of its argument. The Court in that case had stated thus:

> "[6] An interim protection order made in terms of s 5 of the Domestic Violence Act is exactly what it is called. It is a protective order of a provisional nature which is subject to confirmation or being discharged on the return date. It is quite different in that respect to an order (final) made in terms of s 6 of that Act. With respect to a final order s 6(7) provides:
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> "Subject to the provisions of s 7(7), a protection order issued in terms of this section remains in force until it is set aside, and the execution of such order shall not be automatically suspended upon the noting of an appeal.
>
> [7] By virtue of the interim protection order being in the nature of interim relief, the respondent may, as provided for in s 5(9), anticipate the return date for the purpose of having the order discharged or made final.

[8] On the basis of the aforegoing and the allegation made in the charge sheet that the order allegedly breached was in force, it follows that the State bore the onus not only to prove the acts allegedly performed by the accused in breach of such order but also that the order was at that time in force."

[4] It is apparent from this decision that both the prosecution's argument and the trial court's finding that the interim order of the 6th April 2006 was still valid and in force on the date of the transgression, was misplaced and erroneous. On face value, this would normally result in one agreeing with the appellant's contention on the validity and enforceability or lack thereof of the protection order of the 6 April 2006. However, the appellant's argument clearly and conveniently overlooks pertinent realities and developments that occurred at the trial such as the evidence of the clerk of the court which was corroborated by the complainant with regard to a final order, a copy whereof was produced and handed in as an exhibit by agreement between both the State and the defence. It is particularly that evidence which impacts on and rebuffs the appellant's otherwise sound argument. I now consider the evidence relevant on this aspect.

EVIDENCE OF THE STATE

[5] At the instance of the trial court and consequent to uncertainty as to the existence of a final order, the Clerk of the Court was called as a witness on this specific aspect. In her evidence she testified that both the complainant and the appellant were present in court when the interim order was confirmed and that the original order was handed to the appellant as required by s 6(7) of the Act and a copy to the complainant. The complainant confirmed this albeit her evidence was the copies of the final order were given to her and the appellant. The clerk went on to produce a document that she referred to as a copy of the final order confirming the interim order. This document was, by agreement between the prosecutor and the defence, handed in as Exhibit B.

EXHIBIT B

[6] For the relevance of Exhibit B to the issues raised, I deem it necessary to describe it, as far as I consider it necessary. This is a document appearing on paginated page 164 of the record of the proceedings in the court a quo. It is titled 'APPLICATION: DOMESTIC VIOLENCE ACT, ACT 116 OF 1998.' On top on this title is a handwritten insertion that Reads: EXHIBIT B with a signature and date appearing thereunder. It appears to be a Standard form with blocks in which to tick the relevant occurrence amongst those Tabulated next to each block; below the title appears: REFERENCE NO. 1/4/15:316/06; Next is the date 2007-04-26 followed by the name of the presiding officer, the interpreter and an indication that the Applicant and the Respondent (complainant and the Accused at the trial, respectively, appeared in person;

[7] Under the sub heading 'BEFORE COURT' , the blocks on the side of which the following occurrences are recorded have been ticked;

*Confirmation of interim protection order;

*Both parties advised as to right to attorney;

*The next two boxes relate to both parties choosing to proceed without legal representation;

*The application was considered in chambers after considering only the affidavits on record;

*Interim Protection Order confirmed. A handwritten note relating to this block reads: 'iro point 3.1.2.1 deleted." A further handwritten note appears and reads: 'Parties agree point 3.1.2.3 to be deleted.'

It is worth mentioning that on perusing point 3.1.2.3 of the interim order appearing on paginated page 166 of the record, it is apparent that the said point relates to the prohibition of the Appellant from entering the complainant's residence which the parties once shared. Exhibit B is signed at the bottom by the Additional Magistrate and bears the official stamp of the KlerksdorpMagistrate Court with the date 2007-04-26.

[8] In my view, Exhibit B, which was handed in by agreement as aforestated, constituted the final order and I find that the appellant was very much aware of its existence and so was the defence counsel at the trial. This view is founded on two pillars, firstly, the unchallenged evidence of both the clerk of the court which was corroborated by that of the complainant and, secondly, the evidence of the appellant himself where he testified that he had been to the complainant's residence as recently as on the Sunday preceding his transgression to fetch the child and returned it later the same afternoon. This, in my view, he did with the knowledge that he was and is still no longer prohibited from entering the complainant's home. I find, consequently, that the argument in denial of the existence of the final protection order is disingenuous and stands to be rejected.

CONVICTION

[9] The trial magistrate erred when, having accepted Exhibit B, he failed to order that it substitutes the interim order, This despite the prosecutor's subsequent request for an amendment of the charge-sheet in terms of s 88 of Act 51 of 1977. This led to the learned magistrate further erring in finding the appellant guilty as charged considering that both the interim and final orders prohibited only 'threatening or assaulting' and make no reference to a prohibition of 'insulting.' In my view and on the strength of the evidence before him, which I find to have proved the guilt of the accused beyond reasonable doubt on the charge of threatening the complainant, the trial magistrate ought at the least to have found the appellant guilty of threatening the complainant in contravention of the final order dated 2007-04-26

INSULTING

[10] Although the charge-sheet also contained a charge of insulting which was put to the appellant and he pleaded thereto, the trial magistrate correctly pointed out that the protection order did not mention insult of the complainant as conduct the appellant was restrained from committing and pointing out that a charge of crimes injuria should have been included. Consequently, the trial court erred in finding the appellant guilty as charged. While I have already expressed the view that the evidence that was led by the State also proved the insult of the complainant by the appellant, relevant averments in a charge of crimes injuria were not made in the charge sheet. In this regard the applicable legal principle was aptly stated thus in the SCA judgment in JAMES AZWINDINI NEDZAMBA v S (911/2012)[2013] ZASCA 69 (27 May 2013) : "[20] It is generally accepted that charge sheets or indictments may be amended on appeal or review. Once again the test is whether the accused could not possibly be prejudiced thereby. When application is made to amend a charge sheet on appeal, the Court must be satisfied that the defence would have remained the same if the charge had originally contained the necessary averments." In the present case, neither the charge of crimen injuria nor the necessary averments relating to it were made in the charge sheet. I consequently find that despite the error in his pronouncement of guilty as charged, the trial court's comment referred to above was correct and that it does not appear, in light of that comment, that the sentence imposed factored in the appellant's insult of the complainant.

[12] For the sake of completion and although not specifically challenged by the appellant and to give meaning to my stated findings that the State was successful in proving the guilt of the appellant beyond reasonable doubt, I now give a summary of the State witnesses' evidence that resulted in the conviction of the appellant.

[13] The State had called two witnesses. First was the complainant who testified that she was insulted by being called a whore and threatened with death by the appellant while at work on the morning of 13 July 2013. This after the appellant had come to

confront her for what he perceived to be the complainant's denial of the appellant's right to visitation by the their minor daughter as priorly agreed. The appellant refused to accept the complainant's explanation which he had received via sms earlier that morning in which the complainant cancelled the prior arrangement due to the child not being well and having to be taken to a doctor.

[14] The complainant testified that the appellant had been aggressive and very loud when he approached, accused and insulted her. She testified that, knowing what the appellant was capable of, she had become terrified by his threat and had proceeded to report it the police after the appellant had left.

[15] As a result of the appellant's loudness, the argument was overheard by the complaint's supervisor, Ms Wessels, the second State witness, from her office which was next to the complainant's. Ms Wessels testified that she then walked out and proceeded to the complainant's office to investigate. She was present and heard the appellant insulting and threatening the complainant as well as the actual words the appellant had uttered which she repeated as were stated by the complainant in her evidence, namely, that the complainant was a whore and that the appellant had been in the military and to him killing a person was like pressing a switch on the wall. She further confirmed that the complainant was visibly terrified. Wessel's attempts at persuading the appellant to leave fell on deaf ears resulting in her leaving the office to call security. On her return the appellant had already left. She (Wessels) had known the couple and had had no problems with either of them.

CROSS EXAMINATION AND ASSESSMENT

[16] Despite the gruelling cross examination that followed, nothing adverse was extracted from the cogent evidence of either of the State witnesses nor was any aspect of their

evidence challenged on appeal. These witnesses were impressive and gave evidence in calm manner that displayed the absence of bias against the accused.

EVIDENCE OF THE ACCUSED

[17]] The appellant denied he that had been loud and that he insulted and threatened the complainant. This despite his own testimony that he had been aggressive when he demanded to know why the complainant was refusing him visitation by the child and insisting that he takes the child to a traditional doctor for protection before taking her to his house for fear that the appellant's wife could bewitch the child. He had responded to this by calling the complainant herself a witch.

CROSS EXAMINATION

[18] In cross examination, the appellant initially denied that he had been angry when he confronted and argued with the complainant, but subsequently contradicted himself several times about his emotional state at the time stating firstly that he had been cool and, subsequently conceded that he had been angry and, lastly, that he had been at another level. On the insulting words and threat he allegedly uttered, he responded thus: "those are their words, not Mine." He admitted knowledge of the existence of the protection order against him, but on being led directly in regard to his knowledge, he qualified his response by stating that the order he was aware of had been an interim one that was never confirmed. He did not deny his presence in court when either of the orders were made.

ASSESSMENT OF ACCUSED'S EVIDENCE

[19] In my view, the appellant was a poor witness whose evidence could not be relied on could it be regarded as reasonably possibly true. As such, his testimony was correctly rejected by the trial court.

CONCLUSION

[20] In light of the aforegoing, I propose that the following orders be made:

[1] The appeal is dismissed.

[2] The order of the trial magistrate is replaced with the following order;

(a) It is ordered that the interim order dated 5 May 2006 on which the charge sheet was formulated is replaced by amended final order dated 26 April 2007;

(b) That the charge sheet be amended to read: "COUNT 1: That the accused is guilty of wrongfully and unlawfully contravening the protection order granted to the complainant in terms of section 6 read with sections 1, 6 and 21 of the Domestic Violence Act 116 of 1998 on the 26 April 2007 and in terms of which the accused was prohibited from and ordered not to threaten or assault the complainant and that the said order was handed to the accused and was and still remains in force.

(c) That the charge of insulting referred in the charge sheet is deleted.

(d) That the accused is found guilty of contravening the protection order of the 26 April 2007.

(e) That the sentence imposed on the accused by the trial magistrate be confirmed.

M. MBONGWE, AJ

ACTING JUDGE OF THE HIGH COURT, PRETORIA

I agree and it is so ordered.

N V. KHUMALO, J

JUDGE OF THE HIGH COURT, PRETORIA

Date of hearing	5 May 2016
Date of judgment	29 July 2016
REPRESENTATIVES	
For the Appellant	Adv L. Augustyn
Instructed by	Legal Aid South Africa
For the Respondent	Adv GJC Maritz
Instructed by	The DPP, Pretoria