

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

Case No:

AR03/2021

In the matter between:

MICHAEL McGROARTY

APPELLANT

And

VALERIE ROZANNE HUTCHINSON

RESPONDENT

ORDER

The following order shall issue:

- (a) The application for condonation against the late noting of the appeal is granted.
- (b) The appeal succeeds.
- (c) The order of the court a quo is set aside and is substituted with the following order:
 - ‘1. The interim protection order granted on 14 October 2019 is discharged;
 - 2. There is no order as to costs.’
- (d) Each party is to bear its costs of the appeal.

JUDGMENT

Delivered on: 3 June 2022

Masipa J (Radebe J concurring):

Introduction

[1] The appellant appeals against a judgment of the magistrates' court, Verulam (the court a quo), handed down on 5 December 2019, confirming an interim protection order dated 14 October 2019, issued in terms of the Protection from Harassment Act 17 of 2011 (the Act). Reasons for judgment were handed to the parties on 17 December 2019. The appellant herein was the respondent in that application while the respondent was the applicant. The appeal was noted late and the appellant applied for condonation as is required by the Uniform rules of court.

[2] The respondent and the appellant are residents of the M[....] E[....] Country Club Estate¹ (the estate). The respondent is the owner of and resides in unit [...], while the appellant resides in unit [...], which is owned by his wife. The units are registered in terms of the Sectional Titles Act 95 of 1986. There are seven units in the estate. There are no exclusive use areas, and the land surrounding the units is common property. The respondent has lived in the estate since March 2014 while the appellant moved into the estate during February 2015.

[3] On 15 October 2019, the respondent filed an application in terms of s 3(2) of the Act. In that application, she contended that the court was required to urgently consider the matter since the appellant was very aggressive in his interaction with her, and he seemed to be constantly watching her every move when she was outside her unit, the appellant having installed surveillance cameras. His conduct bordered on obsession. Secondly, that the appellant interfered in her affairs, especially on the common property, when he had no reason to do so. Lastly, that the appellant behaved very angry when he approaches her and she was afraid that his verbal and physical threats would escalate into violence which would result in grievous bodily harm to her.

[4] In opposing the protection order, the appellant contended that the respondent's application was nothing but delayed revenge since he and his wife had supported the respondent's neighbour, Mrs Naesham, when she brought a similar application against her (the respondent), and a consent order was taken with the respondent agreeing not to commit acts of harassment against Mrs Naesham. The appellant accordingly denied ever threatening to assault or ever intimidating the respondent. He contended, as shall appear below, that the respondent was never afraid of him and that this is apparent from her failure to take any legal steps prior to October 2019. Further, that had the respondent felt that he was acting contrary to

law, she would have taken immediate action considering the legal education in her family.

[5] The relief the respondent sought from the Verulam Magistrates' Court was that the appellant be prohibited from:

- (a) Engaging in or attempting to engage in harassment of her;
- (b) Engaging in or attempting to engage in harassment of a related person;
- (c) Enlisting the help of other persons to engage in or attempting to engage in harassment; and
- (d) Communicating in any of the following acts:
 - (i) verbal or written communication with the complainant;
 - (ii) confronting or interacting with the complainant in person; and
 - (iii) engaging in physical violence, or threats of violence, verbal abuse and written abuse (especially through electronic means).

The Protection Order

[6] According to the respondent, the harassment started during 2015, when she requested that the appellant and his wife prune the roses planted in the common property as they were overhanging into the road, which provided access to her house. The request was declined. Since then interaction between the respondent and the appellant and his wife became strained.

[7] In 2016, the respondent reversed into the driveway adjacent to unit [...] and the appellant and his wife took exception to this. The appellant averred that the respondent did not request either himself or his wife to prune the roses and that she unilaterally cut them. Her conduct was contrary to the estate rules, which required a request for the pruning of the roses be sent to the estate management, which would arrange with its gardening service to attend to this. The roses were the responsibility of the appellant's wife for some nine years as she had requested to plant them. It appears she had requested to plant them and was given approval by a previous estate manager.

[8] The estate rules provide that no plants are to hang over the road kerb. However, this happened throughout the scheme but only the roses seemed to have been a problem. According to the appellant, the respondent drove a small vehicle and the overhanging roses were not a problem to her. Therefore, cutting the roses

herself without consent was purely vindictive. He denied that his wife refused to prune the roses and contended that the respondent's husband, at a meeting in the street, requested the pruning. The respondent was not present at that meeting. She only made a single request to the appellant's wife in four years while she had been cutting the roses.

[9] On 22 December 2016, the appellant drove his car into a driveway adjacent to unit [...], alighted from the vehicle and banged on the front door of the respondent's unit. When the respondent opened her front door, the appellant who, according to her, was in an aggressive state of mind confronted her. He shouted the words 'common property', and said he was leaving his vehicle there. The respondent told him to go ahead as she would do the same. The appellant's wife came out and defused the situation. The appellant's conduct was according to the respondent physically threatening and amounted to verbal abuse.

[10] As regards this issue, the appellant contended that during December 2016, the respondent reversed into a driveway adjacent to unit [...], drove over the grass with irrigation pipes underneath and damaged the piping and pop-up sprinkler. The appellant's wife witnessed this and sent an email to the respondent requesting considerate driving. In the evening, the respondent knocked at their door and took issue with the appellant's wife sending an email instead of approaching her at her home. She then told the appellant's wife to have a fence around the irrigation system, which is not permitted, by the estate. The respondent was shouting that she owned a share in the common property and had a right to drive in the driveway. The tirade took place for approximately 25 minutes and when the respondent left, the appellant's wife was shocked by the attack.

[11] The appellant noted that his wife was upset and decided to drive his vehicle into the driveway adjacent to unit [...], parked it there, knocked at the respondent's door and told her that they were all entitled to use her driveway since it was common property. He left the vehicle there for 15 minutes and returned to unit [...]. His wife saw the respondent approaching in the driveway. There was an intense argument between them and the respondent but there was no physical threat or verbal abuse. The conversation continued and the appellant left the respondent and his wife talking as the situation seemed to have calmed down. He contended that the respondent's conduct of following him was not a sign of someone who felt threatened.

[12] In January 2017, the appellant and his wife made renovations to their unit. It had been agreed with the appellant's wife that part of the landscape adjacent to units [...] and [...] would be used to facilitate the building works to unit [...]. This included the water irrigation pipe connected to unit [...]'s water supply and the removal of several plants to facilitate the erection of a shade cloth to provide builders with adequate working space. On 18 January 2017, the appellant entered part of the landscape to erect the shade cloth. The respondent called estate manager to ensure compliance with the initial agreement. According to the respondent, this caused her psychological harm.

[13] The appellant denied that he unilaterally attempted to erect the shade cloth. The builders went on to erect the shade cloth in the area, which was provided, but the respondent shouted at them and told them to get out, as the area was common property. The appellant went and saw what happened but made no comment. He told the builder, Peter Jafta, to continue to erect the shade cloth. The respondent screamed at them and told them she would set her dogs on them if they did not leave. The builders returned to unit [...] and advised the appellant of the threat. They then refused to go back to work, as they were afraid that the respondent would release her dogs. According to the appellant, he called the estate manager, Peter Hean (Mr Hean). On arrival, his first words were, 'what has she done now'. Mr Hean went to the respondent and on his return advised that she demanded a site-commencing meeting. The appellant refused and told Mr Hean that the respondent had no right to demand anything as the estate who are managers of the common property approved the alterations. Mr Hean agreed and went to tell the respondent to stay away.

[14] On 11 February 2017, the appellant called the estate security operator complaining about a vehicle parked on the road in the estate. The vehicle belonged to one of the occupiers of the respondent's property. According to the respondent, the vehicle was not obstructing unit [...] and she explained to the security guard attending to the complaint that it was parked there since the driveway was being extended. At about 10 pm, the appellant complained again and the respondent had to again provide an explanation security. The respondent contended that the complaint was made in order to harass her. The appellant conceded that he reported the nonchalant parking by the respondent since her family, their tenant and the

tenant's visitors parked inconsiderately on numerous occasions. He denied that there were any extension works on the driveway and said that the vehicle was parked overnight. The vehicle obstructed trucks which were delivering building material at his house. At a subsequent meeting, it was agreed that overflow parking could take place on the road if the closest neighbour was informed.

[15] On 11 April 2017 at approximately 1 pm, the respondent was watering the garden on the common property where the shade cloth was erected. There had been no water in the area since 18 January 2017. According to the respondent, the appellant appeared on his side of the shade cloth and shouted at her, calling her a stupid cow and asking her if she was mad. He kept repeating these words. After hearing these words, which she perceived as incessant verbal abuse, she told him, 'fuck off, you stupid idiot'. He then picked up a white conduit pipe and attempted to hit her from across the shade cloth and she sprayed him with water from the house in self-defence. She tried to record this but recorded herself telling her husband that 'that idiot is trying to hit me with a stick'.

[16] According to the appellant, the irrigation system was in perfect working order and it was unnecessary for the respondent to water the common area with a hose. The respondent lifted the bottom part of the shade cloth and sprayed the freshly dug soil on his side of the shade cloth where new pipes had been laid causing mud splatters over his freshly painted exterior wall and kitchen door. The painter reported this to the appellant and he video recorded it. New tiles had also been installed and the grout had not yet set. Because of the respondent's conduct, the grouting and painting had to be redone. The appellant accepted that he shouted at the respondent to stop spraying water under the shade cloth but denied using the words mentioned by the applicant. He also denied that he attempted to attack her.

[17] On 29 November 2017, the respondent arrived home at 1.45 pm and found Mavis, an employee of Leitch Landscapes, sweeping the driveway adjacent to her unit. The respondent parked on the corner entrance of the road to allow Mavis to continue sweeping. At 2.10 pm, a security guard arrived at her home and asked her to move her vehicle due to a resident complaint. The appellant's vehicle was parked in the driveway. The respondent explained the situation to the security guard and moved the vehicle as soon as Mavis finished sweeping. The next day, Mavis was tending the garden and the respondent asked her to tidy the area around the

wooden fence separating units [...] and [...]. There was a wasp next to the creeper which encased the wooden fence. Mavis said she could not work there. The respondent proceeded to swat the nest in an attempt to dislodge it with no luck. The noise alerted the appellant whom she heard saying, 'she is destroying the fence'. According to the respondent, once the creeper was removed, the appellant wrote what she termed defamatory emails about her to the estate manager and members of the body corporate accusing her of tearing the wooden fence.

[18] The appellant contended that when he returned home on 29 November 2017, he found the respondent's vehicle parked illegally on the corner of the road obstructing entry into the road. He believed that this was a deliberate nuisance as there was no reason why the respondent could not park in her garage. As the respondent had parked on the wrong side of the road, facing oncoming traffic, he had to manoeuvre several times to pass and enter his driveway. According to the appellant, the incident regarding Mavis occurred on 30 November 2017. He denied that there was a complaint regarding the wasp or that the respondent cut the creeper as it was overhanging. He said this was apparent from the comments made by the respondent while destroying the creeper. The hedging was ripped off damaging the fence in the process. There had been areas of the fence, which were damaged by termites, but the fence was still solid. Additionally, the estate rules require a request to be made prior to pruning.

[19] The respondent averred that on 17 January 2018, whilst she was trimming the creeper, which had overgrown, the appellant and his wife exited their unit and the appellant took photos and videos of her. She heard him saying he had enough photos and they went back inside their unit. The respondent viewed this as the appellant attempting to intimidate her. On 8 July 2018 at around 2 pm, the respondent went to retrieve some concrete pavers and found a broken panel of the fence on top of the pavers. She picked it up, placed it on top of the wooden fence, and carried on with what she had set out to do. Around 4 pm she was still in the garden when the appellant came out, removed the panel and threw it onto the concrete palisade fence breaking it completely. She contended that while doing this, the appellant made verbal threats and psychological abuse directed at her to lower her reputation amongst the residents.

[20] The appellant conceded to taking photographs of the respondent as she was breaking the fence and not trimming the creeper. According to him, the creeper had been completely removed on 30 November 2017. The appellant's wife asked him to take more photos, which request he declined as he had collected enough to submit to the estate management. He had no intentions to intimidate the respondent. In respect of the incident of 8 July 2018, the appellant averred that the fence provided a barrier and privacy for them. He accordingly denied breaking it. Furthermore, the fence was not accessible to them from their side of the divide. He contended that the respondent misconducted herself to cause nuisance, irritation and provocation to illicit a response.

[21] On 15 July 2018 at about 3 pm, the respondent went to the area of the palisade fence and found the broken pieces of wood, which she had placed on top of the existing wooden fence thrown back causing further breakage. She picked them up and wedged them firmly between the creeper and the existing fence. The appellant opened his patio door and took photographs of her. She told him not to worry and that he could take as many photographs as he wanted as she also had photographic evidence. The respondent contended that the appellant's actions in breaking the fence panels was to intimidate her.

[22] On 10 July 2018, the dumping of broken fence continued and the appellant requested Leitch Landscapes to remove them. On 15 July 2018, he took further photographs of the respondent's continued aggravation as she was attempting to separate the creeper on the appellant's side of the fence from the fence by wedging the slats between the fence and the creeper. The appellant believes the intention was always to destroy the fence and the creeper to support her demand for a new fence.

[23] On 23 January 2019, the respondent noticed video cameras inside the windows of unit [...], one facing the common property driveway adjacent to unit [...] and two pointing in the direction of the wooden fence. According to the respondent, these were used to survey her movements and to provide further reasons for the appellant to engage in written harassment against her. On 12 February 2019, the appellant filed an affidavit in the Verulam Magistrates' Court, which the respondent contended made a number of defamatory and false allegations against her, and were based on unsubstantiated hearsay or complete fabrication. She contended that

the affidavit was a further attempt by the appellant to lower her reputation among the residents in the scheme, which resulted in other residents bringing a scandalous and vexatious application in the Verulam Magistrates' Court.

[24] According to the appellant, the cameras were installed for security reasons as there were security issues in the bordering factories. As the appellant travelled to African countries for a week at a time, the cameras were installed for his wife's safety. It was purely coincidental that the cameras captured the respondent driving into their driveway. The cameras recorded the respondent driving over, and damaging the appellant's irrigation system. They lodged a formal complaint against her and asked the estate management to instruct her to desist from such malicious conduct. The appellant stated that the cameras remained installed as there had been two breaches to the perimeter fence and they did not feel safe. As regards 12 February 2019, the appellant submitted that Mrs Naesham had requested the affidavit wherein he set out the interactions he and his wife had with the respondent. The appellant and his wife both filed affidavits.

[25] On 13 June 2019, the respondent arrived home at 1.36 pm and the appellant's vehicle was 'overhanging' the edge of the driveway-adjoining unit [...]. The respondent suspected that this was a set up. She decided to enter that driveway to investigate if she was being video recorded. She noticed the garage at unit [...] was empty and according to her, this confirmed her suspicion. She took photographs of the position the vehicle was parked as the left rear was protruding into the road. She reversed onto the driveway, to the grass then to the driveway adjoining unit [...]. She thereafter took photographs of an empty driveway and garage at unit [...]. The appellant did not answer to this allegation.

[26] The respondent contended that on 14 June 2019, the appellant wrote a defamatory email to members of the body corporate and the estate's homeowners association, and threatened to post photographs of the respondent on the estate's Facebook page if he did not receive action from them by 5 pm. The email contained a complainant by the appellant regarding the respondent's conduct of continuously driving over the lawn on a specific driveway and damaging pop-up sprinklers when she had other options. Following the email, the respondent approached her attorneys to send a letter demanding the removal of cameras.

[27] The appellant confirmed that he sent an email to other owners in the estate as he believed they had a right to know when the body corporate property was being damaged. He contended that the letter of demand sent to him by the respondent's husband, an attorney to overshadow the main issue. The respondent deliberately drove over the grass because the appellant's vehicle was in the driveway while the driveway opposite was empty and was an easy option. The appellant had returned home to fetch his wallet, which he had forgotten. He believed the letter of demand was intended to gag him from discussing issues of the scheme with other owners and prevent him from reporting his complaint with the association. The letter demanded the removal of cameras and was fully complied with.

[28] The respondent contended that on 8 October 2019 at 8.30 am, she asked an employee of Leitch Landscape to remove some garden refuse she had placed on the driveway. She then pushed a rose, which she said was overhanging on the driveway. The employee asked why she did that but she did not answer and returned to her unit. At 8.35 am, she asked the employee, who was with the domestic worker from unit [...], why she was ignoring her request, but the employee continued sweeping and did not respond to her. She then called Thobi Vezi (Ms Vezi), a manager at Leitch Landscape, to the estate as she was having a problem with one of the employees.

[29] When Ms Vezi arrived, the appellant was standing in the road with his domestic worker looking at the roses. Upon seeing her, the appellant made a gesture with his face and hands indicating a mad person. According to the respondent, annexure 'G' is a photograph showing this. A copy of that photograph was unclear and just showed the appellant's hands lifted up to his face. The appellant said, 'these are our roses; they have nothing to do with you'. He then turned and walked away. She followed him recording a video on her phone. He stopped at his door and stared at her. She then said, 'court order' and he said, 'Ye, you are not a well woman'.

[30] The respondent waited for Ms Vezi to come to her unit, but when she did not arrive at 8.47am, she went out looking for her and found her talking to the appellant. She started the video again for her protection, as she was fearful that the appellant would become violent. The appellant walked into the driveway and the respondent went to speak to Ms Vezi. The appellant then asked the respondent if she was aware

that everyone was laughing at her. He then told her that since he did not authorise her to record him, she was infringing his privacy. The appellant's phone rang and he left. According to the respondent, the appellant involved himself in a discussion which had nothing to do with him. The respondent averred that she kept a diary of the events in anticipation that the appellant's harassment would continue. She contended that the appellant takes every opportunity to harass her.

[31] According to the appellant, his domestic worker told him that the Leitch Landscape gardener, Zandile Majozi (Ms Majozi) wanted to talk to him about the respondent who was breaking the roses on the side of the garage. There had been similar reports and photographs previously by other Leitch employees. The appellant walked to the rose bed and Ms Majozi showed him the stems, which the respondent broke. Ms Majozi explained that the respondent asked her to cut the roses back, which request she declined, as she knew there was a weekly service vendor who maintained the roses. The appellant contended that the respondent had no right to order Ms Majozi to do anything to the plants as there are estate rules regulating this.

[32] While talking to Ms Majozi, the appellant noticed a steel plant leaning against the electric fence and viewed this as an attempt to short circuit the transformer or reduce the currency. He removed it and threw it onto the respondent's lawn after which she came running out of the house with a phone in her hand taking a video. He asked her why she was breaking the roses as they had nothing to do with her. He then turned to go to his house and she followed him. He turned and pointed to his temple and told her that 'she wasn't a well person'. He went to his driveway and plugged in his golf cart.

[33] The staff in the vicinity giggled and the appellant asked the respondent if she was aware that people were laughing at her. He also told her that he did not approve the video and that she was infringing on his privacy. She continued recording the video and he told her that she was not well. He moved away from the respondent into the house to phone the estate manager, Mr Preggs. When Mr Preggs arrived, the appellant asked him and Ms Vezi, to discuss the incident at his home. The appellant told Preggs that this harassment had to stop and that the respondent's behaviour was getting out of hand. Preggs assured him that he would take it up with the body corporate.

[34] According to the appellant, on 23 October 2019, he was washing his vehicle in the driveway. The respondent drove straight there despite another driveway being completely empty. He contended that this showed the fictitious and malicious nature of the allegation by the respondent after serving him with a temporary protection order, of his alleged violent behaviour. He averred that it is inconceivable for a legitimate victim of violence to seek out close proximity of their alleged abuser. The appellant contended that he, his wife and other people in the estate have complained of the respondent's continued harassment. He averred that the application to court was unnecessary and was constructed by the respondent. In order to avoid abuse of court, they had referred their complaint to the Community Scheme Ombud Service (the CSOS) in accordance with the estate rules.

The impugned judgment

[35] Having considered the facts as set out above, the judgment of the court a quo delivered on 5 December 2019 confirmed the interim order granted on 14 October 2019 and ordered the final protection order, which expires on 5 December 2024. The court found that the estate management rules adequately cater for the regulation of conduct of occupiers of the units whether as owners or visitors. In addition, that there is a provision for respect of all members and unreasonable nuisance is strictly prohibited. The court a quo held that the respondent (the applicant before it) was entitled to approach it for protection from harm under the Act.

[36] Pursuant to a request for reasons by the appellant, the court a quo issued reasons on 17 December 2019. These were said to be in addition to reasons already given on 5 December 2019. The court a quo stated that the Act refers to a broad concept of harm and that conduct need not be accompanied by violence. Secondly, that the respondent alleged 15 incidents of harassment over a period of three years and the appellant agreed to 13 of the 15 incidents having occurred. Lastly, the court a quo stated that the estate conduct rules have to be followed by all persons living in the estate and are intended to protect a high quality lifestyle. The court a quo found that the appellant violated these rules and the respondent was entitled to seek protection. There was no order as to costs as the court a quo did not find the appellant's opposition frivolous or vexatious.

Condonation for failure to timeously prosecute appeal

The degree of lateness

[37] Rule 50(1) of the Uniform Rules of Court provides that an appeal against the decision of a magistrate must be prosecuted within 60 days after the noting of an appeal. Thereafter, in terms of Uniform rule 50(4)(a), the appellant must before the expiry of 40 days after noting the appeal, apply to the registrar in writing and on notice to all parties for a date for the hearing of the appeal. The appellant must, as provided in Uniform rule 50(7)(a), provide a record of appeal simultaneously with the lodgement of the application for dates.

[38] The time periods above commence after the appeal has been noted, which is done in terms of Magistrates' courts rule 51(3). As provided by Magistrates' courts rule 51(3), an appeal must be noted within 20 days of delivery of judgment. The 20-day period is calculated from the date of judgment or within 20 days of receipt of written reasons for the judgment, whichever is the longer period. It has already been stated that the reasons for judgment were received on 17 December 2019. The appellant contends that as at 17 February 2020, neither the appellant nor his attorneys had not received the written reasons. On receiving the reasons, the appellant endeavoured to serve the notice of appeal within the 20-day period, being 11 March 2020.

[39] Having served an electronic copy of the notice of appeal, an attempt was made to serve a hard copy on the court a quo. However, Ms Anderson was advised by her correspondent attorneys that the magistrate refused to accept physical service as there was no security filed. Thereafter, national lockdown came into effect and physical service could not be effected. Consequently, the appeal was only noted on 1 December 2020, which meant that the appeal was noted 264 days out of time.

[40] The respondent contends that prior to attempting to deliver a notice of appeal; the appellant's attorneys should have arranged to issue and lodge a bond of security or deposited cash with the clerk of court. Alternatively, they could have delivered the security simultaneously with the notice of appeal and that there is no justification as to why it took the appellant's attorneys a period of about ten months to provide security.

[41] Accordingly, the respondent contends that the appellant's attorneys failed to exercise the necessary care and skill to ensure that security was furnished timeously, and in so doing allowed a significant amount of time to pass. The

respondent contends further that the noting of an appeal could have taken place at a much earlier date had the appellant's attorneys exercised the necessary diligence. She accordingly submitted that the court should not condone the subsequent expiry of the 60 days within which the appellant was afforded to prosecute the appeal in terms of Uniform rule 50(1).

The explanation for the lateness

[42] Lauren Marion Anderson (Ms Anderson), the appellant's legal practitioner and the deponent to the appellant's affidavit in support of the condonation application, alleges that the appellant's failure to comply with the stipulated time period was not wilful and that there was good cause for the lateness in prosecuting the appeal.

[43] According to her, the delay was caused by serious events which led to the ultimate failure to meet the time periods in terms of the rules, these being:

- (a) That security was required and the magistrates' court refused to accept service;
- (b) There was a national lockdown closing the courts and attorneys' offices; and
- (c) She was absent from her office for a period of ten weeks, from 22 May to 20 July 2020, due to her late father taking ill and she was compelled to travel to St Francis Bay in the Eastern Cape to care for him.

[44] Ms Anderson's father passed away on 3 July 2020. Following the memorial service, she had to attend to other administrative issues and only returned to her office on 20 July 2020. She was physically exhausted having cared for her father alone for eight weeks. It was difficult to obtain nursing care due to the lockdown and travel restrictions. She also contends that she was mentally exhausted and was grieving. Her own health deteriorated and she was diagnosed with thrombosis in her left foot and was hospitalised on two occasions, on 20 September 2020 for two days, and on 27 September 2020 for four days. She was on bed rest for a week thereafter. She does not say when it is that she returned to her office but it can be concluded that it was sometime during early October 2020.

[45] Upon her return to office, Ms Anderson states that the noting of the appeal was not forefront in her mind and it only came to her attention on 26 November 2020 when a colleague asked her about it. She immediately took the necessary steps to note the appeal. She states further, that in addition to her personal issues, the

record, being the transcript of proceedings, was requested from Sneller Recordings and was not received by her office. Had it been received it would have served as an urgent reminder to attend to the matter. It appears Sneller Recordings had emailed the record to an incorrect email address. No time frames or dates have been provided in respect of the role attributed to Sneller Recordings. She states that any fault lies solely at her feet and not those of the appellant.

[46] Ms Anderson states that while the delay in prosecuting the appeal appears significant, given the problems experienced, the appellant has provided an acceptable explanation for the delay and has shown that everything that could possibly have been done to ensure that the matter moved forward was and has now been done. The lateness must also be considered in light of the circumstances within which the appellant's attorney found herself.

[47] According to the respondent, the delay was because of the appellant's attorney's failure to anticipate and adhere to the magistrates' courts rules timeously with regard to the furnishing of security, which resulted in the noting of appeal being beyond the 20 day period allowed for in Magistrates' courts rule 51(3). The respondent contends that notwithstanding the declaration of the national state of disaster on 15 March 2020, the appellant could have taken steps to furnish security and note the appeal within a period far less than ten months.

[48] The respondent's counsel, Mr *Leppan* conceded that the national lockdown prevented the appellant's attorneys from performing their duties. He contended, however, that the restrictions were in place between 26 March 2020 and 30 April 2020. The restrictions were relaxed by the Minister of Justice and Constitutional Development with the commencement of alert level 4 on 1 May 2020 in terms of reg 4 of the regulations published in GN R4898, GG 43268. During that period essential services could be performed, which included essential functioning of courts and legal practitioners, amongst others. The 4 May 2020, being a Monday was the first working day when the appellant's attorneys should have tried note the appeal.

[49] Mr *Leppan* submitted that Ms Anderson failed to apply the necessary care to ensure compliance with the rules of court at the first opportune moment. Ms Anderson failed to exercise the necessary skill expected of a legal practitioner. Consequently, the respondent submitted that this court should not condone such

conduct. He submitted further that the respondent sympathises with Ms Anderson on the passing of her father and her being ill thereafter. However, that the continuing delay of about eight months, from 1 May 2020 to 1 December 2020, was unjustified especially since Ms Anderson practices in a firm of attorneys. Greater care have been taken to ensure that the appellant's file had been attended to while Ms Anderson had taken a leave of absence. The respondent contends that it would appear that the appellant's file was simply allowed to go dormant and not attended to until 26 November 2020.

[50] The respondent contends further that the problems in procuring the record should not have affected the furnishing of security and the noting of the appeal because they are not contingent on the appellant securing the record. There could still have been compliance. He submitted that in any event, the appellant's attorneys should have investigated the delay with Sneller Recordings long before Ms Anderson returned to work. The salient issue that this court must determine is whether the delay of ten months was attributable to an unanticipated external factor(s), which prevented the appellant's attorneys from carrying out their duties, or through their own conduct, was justifiable. The filing of security and the noting of the appeal could have delivered them simultaneously. It was submitted that the appellant's attorneys' conduct of the appellant's attorneys could only be described as gross negligence.

[51] The respondent contends that the fact that Ms Anderson had taken ill and suffered bereavement are insufficient reasons to excuse the continuing delay of about eight months from 1 May 2020 to 1 December 2020. According to the respondent, this is because the delay was caused by the appellant's attorneys' staff who failed to ensure that the file was attended to during Ms Anderson's absence. In addition, the appellant's attorneys are a law firm with several attorneys who should have taken greater care to ensure that the appellant's file was being attended to in Ms Anderson's absence. It, however, appears that the appellant's file was allowed to go dormant and was not attended to until 26 November 2020. The respondent contends that this shows a failure on the part of the appellant's attorneys to exercise the necessary care and skill expected of a legal practitioner.

[52] As regards the record, the respondent contends that the problem in procuring it should not have affected the time taken to furnish security and the noting of the

appeal since these steps/actions could have still been done even in the absence of the record.

[53] The appellant's counsel Mr *Shapiro* submitted that while the appeal was prosecuted out of the time, the notice of appeal was taken into court for filing on 11 March 2020 but that the magistrate had refused to accept it. Further, that the appellant's attorney expressed not only the impact of the national lockdown but also a series of tragic personal events in her own life, which led to the delay in formally noting the appeal on 1 December 2020. He submitted that it was untrue that there was any gross negligence on the attorney's conduct.

[57] It was submitted by Mr *Shapiro* that there was no suggestion that the appellant took any steps to delay the appeal or was complicit in the failure to note it timeously nor that the appellant would have known what steps were required after the notice was delivered. To the contrary, the appellant's instruction led to the drafting of the notice of appeal and timeous attendance at the magistrates' court on 11 March 2020. Mr *Shapiro* further submitted that this was not a matter of simple lack of diligence or inaptitude and that a full explanation has been given. Further, that whilst the delay is 264 days, this should not in the circumstances bar the appellant from being able to prosecute the appeal.

[58] Mr *Leppan* argued that the appellant was dilatory in pursuing this matter on appeal, which has resulted in an extraordinary delay. Also, that ordinarily the appeal court is slow to shut the door to a bone fide would be appellant. Notwithstanding the intrusion of COVID19, the extraordinary delay in prosecuting the appeal also brings to the fore the failures by the appellant to comply with Uniform rule 50(1), Magistrates' courts rules 51(3) and 51(4) and s 84 of the Magistrates' Courts Act 32 of 1944. Regard must also be given to the appellant's attorney's failure to take advantage of the relaxation of civil law proceedings after May 2020 as set out in GG 43628.

[59] Mr *Leppan* submitted further that whilst the appellant's legal representative's personal circumstances may illicit a sympathetic response, it does not satisfactorily explain the delay after 20 July 2020. Further, that condonation is not merely for the asking and while he submitted that the affidavit does provide some explanation for the initial delay, it does not excuse the delay after 20 July 2020. He submitted that

the appellant's attorney was not a sole practitioner and the further delay of nearly six months is inexcusable. Notably too is the absence of any mention of the appellant himself querying the delay. In this regard, reliance was placed on *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) at para 6. This consideration coupled with the appellant's bleak prospects of success on appeal should close the appeal court door to the appellant.

Prospects of success

[60] As regards the prospects of success, Ms Anderson states that these have been set out in the notice of appeal, which are briefly as follows:

- (a) That the court a quo did not give due consideration to a number of factors including the appellant's version of events, and accepted the respondent's version of events uncritically and without evaluating the probabilities inherent in her version;
- (b) The court a quo failed to consider the respondent's own conduct and role in the events alleged;
- (c) The court a quo failed to conclude on the probabilities that the appellant neither caused harm nor inspired a reasonable belief of harm;
- (d) The court a quo failed to conclude that the respondent's application was vindictive;
- (e) The court a quo failed to conclude that the appellant had not committed any act of harassment as defined in s 1 of the Act;
- (f) The court a quo failed to conclude that the respondent did not fear the appellant given the length of time over which the alleged incidents occurred; and
- (g) The court a quo erred in concluding that the appellant had violated estate conduct rules, which in turn justified an order in favour with the respondent.

Prejudice

[61] Anderson averred that there was no prejudice suffered by the respondent since she has a final order in place and has not had any reason to act further in the matter. The appellant on the other hand, if not granted condonation due to the delay, will suffer prejudice, as he will be denied the right to have the appeal determined. It was contended that the prejudice to the appellant far outweighs any prejudice suffered by the respondent.

The importance of the matter

[62] According to Ms Anderson, this case involves a matter, which is important to the appellant who has, until this matter is ventilated, a final order that infringes his rights. In addition, that it is in the interests of justice that condonation be granted since the appellant did not create the lockdown or the personal circumstances of his attorney. It was submitted that the appellant demonstrated good grounds for the granting of condonation for the late filing and prosecuting of the appeal.

[63] The respondent contends that there was clear negligence displayed by the appellant's legal representative in failing to prosecute the appeal timeously and failing to prepare the record timeously. There are no prospects of success and the appellant has put up an incomplete record. The respondent contends further that the appellant's notice headed 'application for condonation' is defective as it does not comply with the provisions of Uniform rule 6(5)(b)(iii) by not providing a date by which the respondent must notify the appellant of an intention to oppose. Also, that there is no power of attorney filed authorising the prosecution of the appeal as required by Uniform rule 7(2) and (3).

Submissions by counsel

[64] It was submitted by Mr *Shapiro* that the appellant has very strong prospects success on appeal. Further, that his case is important and that it set precedent that the court can find a person guilty of harassment based on the subjective views of a complainant in circumstances where such conduct is simply objectionable or irritating to a complainant. It was submitted that the court needed to determine the objective standard required before conduct is deemed harassment. It was argued, that there are linked and serious consequences for the person who has been found by the court to be guilty of a type of serious and almost criminal conduct that constitutes a breach of the Act, justifying a final protection order being granted against him and the concomitant authorisation of a warrant of arrest.

[65] It was further submitted that the late delivery and prosecution of the appeal did not prejudice the respondent since she is in possession of an enforceable protection order that is valid until 2024. It was accordingly argued that the appellant has shown sufficient cause for this court to condone the late delivery and prosecution of the appeal. However, that should the court not be inclined to grant condonation as in the *Uitenhage* case, the appellant submitted that the court may

wish to consider the prospects of success before deciding the issue of condonation. In this regard, it was argued that there were compelling reasons to hear the appeal.

[66] Counsel for the respondent submitted that the learned magistrate considered the matter and that there was no evidence to support the contention that he had not critically evaluated all of the evidence and their probabilities. The respondent submitted that the issue to be considered is whether the appellant's conduct constitute harassment as defined in s 1 of the Act. In addition, to determine whether the appellant had the intention or ought to have known that his misconduct would cause physical, economic, mental or psychological harm to the respondent, and not whether the respondent was at fault or not. The respondent contended that the evidence clearly shows a course of conduct embarked upon by the appellant, which constitutes harassment. In addition, that it was demonstrated in her evidence that the appellant's actions were an attempt to physically harm her and caused her mental and psychological harm.

[67] The respondent counsel submitted that the evidence does not show that she played a specific role or that her conduct was inflammatory. The question to be answered was whether the appellant's conduct contravened the provisions of the Act. He submitted further that there is no evidence to support the assertion that the respondent brought the application in the court a quo as an act of vindictiveness. According to her, the evidence shows a course of conduct by the appellant over a prolonged period of time demonstrable from the matrix of the chronology of events, which culminated on 8 October 2019 when the appellant accosted her both verbally and with the use of physical signs. This incident occurred some months after the application before the court a quo by the neighbour, which was brought against the respondent.

[68] According to the respondent's counsel, the evidence shows that the appellant's acts constitute harassment as defined in s 1 of the Act. Accordingly, the court a quo was correct to decide that conduct need not be violent to constitute harassment. This is because the appellant admitted to 13 incidents which included accosting, watching and communicating verbally and in writing via electronic communication. In this regard, counsel relied on the leading case of *Mnyandu v Padayachi* 2017 (1) SA 151 (KZP) where this court decided that such conduct would amount to harassment.

[69] The respondent counsel submitted that length of time is no indicator of whether the appellant's acts caused her fear. The acts do show cause of conduct which were intended to and did induce fear in her. He submitted further that they caused her mental and psychological harm as the appellant's behaviour induced anxiety and anguish. He argued that it is evident that she tried to address these issues by referring them to the estate management without success. The respondent's application was brought after the events of 8 October 2019, as she could no longer endure the behaviour of the appellant. It was submitted that the court a quo considered the estate conduct rules to determine whether the respondent was entitled to bring the application or whether she should have addressed her grievance through the estate management. It was submitted that in its decision, the court a quo did not make its finding based on a violation of the conduct rules.

[70] The respondent argued that the magistrate did not err in failing to dismiss the application but that the granting of the final order was made after careful consideration of the evidence and the law. It was further argued that the final order has provided the required relief since she has not suffered any further harassment by the appellant. According to the respondent, any prejudice that may be caused to the appellant is the fault of his attorneys and he can commence action against them for compensation. The respondent's counsel contended that this court should not offer condonation when the conduct of the appellant's attorneys demonstrates gross negligence in bringing the appeal and there is a slim prospect of success. She contended that there are no good grounds for condonation nor do the interests of justice call for condonation to be granted.

[71] The respondent accordingly submitted that the court a quo dismissed the application for condonation with costs for the following reasons:

- (a) That the conduct of the appellant's attorneys demonstrates gross negligence;
and
- (b) That there are no reasonable prospects of success for the appeal succeeding.

Analysis

[72] Where a specific period is prescribed by the rules of court and there is non-compliance with the said period, it is peremptory that condonation be applied for. It is trite that in condonation applications where the delay is excessive, a full, detailed

and accurate account of the cause for the delay must be furnished (see *Darries v Sheriff, Magistrate's Court, Wynberg, and another* 1998 (3) SA 34 at 40H-J; *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) para 6, and *Dengetenge Holdings (Pty) Ltd v Southern Sphere and Mining Development Company Limited and others* [2013] 2 All SA 251 (SCA) para 11).

[73] In *Darries* at 41A, the court held that it cannot be assumed that where the non-compliance was entirely due to the negligence of the appellant's attorney that condonation would be granted. In *Saloojee and another, NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141B-G the court stated as follows: 'In *Regal v African Superslate (Pty.) Ltd.*, 1962 (3) SA 18 (AD) at p. 23, also, this Court came to the conclusion that the delay was due entirely to the neglect of the applicant's attorney, and held that the attorney's neglect should not, in the circumstances of the case, debar the applicant, who was himself in no way to blame, from relief. I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are. (Cf. *Hepworths Ltd v Thornloe and Clarkson Ltd.*, 1922 T.P.D. 336; *Kingsborough Town Council v Thirlwell and Another*, 1957 (4) SA 533 (N)). A litigant, moreover, who knows, as the applicants did, that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorney and then wash his hands of it. If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney (cf. *Regal v African Superslate (Pty.) Ltd.*, *supra* at p. 23 *i.f.*) and expect to be exonerated of all blame; and if, as

here, the explanation offered to this Court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself. That has not been done in this case. In these circumstances I would find it difficult to justify condonation unless there are strong prospects of success (*Melane v Santam Insurance Co. Ltd.*, 1962 (4) SA 531 (AD) at p. 532).’

[74] Further, in *Darries* at 41B-E, the court stated that the appellant’s prospects of success are an important consideration in a condonation application although not decisive. The prospects of success are but one of the relevant considerations in the exercise of the court’s discretion, unless the cumulative effect of other factors render such application unworthy of consideration. Where non-observance of the rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success may be (see *Blumenthal and another v Thomson NO and another* 1994 (2) SA 118 (A) at 121I-122B).

[75] In *Waverly Blankets Ltd v Ndimma and others* [1999] 11 BLLR 1143 (LAC) at 1145I-J, the court held that where the delay is excessive and the explanation is unreasonable and unacceptable, the court may refuse condonation without considering the prospects of success. Further, that where the excessive delay is explained, it may not justify the granting of condonation, especially if the delay is attributable to the litigant’s representative (see Zondo J in *Grootboom v National Prosecuting Authority and another* 2014 (2) SA 68 (CC) para 51). Regard must be had to the importance of the issue raised in the matter. In para 59 of *Grootboom*, Zondo J found that what needed to be decided in respect of condonation was whether the respondent had reasonable prospects of success, which is an important consideration in deciding whether to grant or refuse condonation.

[76] In para 22 of *Grootboom*, Bosielo AJ stated that the standard for considering an application for condonation is the interests of justice, which includes the nature of the relief sought, the extent and cause of the delay and the prospects of success (as set out in *Brummer v Gorfil Brothers Investments (Pty) Ltd and others* 2000 (2) SA 837 (CC) and *Van Wyk v Unitas Hospital and another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC)). The ultimate determination of the interests of justice must reflect due regard to all relevant factors but is not limited to

them. The particular circumstances of each case determine which of these factors are relevant.

[77] At paras 34 and 35 of *Grootboom*, Bosielo AJ stated that the impression created in the matter was that ‘we have reached a stage where litigants and lawyers disregard the rules and directions issued by the court with monotonous regularity’ and with flimsy or no explanations causing prejudice to the courts. He stated that a message must be sent to litigants that the rules of court cannot be disregarded with impunity. As regards the exercise of judicial discretion in determining a condonation application, he stated that it involved a value judgment and is based on the facts of each case. The court refused the condonation for application where the delay was 30 days due to the absence of an explanation for the delay.

[78] In *Tshivhase Royal Council and another v Tshivhase and another; Tshivhase and another v Tshivhase and another* 1992 (4) SA 852 (A) at 860C-G, the court found the failure to lodge proper security timeously (with a delay of eight months) had been remedied. It found that the appellants had at all times demonstrated a firm intention to appeal and that there was no real prejudice to the respondents. The court found further that the outcome of the appeal was of vital importance not only to the appellants, but also to the tribe as a whole. It seemed unfortunate that the issue of chieftaincy would be determined by the non-compliance with the rules. Accordingly, the court ruled that it had to consider the merits of the case to determine the prospects of success.

[79] The courts have raised concerns about the impact that non-compliance with time frames has on the interests of justice (see *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) at para 11; *Brümmer v Minister for Social Development and others* 2009 (6) SA 323 (CC) para 64 and *Road Accident Fund and another v Mdeyide* 2011 (2) SA 26 (CC) para 2).

[80] The extent of delay of 264 days is extremely excessive. The explanation tendered falls short since the only reasonable explanation relates to the period when Ms Anderson was caring for her late father being between 22 May and 20 July 2020, and to the six days when she was hospitalised in September 2020. The explanation provided accordingly accounts for 64 days. In my view, there is no explanation provided in respect of the other 200 days since, according to Ms Anderson, the

papers in the matter were ready to be filed from March 2020. The respondent is correct that all relevant documents should have been delivered by 4 May 2020 following the lifting of the hard lockdown.

[81] While Ms Anderson's explanation in respect of the 64 days is reasonable, that does not explain why other practitioners in the firm could not provide the necessary attention required in the matter. As correctly argued by the respondent, Ms Anderson was not a sole practitioner. It is apparent from the papers that the appellant's attorneys failed to exercise the necessary care and skill expected of them. It was reasonable for the magistrate to refuse delivery of the notice of appeal since no security was provided. There is no explanation provided as to why security was not provided sooner than 1 December 2020 save for Ms Anderson's absence. The issue of the availability of records had nothing to do with and could not have been an impediment to the furnishing of security.

[82] As was argued by the respondent, the appellant provided no explanation as to what actions he had taken to enquire on the matter. While it is accepted that he is not a legal practitioner, according to him, the order that was made by the court a quo was serious to him and had serious implications. He, however, sat back and took no action for a period of approximately a year. If the matter was a serious to him, like it is suggested by him and his counsel, he would have made enquiries and followed up on the appeal with his attorneys.

[83] In considering this condonation application, much turns on the prospects of success. The respondent's counsel submitted that the appellant has bleak prospects of success while the appellant argues that he does. In determining whether the appellant has reasonable prospects of success, it is proper that the merits of the matter are considered.

[84] It is trite that for this court to interfere with the judgment of the court a quo, it must find that the decision was capricious or based on wrong principles, that there was a failure to bring an unbiased judgment to bear or that there was a failure by the court a quo to act for substantial reasons. See *Western Cape Minister on Education v Governing Body of Mikro Primary School* 2006 (1) SA 1 (SCA). In order to determine this, it is necessary to consider the relevant provisions of the Act, relevant legal authority and the application thereof.

[85] As set out above, the application before the court a quo was in terms of the Protection from Harassment Act. Section 1 of the Act, the definition section, defines harassment as:

‘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 or a related person by unreasonably-
 - (i) following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;
 - (ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or
 - (iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to, or brought to the attention of, the complainant or a related person;
- (b) amounts to sexual harassment of the complainant or a related person;’

[86] Section 1 of the Act also defines harm as ‘any mental, psychological, physical or economic harm’.

[87] In terms of s 3 of the Act, when considering an application in terms of this Act, the court may consider all relevant evidence, including oral evidence or evidence on affidavit. Where the court is satisfied that there is prima facie evidence that:

- (a) The respondent is or has engaged in harassment;
- (b) Harm is being or may be suffered by the complainant or a related person as a result of the respondent’s conduct if a protection order is not immediately issued;
- (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.

it must grant an interim protection order with the return date despite the respondent not being served. Section 9(4) of the Act provides that on the return date, the court is to consider all the relevant evidence and issue a final protection order if it finds on a

balance of probabilities that the respondent has engaged or is engaging in harassment.

[88] Section 9(5) of the Act directs the court on what it must consider when determining whether the conduct of the respondent is unreasonable and provides that in addition to any other factor, the court must take into account whether such conduct was engaged in:

- (a) For purposes of detecting or preventing an offence;
- (b) To reveal a threat to public safety or the environment;
- (c) To reveal that an undue advantage is being or was being given to a person in a competitive bidding process; or
- (d) To comply with a legal duty.

[89] All the relevant facts are before this court and we are of the view that the interest of justice required that they be considered. We accordingly venture into an exercise of considering them. The court a quo found that of the 15 purported acts of harassment the appellant agreed to 13 incidents having occurred. It is not clear what is meant that the appellant 'agreed' to the incidents having occurred. The respondent, in her complaint, detailed the events and dates when such events occurred. What the appellant did in his defence, which was proper and reasonable, was to file an answer to each of those events as set out by the respondent. There is no admission by the appellant that any of those incidents amounted to harassment. On the contrary, what the appellant did in his answering affidavit was to provide evidence to support his version that he had not harassed the respondent and to present the respondent as the aggressor.

[90] It is evident from the record that the relationship between appellant and the respondent is acrimonious. The issue is whether such acrimony can result in one of the parties succeeding in a claim for harassment. In answering this question, sight must not be lost of the fact that legislature, in enacting the Act, gave due consideration to the issues and set out what the purpose of the Act is and circumstances when the court would find that there was contravention. In order to arrive at a conclusion that there was a contravention, it is my view that it is necessary to consider the incidents complained of, an exercise, which the court a quo as the court determining the facts, should have done.

[91] As regards the incident of 2015 regarding the pruning of roses, and that of 2016 when the respondent drove into the driveway adjacent to unit [...], being the first purported incident, it is clear that the estate rules regulate the pruning issue. It appears, having considered the version of both parties that the respondent was the aggressor who took it upon herself to prune the roses when there are estate rules regulating this. In respect of driving into the driveway, it is unclear as to the reason why the respondent avers that the appellant and his wife took exception since there is no suggestion that they did anything about this. There is nothing to suggest that there was any unreasonable conduct by the appellant that caused harm to the respondent and accordingly no harassment.

[92] The next relevant incident is on 22 December 2016, when the appellant knocked at the respondent's door and shouted the words 'common property'. It is unclear what the appellant did to suggest that he had an aggressive state of mind. Shouting out the words common property, when it is a fact that the driveway is common property cannot be said to be verbal abuse, especially in view of the respondent's earlier conduct of knocking at the appellant's home to take issue with his wife about the email she sent regarding the respondent driving over their pop-up sprinklers. Despite the intense argument between the appellant, his wife, and the respondent, this issue was resolved, which was a neighbourly way of dealing with disagreements. There was no suggestion by the respondent of any harm being caused to her and, in my view, no act of harassment.

[93] The issue of 18 January 2017 regarding the erection of the shade cloth was an issue discussed with and agreed to by the estate manager. It is unclear as to why the respondent intervened instead of raising the issue with the estate manager or body corporate. As the court a quo found, the estate has rules regulating the conduct of owners and their visitors adequately. In instances where there is non-compliance with these rules, parties are to seek enforcement from the estate and not take it upon themselves as was done by the respondent did when she threatened the building staff. Again, she was clearly the aggressor and there is no evidence of any harassment through the causing of harm by the appellant.

[94] The issue of 11 February 2017 relates to the appellant complaining to the estate security about the respondent's resident parking on the road. The respondent suggested that the complaint was made to harass her. The basis for such contention

is without any merit. The appellant was entitled to complain if he was being inconvenienced. The appellant did not direct any communication to the respondent or indirectly intend to harass her. He raised a genuine complaint with the estate management. It cannot be said on the existing facts that his conduct was unreasonable.

[95] The incident of 11 April 2017 was both unfortunate and unwarranted. There are two conflicting versions as to what transpired. It is, however, unclear why the respondent was watering the common property, regardless of whether the irrigation system was working or not, as it was not her responsibility to do so. As a result of her conduct, the appellant's renovation was adversely affected. The appellant accepts that he shouted at the respondent but denies using the words suggested by her. If indeed the appellant used those words, the respondent retaliated in a similar manner.

[96] As regards the issue of 29 November 2017, it is unclear what harm or harassment is contended. The respondent was parked on the wrong side of the road. She accepts that she was parked on the road. There are rules regulating parking in the estate. It appears that the appellant reported this to security. There was nothing harmful and unreasonable about his complaint. As regards the alleged overhanging creeper, estate rules regulate the cutting or pruning of plants and there are people employed for that. As to why the respondent cut the creeper, and how the appellant's comment that she was destroying the fence becomes harassment, is not apparent from the facts.

[97] It appears the issue of the creepers and their purported trimming was one of the contentious issues between the appellant and the respondent as it was a recurring theme in the incidents. When the respondent, on her version, again attended to it on 17 January 2018, the appellant felt the need to take photos of her to gather evidence. As already stated earlier, it was unnecessary for the respondent to have attended to the trimming since there is a landscaping company that attends to them and the estate rules regulate this. The appellant denies making any verbal threats and the onus is on the respondent to prove these. In view of the respondent's constant conduct, it was reasonable for the appellant to obtain evidence to be submitted to the estate management who were clearly not giving the matter the attention it required. The fence issue arose on 8 July 2018 and 15 July 2018 and the

photographs were taken. This time, according to the respondent, she told the appellant that she also had photographic evidence. Although it is improper to take photographs and this may in the normal course amount to some form of harassment, both the appellant and the respondent did it. Accordingly, on the facts of this case, it cannot be said that such conduct amounted to harassment.

[98] As regards the issue of the video cameras on 23 January 2019, the appellant provided a reasonable explanation as to why these had to be installed; it is unclear why the respondent would believe they were meant for her. In respect of the affidavit of 12 February 2019, the appellant was requested to set out his experience with the respondent by another aggrieved neighbour. The matter was before court and the respondent had opportunity to challenge its contents. How this amounts to harassment is not apparent from the papers. Regarding the incident on 13 June 2019, when the appellant's vehicle was overhanging the edge of the driveway, the respondent confirmed that she took photographs. It was acceptable for her to do this, yet when done to her, it constitutes harassment. She then drives over the lawn despite being aware from earlier experience that there are pop-up sprinklers and while she had an option of using the other driveway.

[99] In respect of the email of 14 June 2019, there is nothing therein amounting to harassment save for the indication of the intention to publish photographs. The sending of an email to the estate management cannot be said to be harassment. The appellant was understandably frustrated by the estate management's failure to act. In any event, arising from the appellant's email, the respondent's attorneys sent a letter of demand, which according to the appellant, was complied with.

[100] The pruning issue came up again on 8 October 2019. When Ms Majozi, who was working in the garden, called the appellant, he told the respondent that the roses had nothing to do with her, which was a fact. During the course of this incident, the respondent recorded a video of the appellant, which he was unhappy about. The appellant had did not engage further and opted to leave the matter in the hands of the estate management. It was unwarranted for the appellant to throw the steel plant onto the respondent's lawn, but again this cannot be classified to be harassment. The respondent was the aggressor in this instance as she followed the appellant to his house when he walked away from the scene.

[101] The final incident cited/mentioned was on 23 October 2019. The respondent, having obtained an interim order against the appellant, continued with her confrontational behaviour/conduct by deliberately driving close to the appellant whilst he was washing his vehicle. It appears that the appellant made numerous complaints against the respondent, which were referred to the estate management, yet nothing was done.

[102] It is necessary, arising from the above, to determine who bears the onus of proof and whether such onus was discharged to warrant the granting of a final order by the court a quo. In *Mnyandu v Padayachi* para 30, the court accepted that the onus rests on a party seeking a protection order to prove that she is entitled to that order, ie that party must prove that the conduct complained of constitutes harassment in terms of the Act. In *Pillay v Krishna and another* 1946 AD 946 at 952, the court held that the person who bears the onus of proof will lose if she does not satisfy the court that she is entitled to succeed in her claim. At para 40 of *Mnyandu*, the court went on to say that the complainant must prove on a balance of probabilities that the perpetrator knew or ought to have known that their conduct would cause harm to the complainant, and that the conduct is unreasonable in the circumstances.

[104] At para 44 of *Mnyandu*, the court stated that the conduct against which protection is offered by the Act should not be construed too wide otherwise there would be a plethora of applications based on conduct not contemplated by the Act. An interpretation, which is too narrow, may unduly compromise the objectives of the Act. The court concluded in paras 57 and 59 that an objective test must be applied, ie a reasonable person must think that the course of conduct complained of amounted to harassment.

[105] The court found in para 68 that although the definition of harassment does not refer to a 'cause of conduct', the conduct complained of must either be repetitive and unreasonable, making it tormenting or inculcating serious fear or distress in the victim. Alternatively, if it is a single act, the conduct must be overwhelmingly oppressive such that it has similar consequences as the repetitive act.

[106] The facts of this matter reveal conduct of a neighbour who is unneighbourly. The parties live in an estate with rules which regulate their conduct, especially in

relation to common property. Despite this, the respondent seems to have taken it upon herself to do as she wished on numerous occasions, conducting herself in a manner, which was provoking. On several occasions, the appellant reported such conduct to the estate management but it appears that his complaints were not given consideration. This resulted in him lodging a complaint with the CSOS. Had the estate dealt with the matter from when it started, it is unlikely that it would have led to this.

[107] As stated earlier in this judgment, the issue turns on the decision of the court a quo. Does a reading of the facts in the matter lead to the conclusion that the appellant harassed the respondent? In my view, I find that they do not. As stated earlier, the fact that the appellant provided a reply to all the incidents is not and cannot be perceived as an admission of any unreasonable conduct. The court a quo erred in its understanding of this issue, and without considering the merits of each complaint and the response thereof erroneously concluded that the appellant's conduct constituted harassment.

[108] It is clear from the Act that for conduct to amount to harassment it must be harmful and must be unreasonable. A consideration of the facts in this matter paints a picture of the respondent continuously provoking the appellant and his wife, seemingly certain that the estate management would do nothing to sanction her conduct. On numerous occasions, the respondent went to the appellant's home and confronted him or his wife. It cannot be said that there was prima facie evidence of harassment before the court a quo that warranted the granting of a final order.

[109] Nothing in the judgment of the court a quo suggests that it considered the provisions of s 9(5) of the Act; whether the appellant's conduct could objectively be viewed as unreasonable. That being the case, it is unclear as to how the court a quo arrived at its decision, especially taking into consideration the facts of this matter. It clearly arrived at a wrong conclusion and committed a patent error. I agree with the appellant that the court a quo approached the matter on the basis that it had granted the interim protection order and accordingly that the onus shifted on the appellant. This was incorrect since the onus remained with the respondent to prove that she was entitled to a final order.

[110] There was no evidence to show that the appellant was aware that the respondent perceived any of his conduct as harmful and deliberately persisted with it. As correctly submitted by the appellant, the court a quo confined itself to concluding that because the respondent contended that the events occurred that they constituted harassment. I agree that the court a quo did not make any assessment of the existence or otherwise of psychological harm as contended by the respondent and there was no evidence to that effect. Accordingly, the court a quo committed a material misdirection. Consequently, the appellant has reasonable prospects of success on the merits.

[111] Having reached this conclusion, the question that still needs to be answered is whether having found that the appellant has reasonable prospects of success on the merits, this justifies the granting of condonation despite the excessive delays and a thin or absent explanation for such delay. Taking into account that there was no evident prejudice to the respondent as she was armed with her final protection order, the issue of precedence, and the effect of the final order on the appellant, I find that the interests of justice favour the granting of condonation.

Order

[112] In the result I propose the following order:

- (a) The application for condonation against the late noting of the appeal is granted.
- (b) The appeal succeeds.
- (c) The order of the court a quo is set aside and is substituted with the following order:
 - ‘1. The interim protection order granted on 14 October 2019 is discharged;
 - 2. There is no order as to costs.’
- (d) Each party is to bear its costs of the appeal.

MASIPA J

I agree, it is so ordered

RADEBE J

Details of the Hearing

Date of hearing: 27 August 2021

Date of delivered: 3 June 2022

Appellant's counsel: *W N Shapiro*

Instructed by: MacGregor Erasmus Attorneys

Respondent's counsel: *G J Leppan*

Instructed by: Ramdass and Associates