IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 18052/2022
[REPORTABLE]

In the matter between

MIGAL VAN AS Applicant

And

THE ADDITIONAL MAGISTRATE CAPE TOWN 1st Respondent
Ms. S.H GUENDOUZ N.O

THE DIRECTOR OF PUBLIC PROSECUTIONS 2nd Respondent
WESTERN CAPE

MINISTER OF JUSTICE AND 3rd Respondent
CORRECTIONAL SERVICES

MARGOT VAN WYK 4th Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 24 JULY 2023

RALARALA, AJ

INTRODUCTION

[1] This matter served before this court by way of review as contemplated in section 22 of the Superior Courts Act 10, of 2013 ("Superior Court Act"). The applicant approached this court, seeking an order to review and set aside the decision taken by the first respondent ("magistrate") on 15 September 2022. The review is pursuant to an order of the magistrate invoking the new provisions of the Criminal and Related Matters Amendment Act 12 of 2021, requiring that bail of an arrested person in domestic related offences only be determined by a court, as a result of which she revoked the applicant's release on warning.

[2] The notice of motion indicates that the applicant seeks an order declaring the decision of the magistrate dated 15 September 2022 as unlawful, unconstitutional and invalid. The applicant therefore requests this court to review and set aside:

- the Magistrate's decision to retain the applicant in custody;
- The decision to release the applicant on bail with conditions; and

- The decision to grant a final protection order and warrant of arrest against the applicant in favour of the fourth respondent under case no. D1373/2022 in the Cape Town Magistrate's Court.

- Declaring that the applicant's release on warning under Cape Town case number 13/0722/2022 remains extant.

- The second to third respondents pay the costs of this application jointly and severally.

- In the event of opposition from the fourth respondent shall jointly and severally with the second to third respondents pay the costs of this application.

[3] The application is not opposed by the respondents. The first, second, and third respondents filed notices of intention to abide by the decision of the court. The fourth respondent initially opposed the matter and filed her answering affidavit. However, on the eve of the date of hearing the fourth respondent filed a notice of intention to abide with the decision of the court and thus the matter is unopposed. It bears mentioning, however, that the said notice of intention to abide was filed along with an affidavit in response to the applicant's heads of argument, setting out or reiterating her opposition to the setting aside of the Domestic Violence Protection Order granted by the magistrate.

FACTUAL BACKGROUND

[4] It is necessary to sketch the events forming the background to the dispute.
In this matter, it is common cause that upon the applicant's arrest by the police on the assault charge, he [the applicant] was warned to appear in court on 15 September 2022.

Consequently, on his first appearance before the magistrate on 15 September 2022, the applicant appeared on his own cognizance and with his own legal representative.

[5] Upon the applicant's appearance on warning, the prosecutor requested the magistrate to revoke his warning status and to remand him in custody. Pursuant to the request by the prosecutor, the magistrate revoked the applicant's warning status and he was taken into custody. The record reveals that the decision taken by the magistrate was based solely on the prosecutor's request. Moreover, the magistrate concluded that the process is permissible in terms of section 72A (read with section 68) of the Criminal Procedure Act 51 of 1977("the CPA") as amended by the Criminal and Related Matters Amendment Act 12 of 2021(" the Amendment Act "). The magistrate also determined that the offence the applicant was charged with, fell within the purview of schedule 5 of the CPA, thus a formal bail application was consequential.

[6] During the bail proceedings the prosecutor did not oppose the applicant's release on bail. However, the prosecutor requested that contingent to the release of the applicant on bail, a final Protection Order in terms of section 6 of the Domestic Violence Act 116 of 1998 ("the Domestic Violence Act"), as envisaged in the Amendment Act, should be issued against the applicant. The magistrate granted bail simultaneously with a final Protection Order.

[7] In the course of her ruling in respect of the cancellation of the applicant's release on warning, the magistrate stated:

"The prosecution applies for the accused's warning to be revoked. The defence objects. Court is obliged to grant the application in terms of section 72A of Act 51 of 1977, as it was in the first instance unlawful for the police to release the accused. No provision for his release is made in the Act as it now stands since 5 August 2022."

[8] The applicant and the fourth respondent were romantically involved. On 13 August 2022, they were together at the applicant's residence in Cape Town. An argument ensued between the two of them, the fourth respondent approached the police and reported a criminal case of assault against the applicant.

[9] On 22 August 2022, the applicant was contacted by the investigating officer in the matter advising him of the assault allegations levelled against him. The applicant attended the Cape Town Central Police station with his legal representative where he was formally charged with assault and subsequently released on warning.

[10] The Amendment Act came into operation on 5 August 2022. The purpose of the Act is to *inter alia* amend the CPA so as to further regulate the granting and the cancellation of bail in domestic-related offences. It also seeks to regulate sentences in respect of offences that have been committed against vulnerable persons. This resulted in the amendment of the Criminal Law Amendment Act 105 of 1997. The extent and effects of the Amendment Act in relation to this matter will become apparent later in the judgment.

THE APPLICANT'S SUBMISSIONS

[11] It is averred by the applicant in his founding affidavit that, during the court proceedings the magistrate did not grant the applicant's attorney any opportunity to

oppose the application to cancel the warning, save for noting an objection on behalf of the applicant. It is convenient at this stage to refer to the relevant passage of the proceedings:

"PROSECUTOR: The offence occurred in August.

COURT: On which date in August? Be specific.

PROSECUTOR: 13 August.

COURT: So that would be exactly eight days after the new amendment came into operation. Is that correct? So what is your application now in terms of section 72?

PROSECUTOR: Your Worship, we will have to … that will have to be set aside and then the matter will have to be placed now in terms of … a bail will have to be … the defence will have to apply for bail because now the offence is treated as a Schedule 5.

COURT: Mr Kay, that was a section 72A. I am obliged to keep your client in custody until a Schedule 5 bail application can be heard. Unless it can be heard right now, I will have to"

[12] According to the applicant, his legal representative indicated that he was objecting to the cancellation of his release on warning. The applicant further states in his affidavit that the magistrate merely noted his attorney's objection to the cancellation of the warning and did not afford his attorney the opportunity to present any further argument thereon or amplify the content of the objection.

[13] The applicant further draws this court to the interaction between his attorney and the magistrate that went as follows:

"MR KAY: Yes, Your Worship.

COURT: The prosecution applies for the warning to be revoked. I am noting that you are objecting.

MR KAY: Thank you, Your Worship.

COURT: But like I said, I am a creature of statute. I am obliged to grant the application and revoke the warning in terms of 72A, Act 51 of 1977, however, I would like to resolve the matter today.

MR KAY: Yes, Your Worship"

[14] To avoid imprisonment, it is contended that the applicant had to agree to his release on bail on condition that a final protection order in terms of section 6 of the Domestic Violence Act is granted by the Court. The applicant further avers that the magistrate enquired whether there was an existing protection order forming part of the evidence in the case docket, despite the fact that the fourth respondent had not obtained a protection order against the applicant at the time. The relevant part of the record is as follows:

"Court: I will give you a chance to draft the affidavit. I mean it is your chance if you want to put your client on the stand and then the prosecutor may address me ex parte regarding the feelings of the complainant and then also if there is no Protection Order, interim protection or application for the protection order either in Paarl or here in town, then I would be obliged to make one today and unfortunately, this new law says a final order. So if you are going to object to the final order being made, well you know where your client will be, should the matter be postponed. However, just a heads up you can have that application rescinded tomorrow."

[15] The magistrate cautioned that in the event the applicant was to request a rule *nisi* in respect of the Protection Order, that would necessitate a postponement in respect of the bail application, meaning that the applicant would be incarcerated pending the finalisation of the bail application. The defence attorney agreed to the final protection order being

granted against the applicant on condition that the applicant be released. It is the applicant's assertion that he instructed his attorney to agree to the proposed bail conditions as he was presented with no choice, thus the agreement was under duress.

[16] Further, it is asserted that the fourth respondent not only did she not lodge an application for a Protection Order in terms of the Domestic Violence Act, but she was also absent from court during the bail application and proceedings for the final Protection Order. Thus, no evidence was presented either *viva voce*, or by way of a sworn affidavit in respect of the Protection Order inquiry. Consequently, the applicant was released on bail on the following conditions in line with the Protection Order:

- That the applicant is precluded from directly contacting the fourth respondent electronically or via acquaintances;

- Not to enter the fourth respondent's residence;

- Not to publish, distribute or display any sensitive or explicit content of the fourth respondent; and a warrant of arrest was authorized for the applicant's arrest, the execution of which was suspended subject to compliance with the terms of the Protection Order.

THE GROUNDS OF REVIEW

[17] In his founding affidavit, the applicant asserts that his grounds for review are premised on the principle of legality and sections 22(1) (a) and 22 (1) (c) of the Supreme Court Act 10 of 2013, and are set out as follows:

"Grounds of review of the cancellation of warning

60. I respectfully submit that the magistrate thereby breached the constitutional principle of legality in two respects:

60.1 by failing to comply with the provisions of the Criminal Procedure Act, in breach of the obligation imposed on the judiciary in terms of s 8(1) of the Constitution; and

60.2 by infringing my right, in terms of s 12(1) (a) of the Bill of Rights, not to be deprived of his freedom arbitrarily or without just cause.

61. I respectfully submit that the magistrate further:

61.1. Had no jurisdiction to cancel my release on warning without evidence under oath being presented to her which satisfied the considerations contemplated in Section 68 of the Criminal Procedure Act; and

6.1.2 Committed a gross irregularity in the proceedings in failing to comply with section68 of the Criminal Procedure Act and in acting under the mistake of law as she considered herself bound to cancel my release on warning.

Grounds for review of the protection order

71.I respectfully submit that the magistrate thereby breached the constitutional principle of legality in two respects:

71.1 by failing to comply with the relevant provisions of the Criminal Procedure Act and the Domestic Violence Act, in breach of the obligation imposed on the judiciary in terms of section 8(1) of the Constitution; and
71.2 by infringing my right in terms of section 34 of the Bill of Right, not to have a fair hearing.

72. I respectfully submit that the magistrate further:

72.1 Had no jurisdiction to issue a final protection order in the absence of an application, or evidence tendered, for same; and

72.2 Committed a gross irregularity in the proceedings in failing to comply with Section 6 of the Domestic Violence Act."

SUBMISSIONS BY THE FOURTH RESPONDENT

[18] I have earlier indicated that even though the fourth respondent elected to abide by the decision of the court, she filed an affidavit relating to the cancellation of the domestic violence protection order. In her affidavit the fourth respondent, lamented her plight of lack of protection and vulnerability should the protection order be set aside. Ordinarily the fourth respondent was expected to file heads of argument and not an affidavit at this stage of the application proceedings. The court, however, is alert to the fact that she traversed the application unrepresented and therefore, some degree of benevolence has to be exercised by the court and pay consideration to the purpose, content and the context of the affidavit. See *Xinwa and Others v Volkswagen of South Africa(Pty)Ltd* (CCT3) [2003] ZACC7; 2003 (6) BCLR 13. On the day of the hearing of this application, the fourth respondent was not in attendance and we were advised that she had resolved to apply for another protection order against the applicant.

[19] As mentioned previously, the fourth respondent is not legally represented and she is not opposing the application as far as the procedure followed by the magistrate on the applicant's first court appearance is concerned. Her main contention is confined to the relief sought by the applicant in respect of setting aside the final Protection Order granted

by the Magistrate on 15 September 2022 in terms of section 6 of the Domestic Violence Act.

[20] In her answering affidavit, the fourth respondent points out that she launched an application for a Domestic Violence Protection Order against the applicant on 16 August 2022, and an interim Protection Order was granted on the same date. According to her, this was preceded by the assault case that she had lodged against the applicant on 13 August 2022, at Paarl Police Station which was later transferred to Cape Town Police Station. As mentioned earlier, the concern raised by the fourth respondent revolves around the setting aside of the final protection order, which was granted during the bail proceedings, and the adverse effects thereof on her and her minor son, as she claims that she would be without any form of protection from the applicant.

ANALYSIS AND APPLICABLE LEGISLATION

[21] To recap and with the risk of repetition, this review is grounded in the provisions of section 22 of the Superior Courts Act. Specifically, subsection 1 (a) and (c) thereof. Section 22 (1) reads:

"The grounds upon which the proceedings of any Magistrates' [sic] Court may be brought under review before a court of a Division are –
(a) absence of jurisdiction on the part of the court;
(b)…
(c) Gross irregularity in proceedings; and
(d) …"

[22] Notably section 22 of the Superior Act confers powers and jurisdiction to the High Court, whereas Rule 53 of the Uniform Rules of Court sets out the procedure to be adopted when reviewing decisions or proceedings of the Magistrate Court or of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions. Section 38 of the Constitution provides a right to anyone to approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened. A court may grant appropriate relief including a declaration of rights. This provision is relevant to the issue before us in this matter in that in bringing this review application the applicant contends that his constitutional rights were impermissibly infringed by the magistrate. It is further argued that in this process the principle of legality has been violated by the magistrate, and thus the impugned decisions are reviewable in terms of sections 22(1) (a) and (c).

[23] The principle of legality is one of the founding values of our Constitution, which requires that judicial officers and other public functionaries may only exercise public power lawfully. The judiciary relies on moral authority in society to fulfil its mandate of interpreting the Constitution and upholding the rule of law. It is expected, therefore, that with the history our country has, we have to be intent and steadfast in our commitment to the preservation of the integrity of the rule of law. *See S v Mamabolo* [2001] (3) SA 409 (CC) 16 to 17. It is thus pivotal in the circumstances that these constitutional rights be protected and for the court to determine whether the constitutional rights of the applicant have been infringed or threatened and employ an appropriate redress. *Gerber v*

Voorsitter: Komitee oor Amnestie van die Kommisie Vir Waarheid en Versoening 1998(2) SA 559 T.

Was the cancellation of release on warning unlawful?

[24] Ostensibly the record shows that the Magistrate relied on the provisions of section 72A of the Criminal Procedure Act as amended when cancelling the applicant's release on warning. Section 72A in its application is read with sections 68 (1) and 68 (2) Of the CPA:

"Cancellation of Release on Warning

Notwithstanding the provisions of section 72 (4), the provisions of section 68 (1) and (2) in respect of an accused who has been granted bail, are with the necessary changes, applicable in respect of an accused who has been released on warning"

[25] This further necessitates citing the provisions of section 68 (1) and (2) as substituted by section 10 of Act 75 of 1995 and section 6 of Act 85 of 1997 to gain the understanding and the context of the amendment.

"Cancellation of bail

68 (1) Any court before which a change is pending in respect of which bail has been granted may, whether the accused has been released or not, upon information on oath that-

(a) The accused is about to evade justice;
(b) The accused has interfered or threatened or attempted to interfere with the witness;
(c) The accused has defeated or attempted the defeat the ends of justice;
(c A) The accused has contravened any prohibition; condition; obligation or order imposed in terms of –
(i) section 7 of the Domestic Violence Act 1998;

(ii) Section 10 (1) and (2) of the Protection from Harassment Act, 2011: or

(iii) an order in terms of any law, that was against whom the offence in question was allegedly committed, from the accused;

(d) the accused person poses a threat to the safety of the public, a person against whom the offence in question was allegedly committed; or [of a] any other particular person;

(e) the accused has not disclosed or has not correctly disclosed all his or her previous convictions in the bail proceedings or where his or her true list of previous convictions has come to light after his or her release on bail:

(e A) the accused has not disclosed that-
(i) a protection order as contemplated in section 5 or 6 of the Domestic Violence Act, 1998;
(ii) a protection order as contemplated in section 3 or 9 of the Protection from Harassment Act, 2011; or
(iii) an order in terms of any other law; was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused and whether such an order is still of force,

(e B) the accused has not discussed or correctly disclosed that he or she is or was at the time of the alleged commission of the offence, the sentenced offender who has been placed under correctional supervision, day parole, parole or medical parole as contemplated in section 73 of the Correctional Services Act, 1998;

(f) Further evidence has since become available or factors have arisen, including the fact that the accused has furnished false information in the bail proceedings, which might have affected the decision to grant bait; or

(g) It is in the interests of justice to do so, issue a warrant for the arrest of the accused and make such order as it may deem proper, including an order that the bail be cancelled and that the accused be committed to prison until the conclusion of the relevant criminal proceedings.

(2) Any magistrate, may, in circumstances in which it is not practicable to obtain a warrant of arrest under subsection (1) upon the application of any peace officer and upon a written statement on oath by such officer that-
(a) he or she has reason to believe that-

(i) An accused who has been released on bail is about to evade justice.

(ii) The accused has interfered or threatened or attempted to interfere with witnesses;

(iii) The accused has defeated or attempted to defeat the ends of justice;or

(iv) The accused poses a threat to the safety of ªthe public, any person against whom the offence in question was allegedly committed or [of a] any other particular person;

(b) The accused has not disclosed or has not correctly disclosed all his or her previous convictions in the bail proceedings or where his or her list of previous convictions has come to light after his or her release on bail.

(c) Further evidence has since become available or factors have arisen including the fact that the accused furnished false information in the bail proceedings which might have affected the decision to release the accused on bail: [or]
(d) the accused has contravened any prohibition, condition, obligation or order imposed in terms of –
(i) section 7 of the Domestic Violence Act, 1998
(ii) section 10 (1) and (2) of the Protection from Harassment Act, 2011; or
(iii) an order in terms of any other, law, that was issued by the offence in question was allegedly committed from the accused;
(e) the accused has not disclosed or correctly disclosed that he or she is or was at the time of an alleged commission of the offence, a sentenced offender who has been placed under correctional supervision, day parole, parole or medical parole as contemplated in section 73 of the Correctional Services Act,1998;
(f) The accused has not disclosed that-
(i) a protection order as contemplated in section 5 of the Domestic Violence Act 1998:
(ii) a protection order as contemplated in section 3 or 9 of the Protection from Harassment Act 2011; or
(iii) an order in terms of any other law was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused and such an order is still of force; or
(g) it is in the interests of justice to do so, issue a warrant for the arrest of the accused and may, if the accused is not placed in custody, cancel the bail and commit the accused to prison, which committal shall remain of force until the conclusion of the relevant criminal proceedings unless the court before which the proceedings are pending sooner reinstates the bail."

[26] Distinctly, the provisions of section 68 of the CPA require that information under oath to the effect that one or more of the factors in paragraphs (a) to (g) are present, be presented before the court, which entails hearing of evidence. The prosecutor would be

required to present oral evidence justifying the cancellation of the release on warning. Where this process is not feasible the process described in subsection 2 can be employed. In this event a magistrate is approached, and upon consideration of a written statement by a peace officer, a warrant of arrest would be issued. In *Minister Justice and Constitutional Development and Another v Zealand* 2007(2) SACR 401 (SCA) 407 G 408A (confirmed by CC), the SCA remarked as follows:

"On 29 October 2001, the respondent was remanded in custody without compliance with ss 72(4),72A and 68. These sections read together to provide, amongst other things, that an accused person's release on warning may be cancelled by a magistrate upon receipt of the information on oath. In the absence of compliance with the empowering provisions of those sections, the requirement of constitutional legality was not met and the respondent's release on warning was not lawfully cancelled."

[27] Importantly, it is clear from the record that the cancellation of the applicant's warning was not informed by any consideration of evidence that would have been presented by the prosecution. Similarly, it is evident that the applicant was not afforded an opportunity to oppose such cancellation if they wished to do so. In essence, the applicant, in my view was denied the right to be heard.

[28] It must be noted that section 72A, read with section 68 does not confer a discretion to the judicial officer to *meru motu* cancel the release on warning of an accused person; even in instances where it was necessary to invoke the provisions of section 72A read with section 68 (1) and (2). In *Botha NO v The Governing Body of the Eljada Institute and another* (20530/14) [2016] ZASCA 36 (24 March 2016) para 39, the Supreme Court of Appeal stated the following:

"*As Gauntlett JA said in Lesotho in Matebesi v Director of Immigration and Others. The right to be heard (henceforth"the audi principle")is a very important one, rooted in the common law not only of Lesotho but of many other jurisdictions …it has traditionally been described as constituting (together with the rule against bias, or the nemo iudex in sua principle) the principles of natural justice…"*

[29] Section 165 of the Constitution which confers judicial power on the courts should be the starting point. Thus, courts are subject and subordinate to the Constitution as is the law which is applied by the courts independently without fear, favour, or prejudice. Disregarding the *audi alterum partem* rule constitutes a gross irregularity, especially where the magistrate's inquisitorial powers are greater as the procedure is less formal than that of a trial. Notably, courts are duty-bound to protect the citizen's right to freedom or liberty as contemplated in section 12(1) of the Constitution. The provisions of section 72A are clearly applicable only when the state applies for the section to be invoked. *In casu* the court clearly improperly coaxed the prosecutor during the proceedings, to apply for the cancellation of the applicant's warning status and ordered such cancellation which is a power not conferred upon it by law. Thus, I find what Binns–Ward J said in *Claasen v Minister of Justice and Constitutional Development 2010(2) SACR 451* apposite to this matter, when he stated the following:

"*13 As mentioned in the current case the criminal court magistrate did not hold an enquiry in terms of section 72(4) nor did he cancel the appellant's release on warning in the manner provided for in terms of s 72A, read with s 68 (1) and (2) of the Criminal Procedure Act. It is clear therefore that the magistrate acted contrary to the relevant provisions of the Act in ordering the appellant to be held in detention in the manner in which he did. In doing so he acted in disregard of both the substantive and procedural requirements for the exercise of any power he might have had to curtail the appellant's rights to personal freedom. The disregard for substantive requirements manifested in the committal having been directed without reference to any evidence that might have afforded good reason in law to cancel the appellant's release on warning, or to imprison him in terms of section 72(4) of the Criminal Procedure Act. The disregard for the procedural requirement was demonstrated by the magistrate's omission to comply with any of the procedures in terms*

of s 72 or s72 A, which he was bound by the Act to follow if the appellant were lawfully committed to prison. The magistrate breached the constitutional principle of legality in at least two respects: by failing to comply with the relevant provisions of the Criminal Procedure Act and – in breach of the obligation imposed on the judiciary in terms of s 8(1) of the Constitution – by infringing the appellant's right in terms of s 12(1)(a) of the Bill of Rights, not to be deprived of his freedom arbitrarily or without just cause." See also S v Coetzee 1997 (3) SA 527 (CC) (1997(1) BCLR 437 at para159.

[30] It is my view that the magistrate in cancelling the applicant's warning, arbitrarily, deprived him of his freedom and liberty, thereby acting contrary to the constitutional principle of legality and certainly failing to comply with the constitutional obligation. The provisions of section 8(1) of the Constitution impose on every judicial officer the obligation to comply with the Constitution. In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC17 1999(1) SA 374 1998(12) BCLR 1458 (14 October 1998) the court stated:

"[58] It seems central to the conception of our constitutional order that the legislature and the executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim constitution."

The magistrate's impugned decision in my view, is unlawful, unconstitutional and thus invalid, that being said it stands to be set aside.

[31] I accept, of course, that the Amendment Act also precludes the release on bail of the person arrested for allegedly committing an offence listed under section 1 of the Domestic Violence Act, which involves persons who are in a domestic relationship. Section 59 of the CPA, which permits the police to grant bail after arrest prior to a court appearance,

has been amended by the substitution in subsection 1 for paragraph (a) of the following paragraph:

"(a) an accused who is in custody in respect of any offence, other than an offence –
(i) referred to in Part II or Part III of Schedule 2
(ii) against a person in a domestic relationship as defined in section 1 of the Domestic Violence Act, 1998 (Act 116 of 1998); or
(aa) section 17(1)(a) of the Domestic Violence Act,1998;
(bb) Section 18(1)(a) of the Protection from Harassment Act, 2011 (Act no 17 of 2011); or
(cc) any law that criminalises a contravention of any prohibition, condition, obligation or order, which was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused, may before his or her first appearance in a court, be released on bail in respect of such offence by any police official of or above the rank of non - commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such official"

[32] Ostensibly the provisions of section 59 clearly preclude an accused person who is in custody after being arrested for an offence referred to in Part II or Part III of Schedule 2, committed in the context of a domestic relationship from being released on bail by the police officials. It is an uncontroverted fact that the applicant in this matter was at the time of the alleged assault on the fourth respondent in a romantic relationship with her. A relationship of the kind contemplated by the Amendment Act in section 59 (1) (a) (ii).

[33] For the sake of completeness it is necessary to include section 1(vii)(e) of the Domestic Violence Act, which refers to a domestic relationship to mean a relationship between a complainant and a respondent in any of the following ways:
"
(a) …
(b) …
(c) …
(d) …

(e) they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration;"

The applicant in the founding affidavit contends that the word " offence " in the context of section 59 should be interpreted to refer to offences of domestic violence to be incidences of abuse and the pattern thereof. The general rule to interpretation is that the words in a statute are to be given their ordinary grammatical meaning, having regard to the context of the Act in its entirety, unless the result thereof would be unreasonable or incongruous. See Natal Joint Municipality Pension Fund v Endumeni Muninipality 2012(4) SA 593 SCA 17 and 18 .The Oxford Dictionary defines "offence" as an illegal act. The Amendment Act created a domestic violence offence. It would be remiss of the courts to interprete the domestic violence offence as to mean a series of domestic violence incidents, which is in total contrast to its grammatical meaning . The country is currently facing a crisis of epidemic proportions of gender based violence. Demonstrably, the Amendment Act seeks to address the scourge of gender based violence. Therefore, the only meaning to be attributed to the word "offence" in the context of the Amendment Act is the ordinary grammatical meaning which is a single illegal act.

[34] Upon examination of the facts in light of the aforementioned legislative framework, it is abundantly clear that in the present matter, after arresting the applicant, the investigating officer had no authority to release him on bail, let alone on warning. Similarly, clear is the appreciation by the magistrate of this fact that propelled the impugned decision. If anything, this is indicative of the fact that the magistrate was alive to the provisions of the Amendment Act. Counsel for the applicant contends in the heads of argument, in paragraph 19 as follows:

"A practice appears to have arisen whereby accused who need to be arrested and detained are "warned" to appear in terms of section 72 of the Criminal Procedure Act. A person may only be released on warning if they are in custody. Police always retain a discretion whether to arrest someone and ought to use less intrusive methods to secure a person's attendance at the court when they can."

[35] Mr. Prinsloo, supplementing his argument on this point, relied on the case of *Minister of Safety and Security v Sokhoto and Another* 2011(1) SACR 315 (SCA), where the court at paragraph 28 observed as follows:

"*Once the jurisdictional facts for an arrest whether in terms of any paragraph of s 40(1) or in terms of s 43 are present, a discretion arises. The question whether there are any constraints on the exercise of the discretionary powers is essentially a matter of construction of the empowering statute..*"*(my own underlining)*

[36] Importantly, in this case, the empowering statute [Amendment Act] does not confer such discretion on police officers. On the contrary, the Amendment Act places an obligation on the police officer or investigating officer to effect the arrest of the accused where the assault was reported to the police to have occurred in the context of a domestic relationship. The Amendment Act seeks to provide protection to the victims of domestic and gender-based violence by tightening bail provisions applicable to such matters. Section 3 of the Domestic Violence Act permits a peace officer to arrest without warrant any respondent of domestic violence whom a police officer reasonably suspects of having committed an offence with an element of violence against a complainant. In this respect, the provisions of section 3 correlate with the provisions of section 59 of the CPA.

[37] The amendments to sections 59 and 59A of the CPA provide that neither the police nor prosecutor bail should be granted for an offence against a person in a domestic relationship as defined in the Domestic Violence Act, nor for a protection order issued in terms of this Act. This course elevates the offence to the category of Schedule 5 offences in the CPA. Where the alleged perpetrator of domestic violence is arrested by a peace

officer attending to the complaint, or where a victim of domestic violence lays a criminal charge, either in tandem with an application for a protection order or independently thereof or as a result of a breach of a protection order, the mechanisms of the criminal justice system which provide for arrest, bail, conviction and sentencing are activated. It warrants emphasis that the arresting officer in such instances has no discretion to decide whether to release the accused on warning given that he or she has no authority to even release the accused person on bail. Therefore, the argument proffered by the applicant cannot stand, as in this instance the investigating officer acted contrary to the empowering statute.

Are the subsequent bail and Protection Orders valid?

[38] This brings me to the issue of the bail application. In an ideal situation as contemplated in the Amendment Act, the accused person would upon arrest have remained in custody until he makes an appearance before the magistrate for the consideration of the question of bail. In the matter at hand and given the magistrate's cancellation of the applicant's warning is unlawful and invalid, the subsequent impugned decisions: the incarceration of the applicant and the bail proceedings, inclusive of the Protection order are unquestionably unlawful and invalid, hence annihilated. The magistrate's actions were not within the prescripts of the law and therefore erred in applying the provisions of the Amendment Act. However, had the investigating officer in the applicant's assault case kept him in custody after the arrest as required by law, the position would have been different and the applicant would have exercised his right to

apply for bail, as section 60 of the CPA has been amended to include cases involving domestic violence.

THE POSITION HAD THE APPLICANT NOT BEEN RELEASED ON WARNING

[39] As the accused person has a right to apply to the court for release on bail, the prosecutor must apprise the court with evidence or information to enable the court to determine whether or not to release the accused person on bail. Section 60 (4) compels the prosecutor to furnish reasons if the release of the accused on bail is not opposed, as well as the views of the complainant regarding her or his safety concerns. The section reads as follows:

"4. Section 60 0f the Criminal Procedure Act, 1977, is hereby amended-

(a) by the substitution in section (2) for paragraph (d) of the following paragraph:

"(d) shall, where the prosecutor does not oppose bail in respect of matters referred to in subsection 11(a) [and], (b) and (c), require of the prosecutor to place on record the reasons for not opposing the bail application."

(b) by the substitution for subsection (2A) of the following subsection:

"(2A) The court must, before reaching a decision on the bail application, take into consideration –

(a) any pre-trial service report regarding the desirability of releasing an accused on bail, if such a report is available; and

(b) the view of any person against whom the offence in question was allegedly committed, regarding his or her safety."

[40] Furthermore, in terms of section 60 (11) (B) of the CPA [as amended by the Amendment Act], the accused person or, his or her legal representative is compelled to inform the court whether a protection order had previously been issued against him or

her. This would ensure that the court will not have to issue a protection order if there is one already in existence in favour of the complainant, however, the court will take the existing protection order into consideration**.**

[41] In a case where bail is not opposed by the state, the court is duty bound as contemplated in section 60(9) of the CPA to weigh up the accused person's interests against the interests of justice, provided that the interests of justice would be interpreted to include, but not limited to, the safety of any person against whom the offence in question has allegedly been committed [section 60(10) of the CPA as amended]. After evaluating the evidence and considering the question of bail, the court may, as permitted in terms of section 60 (12) of the CPA, order the release on bail of the accused, subject to certain specified conditions informed by the evidence presented before it. Section 60 (12) reads as follows:

" (a) The court may make the release of an accused on bail subject to conditions which, in the court's opinion, are in the interests of justice: Provided that the interests of justice should be interpreted to include, but not be limited to, the safety of any person against whom the offence in question has allegedly been committed.

(b) If the court is satisfied that the interests of justice permit the release of an accused on bail as provided for in subsection (1), in respect of an offence that was allegedly committed by the accused against any person in a domestic relationship, as defined in section 1 of the Domestic Violence Act,1998 with the accused, and a protection order as contemplated in that Act has not been issued against the accused, the court must, after holding an enquiry, issue a protection order referred to in section 6 of that Act against the accused, where after the provisions of that Act shall apply."

[42] Where after determining the question of the bail, the court is satisfied that the interests of justice permit such release, the court must hold an enquiry in view of issuing

a final protection order if one has not been issued. This process requires the court not only to be attuned to the aforementioned provisions but also to the Constitution.

THE ENQUIRY, A PRECURSOR TO THE PROTECTION ORDER

[43] Where there is no protection order in place at the time the court is considering the issue of the release of the accused on bail, the court must hold an enquiry in view of issuing a final protection order. At this stage, it is befitting to give a historical background of the application process involved prior to the court issuing a protection order at the advent of the Amendment Act. Traditionally the procedure in terms of sections 4,5,6 and 7 of the Domestic Violence Act, any person may apply by way of an affidavit to the court for a protection order. The affidavit must explain the basis of the application and be lodged with the clerk of the court. The application may also be brought outside the ordinary court hours or on a day that is not an ordinary court day if the court is satisfied that the complainant may suffer undue hardship if the application is not considered immediately.

[44] In terms of section 5 the court must as soon as reasonably possible consider any additional evidence it deems fit, including oral evidence or evidence by affidavit. At this stage, the respondent need not be informed of the proceedings and an interim order is granted without notice to the respondent. The court is only obliged to grant an interim order if the court is satisfied, firstly that there is prima facie evidence that the respondent is committing or has committed an act of domestic violence. Secondly, undue hardship may be suffered by the complainant as a result of the violence if an order is not issued immediately. The interim order must then be served on the respondent, and it must call

on the respondent to show cause on the return date specified in the order why a final protection order should not be issued. The return date may not be less than ten days after service upon the respondent. It may, however, be anticipated by the respondent upon not less than 24 hours written notice to the complainant and the court [section 5 (5)]. An interim Protection Order has no force and effect until it has been served on the respondent [section 5(6)].

[45] Section 6 deals with the issue of a final protection order. If the respondent fails to appear on the return date, the court must issue an order if it is satisfied that proper service on the respondent has taken place and that the application contains prima facie evidence that the respondent has committed, or is committing an act of domestic violence. If the respondent appears on the return date to oppose the application, a hearing must take place. The court must consider any evidence previously received as well as further affidavits or oral evidence. After the hearing, the court must issue a protection order if it finds on a balance of probabilities, that the respondent has committed or is committing an act of domestic violence. When a protection order is issued, the clerk of the court must forthwith arrange for the original order to be served on the respondent and for certified copies of the order and the warrant to be served on the complainant. Copies must be forwarded to the police station chosen by the complainant. A protection order remains in force until it is set aside.

[46] In terms of section 7, the court may impose conditions deemed reasonably necessary, for the safety, health or well-being of a complainant.

[47] Notwithstanding the fact that the Domestic Violence Act demonstrated the legislature's responsiveness to the need for effective legal protection for the victims of domestic violence. The courts have consistently recognized and pointed out the need to strengthen the protection of the victims of domestic violence to combat domestic and gender-based violence. The Constitutional Court in *Ahmed Rafik Omar v The Government of the Republic of South Africa and others* Case no CC 47/04 judgement dated 7 November 2005 expressed in Para 14:

"The criminal justice system has not been effective in addressing family violence, for a range of reasons. The need for effective domestic violence legislation was recognised by the legislature. It thus enacted the Prevention of Family Violence Act 133 of 1993, which preceded the Domestic Violence Act."

[48] In *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC), 2000 (1) BCLR 86 (CC) Sachs J, aptly lamented the scourge of domestic violence on women and expressed as follows:

" All crime has harsh effects on society. What distinguished domestic violence is its hidden, repetitive character and its immeasurable ripple effects on our society and in particular, on family life. It cuts across class, race, culture and geography and is all the more pernicious because it is so often concealed and so frequently goes unpunished...to the extent that it is systemic, persuasive and overwhelmingly gender specific, domestic violence both reflects and reinforces patriarchal domination, and does so in a particular brutal form...The ineffectiveness of the criminal justice system in addressing family violence intensifies the subordination and helplessness of the victims. This also sends an unmistakable message to the whole of society that the daily trauma of vast numbers of women counts for little. The terrorisation of the individual victims is thus compounded by on sense that domestic violence is inevitable. Patterns of systemic sexist behavior are normalized rather than combatted."

Similarly, the SCA in *Kekana v The State (629/13) [2014] ZASCA 158 (1October 2014) Mathopo AJA articulated as follows:*

"[20] Domestic violence has become a scourge in our society and should not be treated lightly. It has to be deplored and also severely punished. Hardly a day passes without a report in the media of a woman or a child being beaten, raped or even killed in this country. Many women and children live in constant fear for their lives. This is in some respects a negation of many of their fundamental rights such as equality, human dignity and bodily"

[49] Lately, the legislature recognised the exigency to augment the existing protection provided by the Domestic Violence Act to the victims of domestic and gender-based violence who are amongst the most vulnerable members of our society. The reason is that South Africa is currently immersed in the worst kind of social evil, i.e. gender-based violence, which has reared its ugly head. The deliberate intervention by the legislature for reform of the existing laws to afford effective and rapid response to gender-based violence is most certainly desirable. Hopefully, it would eventually lead us to the ultimate obliteration of patriarchal comportment and total enhancement of the minimized dignity of women and girls in our society.

[50] Having regard to the constitutional provisions, particularly the right to equality and to freedom and security of the person and the international commitments and obligations of the states towards ending violence against women and children, including obligations under the United Nations Conventions on the Elimination of all Forms of Discrimination Against Women and Rights of the child (Preamble of the Domestic Violence Act 116 of 1998 as amended, Context and purpose of the Act). In response to a call made as recently as May 2021, by the United Nations Committee on the Elimination of All forms of Discrimination against Women (CEDAW/C/ ZAF/ IR/1 12 May 2021), which South Africa had ratified without reservation in December 1995. See *South Africa Law Reform Commission, Issue Paper 42, Project 100, Domestic Violence; The Criminal Response,*

8 December 2021, page 15 paragraph 17. In essence, the legislature has as a result effected an overhaul of the Domestic Violence Act to be more responsive to the need to afford maximum protection to women and girls who are exposed to domestic and gender-based violence. This is clearly propelled by the global quest for the creation of a specific crime or offence of domestic violence. South Africa is appropriately taking heed of that call.

OTHER JURISDICTIONS

[51] A number of comparable jurisdictions have sought to revise the manner in which family violence matters are dealt with. This includes holding domestic violence perpetrators accountable to the same extent as offenders of other similar offences. Some comparable jurisdictions have embarked on an overhaul of the criminal law approach to matters related to domestic violence. Signatory nations to the aforementioned international instruments have similarly demonstrated their willingness to strengthen the protection against domestic and gender-based violence.

[52] The legislature's infusion of the inquiry process for protection orders in bail proceedings mirrors that of South Australia and New South Wales. In South Australia, the Bail Act of 1985 particularly section 23 A thereof, and section 9 of Intervention Orders (Prevention of Abuse) Act 2009, allows for the issuing of an Intervention order by the court considering the release on bail of a person accused of committing a domestic violence offence. This concept has been adopted by the legislature and is empowering the courts

to issue protection orders during bail proceedings. Section 23 A of the Bail Act of 1985 provides:

"1) If a police officer or a person representing the crown in bail proceedings is made aware that the victim of the alleged offence, or a person otherwise connected with proceedings for the alleged offence, feels a need for protection from the alleged offender or any other person associated with the alleged offender-

(a) The police officer or other person must ensure that the perceived need for protection is brought to the attention of the bail authority; and

(b) The bail authority must consider-
(i) If the bail authority is a court- whether to issue an intervention order in accordance with this section; or

(ii) If any other case- whether to apply to the Magistrate Court for an intervention order under the Intervention Orders (Prevention of Abuse) Act 2009.

2) If an applicant for bail is a serious and organised crime suspect the bail authority must on its own initiative, consider-

(a) If the bail authority is a court - whether to issue an intervention order in accordance with this section; or

(b) In any other case - whether to apply to the Magistrates Court for an intervention order under the Intervention Orders (Prevention of Abuse) Act 2009

(3) A court may when determining a bail application, exercise the powers of the Magistrates Court to issue against the applicant or any person associated with the applicant an intervention order under the Intervention Orders (Prevention of Abuse) Act 2009

(4) An order issued under this section has the effect of an intervention order under the Intervention Orders (Prevention of Abuse) Act 2009." (my own underlining)

[53] The Intervention Orders (Prevention of Abuse) Act 2009 provide for intervention orders in cases of domestic and non-domestic abuse by regulating the respondent's behaviour towards the protected persons. An intervention order is similar to the Protection

Order as envisaged in the Domestic Violence Act in South Africa. Section 9 of the Intervention Orders (Prevention of Abuse) Act 2009 reads:

"9---Priority for certain interventions
Proceedings relating to intervention against domestic abuse and proceedings brought by a bail authority under section 23 A of the Bail Act 1985 must, as far as practicable, be dealt with as a matter of priority."

The intervention order in its nature may impose any prohibition or requirement upon a respondent in terms of section 12 of the 2009 Act. It may prohibit contacting, harassing, threatening, or intimidating the protected person. It may also prohibit damaging specified property, being in or near the premises of the protected person. It may even require the respondent to surrender specified weapons or articles; return specified personal property to the complainant; allow the complainant to recover or access specified personal property; undergo an assessment by the intervention program manager; undertake an intervention program; and meet conditions of any other particular prohibition or requirement. *[Family Violence Court and Bail: Legal Services Commission South Australia]*

[54] Essentially in terms of these provisions, if the prosecution is made aware that the victim or any other person connected to the proceedings for an alleged offence, feels the need for protection from the alleged offender, they must ensure this is brought to the attention of the bail authority. The bail authority must then consider applying for the intervention order, or if the bail authority is a court, grant an intervention order as if an application had been made. The inquiry, for a protection order, held during the bail proceedings will not change the nature and effects of the Protection Order.

[55] The New South Wales, Crimes (Domestic and Personal Violence) Act 80 of 2007, empowers courts in certain circumstances to issue an interim or final protection order regardless of whether an application for such an order has been made. Section 40 permits the issue of an interim protection order where a person is charged with an offence that appears to the court to be a serious offence. Serious offences include, stalking, attempted murder and domestic violence offences. Section 40(1) reads:

"When a- person is charged with an offence that appears to the court to be a serious offence, the court must make an interim order against a defendant for the protection of the person against whom the offence appears to have been committed whether or not an application for an order has been made."
Section 40(5) reads:

- *"Attempted murder*
- *in this section, a serious offence means-*
- *A domestic violence offence (other than murder manslaughter or an offence under section 25A of the Crimes Act 1900), or"*

[56] Clearly taking note of the above, and having had sight of reforms in comparative jurisdictions one gets the feeling that Domestic Violence cases are taken seriously. In *R v Sarahang* 2021 *ONCJ* 223 *(Can LII)* paragraph 9 where the court held:

> *"…public safety grounds are of significant concern in the context of allegations of domestic violence. These concerns have informed policies and directives to Crown prosecutors to exercise caution in consenting to the release of an accused charged with an offence involving family violence."*

The court went on to state at paragraph 12:

> *"Historically, the justice system's response to the complex problem of domestic violence has been wanting. It has been over thirty years since the Supreme Court of Canada's seminal decision in R v Lavellee and the justice system in Ontario is still struggling to deal with the overwhelming number of domestic violence cases that flow through the courts every day. However, our understanding of*

the complex dynamics associated with family violence are evolving and improving. Prior to the decision in Lavellee intimate partner violence was often approached by the criminal justice system as a private family matter with no societal response deemed appropriate. Then, following the high profile deaths of a number of women by their intimate partners, some of whom were on bail at the time, the justice system moved closer to a multi-faceted public response which in Ontario has included specialized courts and programs. The jury's recommendations in the May / Isles Inquest, The PAR program is a direct result of this, arguably more nuanced, approach to intimate partner violence. In approached cases, it has benefits for both those who are charged with a crime of domestic and their partners who are complainants."

[57] The impetus to combat the rising epidemic proportions of gender-based violence and femicide globally, is apparent in the manner in which different jurisdictions have introduced special provisions that strengthen the protection of domestic and gender-based violence victims. The Amendment Act extends its reach further and imposes a minimum sentence for crimes of assault with intent to do grievous bodily harm committed against a victim who is or was in a domestic relationship with the accused person. The amendment is as follows:

"Amendment of Part III of Schedule 2 to Act 105 of 1997, as submitted by section 68 of Act 32 of 2007 and amended by section 48 of Act 7 of 2013.

17. Part III of Schedule 2 to the Criminal Law Amendment Act, 1997, is hereby amended—
(a) by the deletion of the following offences:
"[Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively in circumstances other than those referred to in Part 1.
Sexual exploitation of a child of a person who is mentally disabled as contemplated in sections 17 or 23 or using a child for child pornography or using a person who is mentally disabled for pornographic purposes, as contemplated in sections 20 (1) or 26 (1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively]"; and

- *by the insertion of the following offence:*
  "Assault with the intent to do grievous bodily harm—
- *on a child –*

- *Under the age of 16 years; or*

Either 16 or 17 years of age and the age difference between the child and the person is more than four years; or

where the victim is or was in a domestic relationship, as defined in section 1 of the Domestic Violence Act,1998, with the accused."

- *The implication of this amendment is that upon conviction the court has to impose the following sentences:*
  - *a term of not less than 10 years imprisonment in respect of a first offender of such an offence;*
  - *where the convicted person is a second offender of the offence, to imprisonment for a period not less than 15 years; and*
  - *a third offender or subsequent offender of any such offence, to imprisonment for a period not less than 20 years. Criminal Law Amendment Act 105, 1997 Section 51 (2) (b) (i), (ii) and (iii).*

It is axiomatic that the legislature by enacting the Amendment Act did not only create a domestic violence offence it ordained a minimum sentence indicative of the deliberate intention to curb this social ill engulfing our country. The courts have been provided with tools in the form of the Constitution and various legislation including the Amendment Act to address gender-based violence.

STRIKING A BALANCE BETWEEN THE VICTIM'S PROTECTION AND THE ACCUSED PERSON'S RIGHTS

[58] In comparison, the bail provisions of section 60 of the CPA are more stringent in nature compared to those of South Australia and New South Wales. In our jurisdiction, the complainant need not approach the court for a protection order. It is peremptory for the bail court upon resolving to order the release on bail, to hold the inquiry in view of issuing a final protection order. On the other hand, courts in New South Wales are

conferred with the discretion to issue an interim or final protection order. Distinguishably South Australian courts would only consider issuing the Intervention order if the need to safeguard the victim has been brought to the attention of the bail court.

[59] For the Amendment Act to have the intended profound and beneficial effect on the fight against domestic and gender-based violence in South Africa, the constitutional rights of the accused person must be prioritized in the process, meaning that proper regard must be paid to the rights to a fair trial enshrined in section 35(3) of the Constitution.

[60] It is therefore imperative to strike a balance between these competing rights, including the complainant's right to be free from all forms of violence [section 12(1)(d)] and upholding the constitutional rights of the accused persons as the incarceration of a person has far-reaching consequences, particularly with regards to the person's freedom, livelihood and security. See *Jeebhai v Minister of Home Affairs* 2009(5) SA 54 at 62H-63A. Significantly, both the accused and the complainant have a right to human dignity, that must be respected and protected. While Section 39 of the Constitution, which governs the interpretation of the Bill of Rights, obliges a court, tribunal, or forum to promote the values that underlie an open and democratic society based on human dignity, equality, and freedom, and to consider international agreements to which South Africa is a signatory and had ratified as binding.

[61] Therefore, it is fundamental to a fair trial that an accused person be given sufficient notice of the charge/s against him or her. In *Naude and Another v Fraser* 1998(4) SA 539*(SCA)* at 563E-G, the court considering a civil matter remarked as follows:

"It is one of the fundamentals of fair trial, whether under the Constitution or at common law, standing co-equally with the right to be heard, that a party be apprised of the case which he faces. This is usually spoken of in the criminal context, but it is no less true in the civil…"

[62] It is therefore incumbent upon the court as courts are enjoined to ensure that an accused person when appearing in court post-arrest, is not only apprised of the charge/s levelled against him but most significantly be forewarned that:

- the charge preferred against him is formulated within the context of the Domestic Violence Act.
- a minimum sentence is applicable to the charge if it is so applicable.

This will eliminate the element of surprise as the implications of the minimum sentence raise the question of the jurisdictional competence of a District court to hear the matter as it does not have jurisdiction to impose a sentence that falls within the ambit of section 51(2)(b) of Act 105 of 1997. Matters, where the minimum sentence is applicable, will have to be adjudicated upon by the Regional Court. Section 75(2) (b) of the CPA provides:

"(b) If an accused appears in a magistrate's court and the prosecutor informs the court that he or she is of the opinion that the alleged offence is of such a nature or magnitude that merits punishment in excess of the jurisdiction of a magistrate's court but not of the jurisdiction of the regional court, the court shall if so requested by the prosecutor refer the accused to the regional court for summary trial without the accused having to plead to the relevant charge."

[63] This is due to the inescapable fact that upon conviction, a sentence outside the scope of the district court's sentencing jurisdiction will have to be meted out. Notably, this will culminate into the Regional Court roll rapidly increasing due to the influx of these matters.

[64] This means that the charge will have to be formulated in such a manner as to be read with the applicable provisions of the Amendment Act, 12 of 2021 and the relevant provision of the Criminal Law Amendment Act 105 of 1997 as amended. Accordingly, it is mandatory that subsequent to arrest, the arresting officer must inform the person in detention of the reason for his or her further detention [section 50(1) (c) CPA], and of his or her right to institute bail proceedings [section 50 (1)(b)]. Similarly, section 50(6) (a) enjoins the court to inform the accused person at his or her first appearance to inform the accused of the reason for his or her further detention, and the right to apply for release on bail. Ordinarily on the first court appearance the accused person must be sufficiently informed of the charge against him, section 35 (3) (a) of the Constitution as well as his rights to legal representation, bail, and the likelihood of the enquiry as envisaged in terms of section 6 of the Domestic Violence Act, must form part of that process. I refer to the term 'likelihood' as the court still has to be informed by the accused or his legal representative whether or not there is a protection order against him or her already in existence. [Section 60 (11B) of the CPA as amended].

ISSUANCE OF THE FINAL PROTECTION ORDER

[65] The issuing of a final protection order in terms of section 6 of the Domestic Violence Act is drastic in comparison to the ordinary process as envisaged by section 4 of the

Domestic Violence Act, which permits the issuing of an interim protection order and on the return date a final protection order would be issued if the court so determines. With the accused already before the court, it is only apt for the Legislature to require that the court during the bail proceedings, holds the enquiry as envisaged in section 6 of the Domestic Violence Act, as the provisions of section 4 thereof are invoked in ex parte applications, with the purpose of issuing interim protection to the complainant pending the respondent's appearance before the magistrate. The situation is distinguishable in that the respondent is the one before court and the enquiry will be conducted as if the application for a protection order has been brought by the complainant. Evidently, the enquiry is now a special dispensation, integral to the bail proceedings. The legislature promulgated in this manner due to the exigency of bail proceedings, and demand for protection of the complainants against the accused in truncated time frames, without any delays. Notwithstanding the sui generis nature of the bail proceedings, due to the now composite nature thereof, it is incumbent upon the court to demonstrate the fulfilment of its Constitutional obligation by guarding against the infringement of the rights of the accused person in this process.

[66] Pertinently, the court must advise the accused person that the said enquiry will form part of the bail proceedings and will take the same procedure employed in the Domestic Violence enquiry without the rule *nisi*, as the Amendment Act directs that a final protection order has to be issued in these proceedings. Evidence will be presented before the magistrate either orally or by way of affidavits. The court will assess the evidence and if it finds on the balance of probabilities that the respondent has committed or is committing

an act of domestic violence a final protection order must be issued. In essence, the enquiry must be conducted in a fair and impartial manner.

CONCLUSION

[67] In this case, the applicant was erroneously released on warning by the police or investigating officer. The magistrate acted unlawfully in arbitrarily cancelling his release on warning. The actions of the magistrate culminated in an infringement of the applicant's constitutional rights as he was not forewarned of the implications of the Amendment Act. As mentioned previously, the magistrate was aware of the provisions of the Amendment Act, however, in haste due to the desperate circumstances that prevailed at the time acted *ultra vires* upon revoking the applicant's release on warning and by invoking the provisions of section 72A of the CPA in an endeavor to remedy the arresting officer's unauthorized decision and actions.

[68] It is trite that the magistrate has no inherent powers to review the decision of the investigating officer in such a manner and can only act in terms of the prescripts of the empowering statute. I find the principle enunciated in the remarks of Jaftha J in his minority judgment in *Liebenberg NO & Others v Bergrivier Munucipality and Others* 2013 (5) SA 246 (CC) at paragraph 44, apposite to the matter at hand:

"In our law, administrative functions performed in terms of incorrect provisions are invalid, even if the functionary is empowered to perform the function concerned by another provision. In accordance with this principle, where a functionary deliberately chooses a provision in terms of which it performs an

administrative function and it turns out that the chosen provision does not provide authority, the function cannot be saved from invalidity by the existence of authority in a different provision."

[69] In *Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another 2018 (1) SA 200 at para 58* Jaftha J's observation was relied upon by the SCA when it stated that:

" the Constitutional Court was equally emphatic concerning the invocation and reliance on a statutory power that was inapposite."

[70] In light of the infringement of the applicant's rights, the decisions of the first respondent on 15 September 2022 are reviewed and set aside.

COSTS

[71] Lastly, in respect of costs in this application. The applicant asked that the fourth respondent pay the costs of the application. The issue of costs is a matter for the discretion of the court. Smalberger JA in *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) 25, on the issue of discretion remarked as follows:

"The court's discretion is a wide, unfettered and equitable one. It is a facet of the court's control over the proceedings before it. It is to be exercised judicially with due regard to all relevant considerations. These would include the nature of the litigation being conducted before it and the conduct of the parties (or their representatives). A court may wish, in certain circumstances, to deprive a party of costs, or a portion thereof, or order lesser costs than it might otherwise have done..."

[72] In both her affidavits, the fourth respondent has expressly indicated that her opposition was in respect of the setting aside of the protection order. Furthermore, she made it clear that the reason for the opposition was informed by her fear of being left

vulnerable without any protection, in the event the impugned protection order was to be set aside.

[73] It can be gleaned from the papers filed that the financial circumstances of the fourth respondent did not enable her to secure legal representation for this matter. She pursued the matter unrepresented. In my view, this warrants proper consideration in conjunction with her reason for initially opposing the application. Understandably she was concerned about her safety in the event the Protection Order granted by the first respondent was to be set aside by this court. It later emerged that she had resolved to apply for a protection order anew and did not pursue the opposition of the application, a clear demonstration that her opposition was not to prejudice the applicant. In my view, to disregard these factors would be ignoring the nature of the litigation this Court is conducting. In essence, this court must try to achieve fairness to all the parties. In light of the aforementioned, the court is disinclined to make a cost order against the fourth respondent.

ORDER

[74] In the result, I propose the following order:

[74.1] The decision to cancel the applicant's release on warning is declared unlawful, unconstitutional and it is set aside.

[74.2] The decision to retain the applicant in custody is unlawful and unconstitutional and it is set aside.

[74.3] The decision to release the applicant on bail with conditions is unlawful and unconstitutional and it is set aside

[74.4] The decision to grant a final protection order and warrant of arrest against the applicant in favour of the fourth respondent under case no. D1373/2022 is unlawful and unconstitutional and it is set aside

[74.5] It is declared that the applicant's release on warning under case no. D1373/2022 remains extant.

[74.6] No order as to costs.

RALARALA N E
ACTING JUDGE OF THE HIGH COURT

I concur, and it is so ordered

NDITA J
JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPLICANT: ADV BEN PRINSLOO
INSTRUCTED BY: ASHERSONS ATTORNEYS, CAPE TOWN