THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

JUDGMENT

Case No: A239/2019

In the matter between

PPS **APPLELLANT**

and

TLS **RESPONDENT**

Coram: Henney and Rogers JJ and Martin AJ

Heard: 21 August 2020

Delivered: 2 September 2020

JUDGMENT

Rogers J (Henney J and Martin AJ concurring)

[1] The appellant, Mr [PPS], appeals against an order forbidding him from entering the residence he shares with the respondent, Mrs [TLS]. The parties are married in community of property. The order was made in terms of s 7(1)(*c*) of the Domestic Violence Act 116 of 1998 ('the DVA'). The impugned order was made on 25 June 2019. Because of the pending appeal, Mr [PPS] has not as yet left the home.

[2] The appeal was first enrolled for hearing on 9 December 2019. The appellant was represented by counsel. There was no appearance for the respondent. Although argument was provisionally heard, the state of the record was unsatisfactory. After the hearing, it appeared that I and the acting judge allocated to the case might disagree on the outcome. The appeal was thus postponed to 28 February 2020 with directions for the supplementation of the record. Due to a misunderstanding, there was no appearance for the appellant on the latter date, by which time in any event the record had not yet been supplemented. By that stage, Martin AJ had taken the place of the previous acting judge whose acting appointment had terminated.

[3] The appeal was thus further postponed. The court thought it desirable to request the Cape Bar Council to nominate an advocate to act as an *amicus curiae* with a view to advancing all arguments that could properly be made on behalf of the absent respondent. A third judge, Henney J, was added to the panel, to ensure that there would be a majority in the event of disagreement. The Covid-19

pandemic delayed the further hearing of the appeal, which eventually took place on 21 August 2020.

[4] The appellant was represented by Mr W Fisher. Ms N Mbangeni appeared as an *amicus curiae*. The court expresses its gratitude for her helpful submissions.

[5] The date on which the parties got married does not appear from the record, but the marriage appears to have subsisted for some years. According to Mrs [TLS], the shared residence was bought for her by her father. By virtue of the community marriage, the parties now own it in equal shares. They have four children. At the time of the proceedings in the court *a quo*, ie June 2019, the oldest son, [VDS], was 18. There were three younger children aged 18 (a son), 12 (a daughter) and 9 (a son). All four children live in the home with their parents.

[6] On 2 May 2019 Mrs [TLS] applied for a protection order against her husband in terms of the DVA. She alleged emotional and verbal abuse and that Mr [PPS] insulted her in front of the children. Because [VDS] took her side, this brough the son into conflict with his father. Mr [PPS] allegedly threatened that he would eject her and the children from the house. She did not want to stay under the same roof as him. Apart from seeking interdicts against the committing of acts of domestic violence, she asked for an order prohibiting him from entering the home.

[7] The court *a quo* granted an *ex parte* interdict against the abuse but did not at that stage make an order prohibiting Mr [PPS] from entering the shared residence. The return day of the interim order was 8 July 2019.

[8] On a date which does not appear from the record, Mr [PPS] applied for a protection order against [VDS]. Mr [PPS]’s application is not part of the record but he testified that he brought it before his wife launched hers. It is unclear

whether an interim order was made. Be that as it may, Mr [PPS]'s application for a final order served before the court *a quo* on 25 June 2019. The magistrate heard evidence from Mr [PPS] and [VDS]. Given the mother's centrality in the domestic conflict, the magistrate said that she wanted to hear from her. She was told that Mrs [TLS] was outside.

[9] Mrs [TLS] was thus called in to testify. She described her husband's alleged abusive behaviour. When the magistrate asked her what she had done about it, Mrs [TLS] told the court of her application for a protection order. Although the return day of that application was 8 July, the magistrate called for the file and placed the matter on the roll. She confirmed with Mr [PPS] that he had received the interim order. The hearing of the two applications then proceeded on a consolidated basis.

[10] The magistrate asked Mr [PPS] to suggest a solution to protect the three family members from each other. Mr [PPS] proposed that all three should be granted protection orders to ensure mutual respect. The magistrate expressed the opinion that [VDS] was essentially a good youngster, and that the problem was not so much with him as between Mr and Mrs [TLS]. Mr [PPS] agreed.

[11] The magistrate suggested that bringing [VDS] to court would not help; what the parties needed was a break from each other. Mrs [TLS] intervened to say that she did not want anything more to do with her husband. Even if she had to sell the house and give him his half-share, that would be fine; he just needed to be away from her.

[12] The magistrate told Mr [PPS] that she could not grant the mutual protection orders he had in mind. She was also not in a position to tell [VDS] that he had to obey his father. She would grant him a protection order against [VDS] because the latter was very angry with his father:

'But I will remove you from that house. That is for the protection of that woman together with her children from you. You will have to go and find a place to stay for yourself until such process where there is a divorce process and then you fight for your share if you need to.

Even though you are married in community of property, it is clear to me … from your evidence that this is not your house. You met her. She had a house. You stayed with her, she had a house…

However, this court is not blind to the fact that there is danger in this house with you staying with these people because you are alone. You are alone there. And she and the two boys … or let me say she and this boy that has shown to you that anything may happen, it is best that you are moved out in your protection and with the protection [indistinct] together with your children.

This does not take away the fact that you are in community of property. You know at the back of the mind this is not your house. You will be gaining because of marriage. You had nothing to put towards the house. If this court moves you out of the house, you are not losing anything because there is nothing that you have put for the house. This is a matter for divorce. It is not a matter for this court … So, moving you out of the house is not going to be prejudicial to you because you are losing nothing …

… And from today, I will give you a month to look for place to stay. I will state in the protection order from today – that is 25 June until 25 July you stay in that house. On the 26th you must have moved yourself to find a place and leave these people in peace in that house …

If you want to lodge a divorce you can still lodge a divorce … The order that I am ordering now, the High Court, the divorce court has authority to set it aside in cases of divorce where the court may order that you may move back into your house, to have your house sold and share the proceeds. But until that day when you both approach the High Court, this order stands.

[13] The magistrate asked whether he wished her to explain the above to him in isiXhosa. Mr [PPS] appeared to want to tell the magistrate about his contributions to the house, but she interrupted him, saying that whatever he had done was done out of love for the benefit of himself, his wife and the children, and that he could

raise those issues if and when there were divorce proceedings. The magistrate again emphasised the stress and anxiety which he was causing to Mrs [TLS] and [VDS]. There was, she observed, in truth no marriage in the home because the parents were sleeping in separate rooms.

[14] After further inconsequential dialogue, the magistrate formalised the terms of the protection orders granted in Mr [PPS]'s favour against [VDS] and in Mrs [TLS]'s favour against Mr [PPS]. Mr [PPS] does not appeal against the final interdicts against abuse, although his counsel did not concede that the evidence on that aspect was fully and fairly canvassed. Mr [PPS] does, however, appeal against the order that he may not enter the shared residence as from 1 August 2019. For convenience only, I shall refer to this as the eviction order.

[15] Despite the fact that the marital relationship had broken down and the parties had been living in separate rooms for several years, neither party had instituted divorce proceedings against the other. Mr Fisher informed us that this was still the position. We do not know why neither party has taken the initiative. It does not appear to be because they still love each other.

[16] Mr Fisher submitted that Mrs [TLS] had not sought an eviction order in her application. It is clear, however, from paras 7(e) and 8(h) of her application that she indeed did so. What is true is that at the interim stage the court *a quo* did not grant an eviction order. That is understandable. The proceedings were *ex parte*, and it is difficult to envisage circumstances in which an *ex parte* eviction order would be justified.

[17] Mr Fisher argued that in any event the evidence did not justify an eviction order and that its imposition had been procedurally unfair. I think it unwise at this stage to express an opinion on whether an eviction order against Mr [PPS] was or is substantively warranted, not least for the reason that if the procedure followed

in the court *a quo* was materially deficient we cannot know that we have all the evidence relevant to the question.

[18] Before addressing procedural fairness, however, I wish to make two observations arising from Mr Fisher's submissions on the merits. First, he argued that emotional, verbal and psychological abuse was less serious than physical abuse, and that an eviction order was more likely to be warranted in the latter case than in the former. I cannot endorse that view. Depending on the circumstances, emotional, verbal and psychological abuse may be as, or more, damaging for its victim than physical abuse, particularly where the non-physical abuse is sustained.

[19] Second, Mr Fisher made reference to s 7(7)(*b*) of the DVA, which provides that if the court is of the opinion that any provision of the protection order deals with a matter that should, in the interests of justice, be dealt with further in terms of any other relevant law, the court must order that such provision shall be in force for a limited period only, in order to afford the party concerned the opportunity to seek appropriate relief in terms of such law. He argued that an 'eviction order' in terms of s 7(1)(*c*) of the DVA implicated the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('PIE'), and that an eviction order under the DVA should thus be for a limited period only, so as to allow the complainant to seek relief in terms of PIE.

[20] The flaw in that argument, as was pointed out by Ms Mbangeni, is that PIE only governs the eviction of an 'unlawful occupier', ie a person occupying land without the express or tacit consent of the owner or person in charge or without any other right to occupy the land. At least in a community marriage where the property in question forms part of the community estate, the right to give and withdraw consent vests in the spouses jointly, so that one spouse cannot become an 'unlawful occupier' simply because the other spouse does not want

him or her to live there. (It is unnecessary to express an opinion on the case where the parties are married out of community of property and the land in question belong solely to one of them.)

[21] Turning then to the question of procedural fairness, the earnest quest to give effect to the important objects of the Act cannot come at the expense of due process. In *De Beer NO v North-Central Local Council and South-Central Local Council & others (Umhlatuzana Civic Association Intervening)* [2001] ZACC 9; 2002 (1) SA 429 (CC) Yacoob J said the following in para 11 with reference to s 34 of the Constitution which promises a fair hearing to anyone involved in a justiciable dispute that can be resolved by the application of law:

> 'The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and rules of court, where it is reasonably possible to do so, in a way that would render the proceedings fair.'

(See also *PSH v PH & another* [2013] ZAECGHC 90 paras 17-18 specifically in the context of the DVA, and *Ramadwa v Kokodi* 2018] ZAGPPHC 714 paras 13-16 in relation to an 'eviction order' granted under the kindred provisions of the Protection from Harassment Act 17 of 2011.)

[22] As will be apparent from my description of the proceedings, this was an unusual case. Mr [PPS] went to court on 25 June 2019 as an applicant in order to obtain final relief against [VDS]. He did not arrive there prepared to defend himself against Mrs [TLS]'s application, which was only due to be heard on 8 July. He would thus have been taken by surprise when the magistrate, midway through the hearing, caused Mrs [TLS]'s application to be placed on the roll, thus effectively accelerating the return day.

[23] It is unclear whether Mr [PPS] knew that his wife was seeking an eviction order. In terms of s 5(3)(*b*) of the DVA, an application should be served on a respondent together with the interim order. While it may be a fair inference that that was done in the present case, the only thing which the magistrate expressly confirmed with Mr [PPS] was that he had received the interim order.

[24] Apart from the fact that Mr [PPS], on 25 June 2019, had not come to court prepared to deal with his wife's application, the interim order on its own would not have alerted him to the danger of eviction. The interim order specified the interim interdicts against abuse, invited him to appear on the return day to give reasons why the interim orders should not be confirmed, and warned him that if he did not so appear the interim orders might be made final. The interim order did not warn Mr [PPS] that although an eviction order had not yet been granted, such an order would or could be granted on the return day. (This appears to be a deficiency in the standard Form 4 prescribed for use as an interim protection order. The standard form should make provision for relief which the applicant will be seeking on the return day, even though such relief had not yet been granted on an interim basis.)

[25] If Mr [PPS] had been aware that his wife was seeking an eviction order against him, he might have wanted to have legal representation. If the return day of his wife's application had not been anticipated, it is conceivable that on 8 July 2019 he would have been legally represented.

[26] An order interdicting a respondent from committing an act of 'domestic violence' (s 7(1)(*a*)) effectively prevents the respondent from doing that which is in any event unlawful. By contrast, an eviction order under s 7(1)(*c*) prevents the respondent from doing that which would otherwise be lawful. Without wishing to suggest that exceptional circumstances need to be present before such an order is

granted, particular care must nevertheless be taken to ensure that the granting of such an order is justified. It is not unusual, in cases of domestic violence, for the complainant and respondent to share a residence. In a sense, one might say that the most effective way of ensuring that an interdict against abuse is complied with is to exclude the offending party from the home, but I do not think that the lawmaker intended that exclusion from a shared residence should be the norm simply because it would make interdicts more effective.

[27] Furthermore, an eviction order implicates a respondent's right to adequate housing in terms of s 26 of the Constitution and may also, as in the present case, implicate his or her right to property under s 25 of the Constitution. This is by no means to suggest that such a respondent's constitutional rights are paramount, because the complainant has important constitutional rights as well, including a right to dignity (s 10) and the right to freedom and security of the person and to bodily and psychological integrity (s 12). Nevertheless, when the grant of an eviction order in terms of s 7(1)(*c*) of the DVA is being considered, the court must give due consideration to the respondent's constitutional rights and must determine whether the inroad on the respondent's rights is truly justified by the circumstances.

[28] It thus seems to me that a court considering the grant of a s 7(1)(*c*) order should warn the respondent that such an order is being contemplated. Because of the significant prejudice which its grant may entail, the respondent should be told of his or her right to legal representation and be afforded an opportunity of getting such representation if he or she so wishes (cf s 14 of the DVA which provides that any party to proceedings in terms of the Act may be represented by a legal representative). This need not mean a lengthy postponement. Since an eviction order entails a balancing exercise, the court should elicit information *inter alia* about the potentially prejudicial implications of the order for the respondent and

children. As a bare minimum, the court should elicit information about the respondent's ability, including financial resources, to obtain alternative accommodation. Where the parties' children reside in the shared residence, the respondent's access to his children in the event of an eviction order being granted should also be taken into consideration.

[29] It is clear that in the present case the procedure followed by the court *a quo* fell well short of the requirements of basic fairness. After hearing Mrs [TLS]'s evidence (at that stage in the context of Mr [PPS]'s application against [VDS]), the magistrate placed her application on the roll, and immediately turned to the question of a suitable 'solution'. She heard no further evidence. She did not invite Mr [PPS] to reply to Mrs [TLS]'s evidence. She did not, in advance of the passages I have quoted at some length from her decision, warn Mr [PPS] that she had an eviction order in mind. She did not ascertain from him whether he was aware that his wife had been seeking such an order. She did not ask him whether he wanted legal representation. She made no enquiries about his ability to obtain or afford alternative accommodation.

[30] The magistrate also seems not to have applied her mind to the effect which the eviction order would have on Mr [PPS]'s access to his children, something which implicated not only his interests as a parent but their rights as children. The DVA's concern for the interests of children in relation to protection orders is apparent from ss 5(1A) and 7(6). Although the evidence indicated a fraught relationship between Mr [PPS] and [VDS], and to a lesser extent between him and the second son [TS], the eviction order effectively cut off Mr [PPS]'s usual access to all four children. Such an order may turn out to be justified, but the court *a quo* did not place itself in a position to make an informed assessment.

[31] Another matter which the court *a quo* should have investigated before coming to a decision was the effect if any which the interim order had already had on Mr [PPS]'s behaviour. By 25 June 2019 the interim interdicts against abuse had been in place for about seven weeks. In order to determine whether eviction was essential to bring the abuse to an end, it would have been important to know whether the interim orders had already done so.

[32] Ms Mbangeni acknowledged that the procedure followed by the court *a quo* was unsatisfactory. Both she and Mr Fisher agreed that if we were to find that the procedure in the court a quo had been materially unfair, the proper course would be to remit the question of an eviction order to the court *a quo* for reconsideration. The court *a quo* will need to give the parties a fair opportunity to adduce evidence and make submissions on the question of an eviction order. The court may need to be proactive in eliciting information. Given the lapse of time, it would be appropriate for the court *a quo* to inform itself as to what has been happening in the home since June 2019. (This remittal will leave untouched the confirmation of the interdicts against abuse.)

[33] As to costs, Mr Fisher in his heads of argument simply asked for the relief set out in his client's notice of appeal. The notice of appeal does not deal with costs. In any event, Mrs [TLS] did not oppose the appeal. The deficiencies in the procedure followed in the court *a quo* were not of her making. I thus consider that there should be no order for costs in the appeal.

[34] I thus make the following order:

(a) Para 2 of the order made by the court *a quo* on 25 June 2019 is set aside.

(b) The matter is remitted to the court *a quo* to determine whether the grant of an order in terms of s 7(1)(*c*) of the Domestic Violence Act 116 of 1998 is warranted, after hearing such evidence and argument as the parties may wish to

adduce and make, and after eliciting such information as the court *a quo* may consider desirable, having regard to the principles laid down in this judgment.

(c) No order as to costs is made in the appeal.

O L Rogers

Henney J (concurring)

Martin AJ (concurring)

APPEARANCES

For Appellant	W Fisher Instructed by N Allen Attorneys Room 11, First Floor, Leisureland Building 11 Robert Sobukwe Road Bellville
For Respondent	No appearance
Amicus Curiae	N Mbangeni Cape Bar