IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

AR19/09

THAMSANQA WILSON NDWANDWE **Appellant**

versus

CELUMUSA DELISILE PURITY NDWANDWE **Respondent**

Judgment

Delivered on 27 July 2009

Steyn J

[1] This is an appeal against an order of the Magistrate's Court of Pietermaritzburg in which it refused to set aside a protection order in terms of section 10 of the Domestic Violence Act, No. 116 of 1998 (hereinafter referred to as 'the Act'). The Appellant, who was the Plaintiff in the court below, applied for the setting aside of the Domestic Violence Order against him, obtained by the Respondent, who was the Defendant in the court below. The application in the Magistrate's Court, to set aside the Domestic Violence Order, was opposed by the

Respondent, as is this appeal.

[2] The Appellant and Respondent were married at the time when the order was granted, and they are still married. The Appellant is an attorney and the Respondent a magistrate. The reason for mentioning their professions will become evident later in the judgment.

[3] On behalf of the Appellant, Mr Quinlan contended that the Respondent either abandoned the Order or had waived her rights under it. Furthermore, that good cause had been shown for the Order to be set aside. In his founding affidavit the Appellant stated the following:

> *"I assumed that the order had been set aside as agreed. The Respondent is employed as a Magistrate at the Pietermaritzburg Court, could easily gain access to the file, and do the necessary. I had no reason to believe that she would not have the order set aside."*

In support of the appeal it is also contended that the learned Magistrate, in refusing to set aside the order, erred in deciding that, for good cause to exist, he had to find that the agreement

between the parties *"was entered into by the respondent … freely and voluntarily."*

[4] Mr Chetty, on behalf of the Respondent, argued that the formalities prescribed in section 10 of the Act were not adhered to, and, in addition, that the Appellant erroneously relied on an agreement between him and the Respondent to set aside the Order under circumstances in which he ought to have known that the enforcement of such agreement, which is disputed, to be wholly inappropriate and dangerous.

[5] The judgment of the court below makes clear that the learned Magistrate was neither satisfied that good cause was shown to set aside the Protection Order, nor convinced that the required procedures, as set by the legislature in terms of section 10(2) of the Act, were met, and hence the application was dismissed.

[6] In my view, orders obtained in terms of this Act, keeping in mind the context and purpose of the Act, are not only distinguishable from other court orders, but are *sui generis* in

nature. The purpose of the Act was dealt with by the Constitutional Court in *Omar v Government of the Republic of South Africa and Others*[1] and I align myself with the views expressed by Van der Westhuizen J, stating:

> *"[D]omestic violence in our society is utterly unacceptable. It causes severe psychological and social damage and there is clearly a need for an adequate legal response to it."*[2]

The purpose is also stated in the preamble of the Act, which reads:

> *"It is the purpose of this Act to afford victims of domestic violence the maximum protection from domestic abuse that the law can provide: and to introduce measures which seek to ensure that the relevant organs of State give full effect to the provisions of this Act, and thereby convey that the State is committed to the elimination of domestic violence…"*

It is clear that the aim of this Act is to afford victims of domestic violence maximum protection, which explains the stringent procedure provided for in terms of section 10 of the Act.

In *S v Engelbrecht*,[3] Satchwell J dealt with the complexities of

1 2006 (1) SACR 359 (CC).
2 *Supra* at para [13].
3 2005 (2) SACR 41 (W).

domestic violence as follows:

> *[341] I agree with the argument that the wide definition of 'domestic violence' in the DVA is unequivocal recognition by the Legislature of the complexities of domestic violence and the multitude of manifestations thereof.*
>
> *[342] It must be accepted that domestic violence, in all manifestations of abuse, is intended to and may establish a pattern of coercive control over the abused woman, such control being exerted both during the instances of active or passive abuse as well as the periods that domestic violence is in abeyance.*(My emphasis)

From the wording of the Act and the provisions relating to orders in terms of the Act it appears that the legislature was very alive to the existing pattern of coercive control in matters of domestic violence and hence the requirement that a final order should only be set aside once the court is convinced that the party who applies for the order to be set aside is doing so freely and voluntarily.[4]

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4 Also see *S v Baloyi* 2000 (1) SACR 81 (CC) where Sachs J states the following:

> *[11] All crime has harsh effects on society. What distinguishes domestic violence is its hidden, repetitive character and its immeasurable ripple effects on our society and, in particular, on family life. It cuts across class, race, culture and geography, and is all the more pernicious because it is so often concealed and so frequently goes unpunished. The*

[7] The focal part of this appeal is the writ granted on 27 September 2005, which ordered the now Appellant:

> *"3.1.2.1 not to commit the following act(s) of domestic violence: assault, threats of assault, malicious injury to property;*
>
> *3.1.2.3 not to enter the shared residence at: 33 Old New Germany Road, Westville, Pietermaritzburg."*

It is common cause that the now Appellant consented to the order and agreed to the terms of the Order. The record, however, also reveals that the aforementioned Order was not the first order obtained by the now Respondent against the Appellant. The previous Order, it being an interim order, was

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Law Commission, supporting the need for appropriate legislation to reduce and prevent family violence, invoked the following quotation from a document drafted by the US National Council of Juvenile and Family Court Judges:

> *'Domestic and family violence is a pervasive and frequently lethal problem that challenges society at every level. Violence in families is often hidden from view and devastates its victims physically, emotionally, spiritually and financially. It threatens the stability of the family and negatively impacts on all family members, especially the children who learn from it that violence is an acceptable way to cope with stress or problems or to gain control over another person. It violates our communities' safety, health, welfare, and economies by draining billions annually in social costs such as medical expenses, psychological problems, lost productivity and intergenerational violence.*' (Internal footnotes omitted; my emphasis)

set aside by the Respondent. The writ that forms the basis of this appeal is, however, distinguishable, since it is final in nature.

[8] Since the formalities of the Act is determinative of the process, I shall now consider and examine the provision that governs the variation of or setting aside of protection orders granted in terms of the Act. Section 10 of the Domestic Violence Act provides as follows:

> ***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.*
>
> *(3) The clerk of the court must forward a notice as prescribed to the complainant and the respondent if the protection order is varied or set aside as*

contemplated in subsection (1).

[9] It follows from the said provision that the Appellant had to show good cause in the court below why the protection Order should have been set aside and in doing so whether there was compliance with the prescribed procedures of the Act. Had the Applicant shown good cause then evidently the learned magistrate misdirected himself in his reasoning of the law and the facts.

The Appellant is an attorney by profession who claims to know the Domestic Violence Act, yet he ignored the provisions of the Act and wants to convince this court that not only was he reasonable in his belief that the Respondent would have the order set aside, but also that such belief also constituted good cause.

In my view there was clearly a dispute of fact after all papers were filed and that such dispute called for a referral for oral testimony. The Appellant, however, despite being burdened with an onus to convince the Court, decided against tendering

oral evidence. I have stated the context and purpose of this Act. To my mind the learned magistrate was quite correct in his approach, to consider the provisions of section 10 applicable to this matter.

[10] It cannot, however, be overlooked that the Respondent never stated in her opposing affidavit that she denied each and every allegation made by the Appellant insofar as it related to the Order that should have been set aside by her. We have asked Mr Chetty to address us on this issue and he had to concede that the affidavit should have contained such assertion. He, however, asked us to bear in mind that the affidavit was drafted under immense time constraints as stated by Respondent in para 7:

> *"As far as the specific issues raised in the Applicant's founding Affidavit which due to time constraints, I am unable to address individually, I address as best as I can."*

[11] Having considered the entire opposing affidavit and its contents, it is evident that the Respondent intended denying the allegations contained in the Appellant's founding affidavit. This can be gleaned from the entire affidavit and its tenor. This Court

therefore is mindful of the fact that the Respondent should not be prejudiced, nor penalised for something that could at best be labeled as poor draftsmanship of the aforesaid affidavit.

[12] There is however another aspect that requires some comment and that is that the Appellant lodged a replying affidavit, which was signed and commissioned on 18 September 2008 by a certain Phumzile Dlamini, who is a deputy manager at the Department of Transport. The very same commissioner of oaths then commissioned two of the confirmatory affidavits filed by S Zulu and Nobuhle Mgende and then deposed to a statement herself confirming what the Appellant had said in his replying affidavit. This kind of conduct is frowned upon, and should be avoided in future. From the dates of these affidavits it appears that when Mr Zulu confirmed the contents of the Appellant's replying affidavit on 7 August 2008, the replying affidavit was not even in existence, because it was only deposed to on 18 September 2008. Not much turns on this issue, except to expose the careless preparation of the application in the court *a quo*.

[13] As stated earlier, the Appellant failed to comply with the requirements of section 10 of the Act or to request for oral evidence to be tendered, and hence the Court *a quo* was justified in dismissing the application. Accordingly in the circumstances the appeal should be dismissed with costs.

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Steyn J

Patel J: I concur, it is so ordered.

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Patel J

Date of Hearing:	8 May 2009
Date of Judgment:	27 July 2009
Counsel for the appellant:	Adv PD Quinlan
Instructed by:	Mkhize Attorneys c/o Lowe & Wills Attorneys
Counsel for the first respondent:	Adv K P Chetty
Instructed by:	Silvia Da Silva & Associates