IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 1622/23P

In the matter between:

SHAZIA HAROON GOPIE	**Applicant**
and	
THAIGARAJ SOOBRAMOONEY PILLAY	**First Respondent**
MAGISTRATE ELLEN GROPP	**Second Respondent**
MAGISTRATE B M MASUKU	**Third Respondent**
MAGISTRATE B E NGUBANE	**Fourth Respondent**

JUDGMENT

WAJ Nicholson AJ:

[1] This matter served before me on the opposed motion court roll wherein the applicant seeks, interlocutory relief in the form of a rule *nisi* as follows:

'2.1 Magistrate B E Ngubane be and is joined hereto as the fourth respondent.

2.2 That the interim protection order granted to the applicant on 13 January 2023 under Vryheid Domestic Violence Case No. 14/7/2-28/23 in its original term be and is hereby restored and is declared to be effective and to operate until such time as the case under Vryheid Domestic Violence Case No. 14/7/2-28/2023 is finally dealt with.

2.3 Vryheid Domestic Violence Case No. 14/7/2-28/23 shall be dealt with by a Magistrate which is stationed in a district other than Vryheid.'

Factual matrix

[2] To place this application in proper perspective, it is necessary to understand the factual matrix that brought the parties before me.

[3] On 21 June 2020, applicant and first respondent were married by Islamic rites. While first respondent asserts that they resided together until 17 September 2022 when they were divorced through talaaq, applicant disputes the divorce and avers that the marriage still subsists.[1] Nothing turns on this dispute.

[4] On 8 January 2023, applicant and first respondent were involved in an altercation where applicant avers that first respondent flew into a rage, slapped her on the face with his open hand, grabbed her and flung her to the ground, threw her around and put his knee on her throat while she was lying on the floor.

[5] First respondent on the other hand disputes applicant's account, and avers that applicant attacked him and he defended himself, and he slapped her.[2] It is instructive that first respondent alleges that applicant moved out of the marital home at Zaailagte Farm where after she resided at lodges,[3] while on the other hand, applicant states:[4]

'I was residing at Plot 231 Aanstoot Farm, Vryheid area, being the matrimonial home where the First Respondent and myself resided together, until I had to flee on 9 January 2023 due to the assault that the First Respondent carried out on me the night before. I had to take up residence at an undisclosed 'bed and breakfast' in Vryheid where my minor child and I currently reside.'[5]

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[1] The interlocutory application vol 1 at 39 para 6; the main application vol 1 at 9 paras 3, 4 and 12.
[2] The main application vol 1 at 11 and 12 paras 12 and 13; Interlocutory application vol 1 at 40 para 9.
[3] The interlocutory application vol 1 at 40 para 7.
[4] The main application vol 1 at 9 para 3.
[5] Date of affidavit: 2 February 2023

[6] The first respondent, in his answering affidavit, avers that during December 2022 the applicant requested for a place to stay. He allowed her to move back in with him as he was about to move back to Zaailagte Farm, during the beginning of 2023, after completing the establishment of a business on Zaailagte Farm.[6]

[7] In her replying affidavit to this interlocutory application,[7] applicant does not deny that she had previously moved out of the marital home, but contradicts the averment that she resided in an 'undisclosed' bed and breakfast when she replies to first respondent's answering affidavit as follows:

'I was forced to leave the farm due to the continuous abuse by the First Respondent and I live at a bed and breakfast which was owned by my friend, Chrisine Taylor who let the room out to me at a reasonable rate. (I attach the confirmatory affidavit of Christine Taylor hereto). It is common cause that the First Respondent would come to me whilst I resided at the bed and breakfast, and begged me to return to him. He would also stay over with me at the bed and breakfast and cohabitate with me, all the while pleading with me to return to the farm by stating that it was in the interest of our child that we reside together. I eventually succumbed to his request for the benefit of the child, as I had verily believed at that stage that he had been remorseful for the manner in which he had abused me, however, as I later found out, that was not the case.'

[8] The irresistible inference to be drawn from applicant's contradiction that she lived at an undisclosed bed and breakfast in Vryheid, is that she was been mendacious to create the impression that she was afraid of first respondent, to bolster her application where the order dated 7 February 2023, which will be referred to hereinbelow, was granted.

[9] On 9 January, applicant opened a case against first respondent for assault with the intent to do grievous bodily harm with reference, Vryheid CAS 110/012023. First respondent too, opened an assault case against the applicant with reference, Vryheid

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[6] The interlocutory application vol 1 at 40 paras 7 and 8

[7] The interlocutory application vol 2 at 107 para 5.2. Also at paragraph 20 of the founding affidavit to the main application, she states that she had to go to an undisclosed bed and breakfast in Vryheid and at page 22 of the founding affidavit, to the main application.

CAS 113/01/2023.[8] On 10 January 2023, the senior public prosecutor declined to prosecute both charges.[9]

[10] I pause here to mention that while applicant in the founding affidavit to the main application, acknowledges that the senior public prosecutor declined to prosecute the matter, in her answering affidavit to the interlocutory application, she states:[10]

'...It is trite to mention that his friends at the SAPS and Vryheid Court assisted him in having the criminal case I filed against him, not enrolled, notwithstanding the fact that it was a complaint of domestic violence with a duly completed J88 form. This is how rife the corruption and collusion in Vryheid is, which is why I am compelled to approach the High Court for intervention.'

[11] It is appropriate to mention here that while applicant acknowledges that she was first to lay a charge against the first respondent, with the first respondent laying a counter charge against her.[11] In her replying affidavit to this interlocutory application, she states:[12]

'In amplification, the First Respondent is well connected with the South African Police Services ('SAPS') in Vryheid and it is common cause that I registered a criminal charge against him in the morning, however, his friends at the SAPS had registered his case before mine when he had only gone to the police station after lunch. This is exposed by the fact that his J88 per annexure 'TSP3' shows that he had only been assessed by a doctor at 14:20 on 9 January 2023, whilst J88 shows that I was assessed at 11:30 am on 9 January 2023, notwithstanding the fact that I had got my J88 first and had returned to the police station to register my case before he had.'

[12] This peculiar allegation is made even though, in the founding affidavit, she states that her reference number for the assault with intent to cause grievous bodily harm case with the following South African Police Service ('SAPS') reference: CAS 110/01/2023 and the first respondent's reference is CAS 113/01/2023. The sequence of the numbers demonstrates that her case was registered first. Accordingly, her view

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[8] The main application vol 1 at 12 and 13 para 16.
[9] The main application vol 1 at 14 para 19.
[10] The interlocutory application vol 2 at 112 para 9.3.
[11] The main application vol 1 at 13 para 18.
[12] The interlocutory application vol 2 at 108 para 7.1.

that first respondent received preferential treatment from the members of SAPS is unsustainable on her own version.

[13] On 10 January 2023, the first respondent applied for a protection order in terms of s 5(4) of the Domestic Violence Act 116 of 1998 (the 'Act'), under Case No. 114/7/2-23/2023 with the return date being 15 February 2023.[13] First respondent was not afforded any interim relief but an order merely to show cause was issued.

[14] On 13 January 2023, the applicant applied at the Domestic Violence Court for a protection order under Domestic Violence Case No. 14/7/2-28/2023. Accordingly, applicant was granted an interim protection order against first respondent in the following terms:[14]

'3.1.2.1. Not to threaten to assault and/or threaten to kill and/or assault the applicant and/or any person living with her.

3.1.2.2. Not to insult the applicant and/or any persons living with her.'

[15] Applicant's protection order was then adjourned to 15 February 2023 to be heard together with the first respondent's protection order application.

[16] It is instructive that when applicant approached the Vryheid Magistrate's Court, the second respondent being the magistrate allocated to the Domestic Violence Court was away attending a funeral. Applicant was requested to return at 15:00 where she was attended to by the second respondent who granted her the relief that she sought, with interim relief. Notwithstanding obtaining the relief that she sought, applicant states that both Ayanda, the Clerk of the Court, and the second respondent were extremely rude to her.[15]

[17] For context I pause here to mention that s 5(5)*(a)* of the Domestic Violence Act reads:

'The return dates referred to in subsections (3)*(b)* and (4)*(a)* may not be less than 10days after service has been effected upon the respondent: Provided that the return date referred to in

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[13] The main application vol 1 at 41 to 52.
[14] The main application vol 1 at 69 to 71.
[15] The main application vol 1 at 16 para 24.

subsection (3)*(b)* and (4)*(a)* may be anticipated by the respondent upon not less than 24 hours' written notice to the complainant and the court.'

[18] On 27 January 2023, first respondent anticipated the rule *nisi* issued in applicant's protection order.[16] It is relevant that given the wording of s 5(5)*(a)* above, there is nothing sinister about applicant anticipating the order.

[19] Ayanda, the Clerk of the Court, contacted the applicant in order to serve the notice of anticipation on her. However, applicant refused service and the document was only provided to her before the magistrate on 27 January 2023. It appears from the founding affidavit to the main application that the reason applicant refused service is because she was of the view that the court, being a neutral body, should not get involved with serving papers.[17]

[20] It is instructive that s13(1) of the Domestic Violence Act reads as follows:
'Service of any document in terms of this Act must forthwith be effected in the prescribed manner by the *Clerk of the court*, the sheriff or a peace officer, or as the court may direct.' (my emphasis)

[21] Considering the reading of s 13(1) of the Domestic Violence Act, it appears that applicant's concern is without merit.

[22] Notwithstanding the very clear and unambiguous reading of s 13(1) of the Domestic Violence Act, and without any authority for a contrary interpretation, instead of advising the applicant that the complaint that the service by the clerk is devoid of merit, in applicant's attorneys heads of argument, dated 14 April 2023 under signature of Mohamed Abdulla Attorneys,[18] the following is stated:
'7. A peculiar defence was raised that in terms of s 13 of the Domestic Violence Act *supra,* the Clerk of the Court is 'allowed' to serve such documents, which position is strongly opposed in this instance for the following reason. Section 13 reads as follows:

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[16] The main application vol 1 at 22 para 38, and at pages 75 to 91.
[17] The main application vol 1 at 21 paras 35 to 37.
[18] The interlocutory application vol 3 at 244 and 245.

"(1) Service of any document in terms of this Act must forthwith be effected in the prescribed manner by the Clerk of the court, the sheriff or a peace officer, or as the court may direct.

(2) ..."

8. It is common cause that s 13(1) refers to three persons who may serve, being the Clerk of the Court, the Sheriff or a Peace Officer, however when considering s 5(5) *supra,* and the fact that the Court is one of the parties which is to be served by the Respondent, it is obvious that the Clerk of the Court cannot be party serving the very Court which she is representing when it comes to anticipation documents.

9. It is basic common sense that either the Sheriff or a Peace Officer are the only person/s in terms of s 13(1) that can serve anticipation documents on behalf of the Respondent, as the Court cannot serve itself. When it is party that is to be served with written notice not less than twenty four (24) hours prior to the anticipation being heard. This is why s 13(2) makes provision for financial assistance to Complainant and/or Respondents when they don't have the means to pay fees for service in terms of this Act, as there are certain instances, like in anticipation matters, where the Clerk of the Court cannot serve due to the obvious fact that the Court is one of the recipients that may be served. This is trite law and any attorney who is familiar with the Domestic Violence Act is aware of the fact, hence our complaint that is the Clerk of the Court has no business serving the anticipation documents on behalf of the respondent.'

[23] While applicant's attorney is clearly wrong in its interpretation of the section, the obvious fallacy in its interpretation is the fact that s 13(1) deals with service and not filing. It is axiomatic that documents are filed at court and served on the parties. In the premises, there was nothing sinister about the clerk of the court serving documents on applicant.

[24] As I have already mentioned, the purpose of the anticipation application was for first respondent to retrieve his firearms. At the (anticipating) hearing, second respondent immediately stated without an application that she is recusing herself; however, first respondent's attorney insisted that the matter be heard. Second respondent then attempted to mediate the issue; however, applicant remains steadfast that she needs an attorney present, and that she does not wish for the firearms to be returned because she is fearful of her life, because first respondent had previously pointed a firearm at her.

[25] It is instructive that this is the first time, the pointing of a firearm was raised because it was not stated in the complaint of assault to the police, which the public prosecutor declined to prosecute, and it was not stated in the application papers for the protection order previously. The application was later heard at 14:00 before a new magistrate, the third respondent herein who eventually granted the relief.

[26] On or about 7 February 2023, applicant brought an application (referred to as the main application herein) citing the first, second and third respondents where applicant sought and was granted relief in the following terms:

'2. A rule *nisi* is hereby granted calling upon the Respondents (hereafter referred to as the Respondents) to show cause on the 3rd day of May 2023 why an order should not be granted in the following terms:

2.1 That the amended interim order made by the Third Respondent on 27 January 2023 under Vryheid Domestic Violence Case No. 14/2/7-28/2023 is hereby stayed pending finalisation of the order granted on 13 January 2023.

2.2 The further proceedings to be presided over by a magistrate under the Second and Third Respondents which magistrate shall be one stationed in a district other than Vryheid.

2.3 The First Respondent is ordered to immediately to surrender to the South African Police Service at Vryheid, all the firearms which were previously seized from him but were then returned to him in terms of the amended interim order made by the third respondent on 27 January 2023.

2.4 The First Respondent is ordered to do what is necessary to restore a supply of water and electricity to the residents where the Applicant is residing, situated on Plot 231 Aanstoot Farm, Vryheid, and to make such premises habitable again, including insuring that the sanitation system is fully functional and that the electronic motor operating the entrance gate to the property is fully functional with a remote being given to the applicant.

2.5 The work contemplated in paragraph 2.5 is to be carried out without the presence of the First Respondent.

2.6 The work contemplated in paragraph 2.5 above to be completed within five (5) calendar days of this order.

2.7 First Respondent to inform Applicant's legal representatives of the completion of such work.

2.8 The First Respondent is ordered to pay the costs of the application on a scale as between attorney and client.

3. Pending the final determination of this application, an interim order is granted in terms of paragraphs 2.1, 2.2, 2.3, 2.4, 2.5, 2.6 and 2.7.'

[27] On 15 February 2023, in terms of the ruling of this court dated 7 February 2023, applicant's protection order with reference 14/2/7-28/2023 was presided over by Magistrate BE Ngubane. It is common cause that the appointment of Magistrate BE Ngubane complied with the order of this court dated 7 February 2023. At that hearing, the first respondent took the point that applicant's interim order was not extended on 27 January 2023, because the matter was not enrolled on 15 February 2023.

[28] On 27 July 2023, Magistrate BE Ngubane accordingly upheld first respondent's point *in limine* and made the following order:

'The interim protection order number 28/2023 issued on 13/01/2023 is hereby discharged by default of non-appearance on the 15th February 2023 and further lapsed due to non-extension of the order on numerous dates'.[19]

[29] Unhappy with the protection order being discharged on 10 August 2023, despite applicant's protection order being discharged, applicant then filed a 'notice of set down', under applicant's case number (28/2023)[20] which reads:

'Kindly Take Notice that the abovementioned matter has been set down for inquiry in the Magistrates Court at Vryheid on the 13th day of September 2023 at 8:30 or as soon thereafter as the parties may be heard by the Honourable court.'

[30] I pause to mention here that it is unclear in terms of which rule, Act or procedure the 'notice of set down' was filed, nor what was sought to be achieved from the inquiry.

[31] First respondent then filed an irregular step to the 'notice of set down', in terms of rule 60A of the Magistrate's Court Rules on 13 August 2023.[21]

[32] On receipt of the notice, applicant took the view that first respondent will cause the matter to be delayed 'inordinately',[22] and therefore, will not be heard on 13 September 2013, which will in turn leave both her two-year-old son and her without relief. In that regard, applicant states, that this interlocutory application is by its very

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[19] The interlocutory application vol 1 at 22 and 23.
[20] The interlocutory application vol 1 at 16 para 28 and page 25.
[21] The interlocutory application vol 1 at 16 para 29 and page 30.
[22] The interlocutory application vol 1 at 17 para 31.

nature urgent because it not only deals with her safety but also the safety of her two-year-old son.[23]

[33] Accordingly, applicant now brings this application seeking *inter alia* the joinder of Magistrate BE Ngubane as the fourth respondent, the reinstatement of the protection order as granted in the main application, and that this matter be dealt with by another magistrate outside of Vryheid.

[34] It is worth noting that applicant, at several occasions in the founding affidavit to this interlocutory application, makes vague allegations that her son is in danger from first respondent,[24] yet perplexingly did not make these allegations in the application for the protection order, nor in the founding affidavit to the main application.

[35] Further, in the founding affidavit to the main application, at various places, applicant states that she was criticised by the second respondent for seeking legal representation, and second respondent was rude to a Mr Padayachee, an attorney who she sought legal advice from, on speaker phone.[25]

[36] Before me, was an index marked volume 3 to the interlocutory application, which was not before the court to the main application were two transcripts are filed: a transcript of the court proceedings,[26] a copy of the transcript from the cellular phone which was recorded by the applicant. I have perused both transcripts and I am unable to find in them, any unprofessionalism or bias displayed by either the second or third respondents.

[37] Having regard to the factual matrix, the following facts emerge:

(a) Applicant misled this honourable court when the matter was heard on 7 February 2023 by causing the court to believe that she fled the marital home to live at an undisclosed bed and breakfast which created the impression that she was afraid of first respondent.

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[23] The interlocutory application vol 1 at 17 para 34.
[24] The interlocutory application vol 1 at 10 para 6, page 17 paras 30 and 34.
[25] The main application vol 1 at 22 and 23 paras 39 to 43.
[26] The interlocutory application vol 3 at 17 para 34.

(b) The factual basis that applicant believed the SAPS favoured first respondent was unsustainable on her own version; because she demonstrates that her case of assault GBH was registered before first respondent, and it is apparent from her version that the senior public prosecutor declined to prosecute the two assault charges and there are no facts presented to demonstrate that the SAPS were involved in that decision.

(c) Applicant seeks to portray that second and/or third respondent favours first respondent when on her own version, first respondent sought a protection order; however, he was not granted interim relief but a mere notice to show cause was issued. Yet on the other hand, when applicant approached second respondent, she was granted interim relief.

(d) Applicant's apprehension of bias is also born from the fact that the clerk of the court served her with the application to anticipate the rule *nisi*, which is unsustainable because the Domestic Violence Act allows for such.

(e) The assertion that second and third respondent was rude and unprofessional to applicant is not borne out of the transcript that was put up by applicant.

(f) As a ground for urgency and/or to seek a preference date, applicant alleges that her 2 year old child is in danger from first respondent yet she does not make a similar allegation in the founding affidavit to the main application nor in the application for the protection order.

(g) The decision to approach this court was made not because of an apprehension of bias by the fourth respondent, but because applicant believed that first respondent was frustrating the prosecution of her protection order.

Issues

[38] On perusal of the affidavits, the following issues emerge:

(a) Applicant seeks the reinstatement of the protection order in terms of the order granted in the main application, on the ground that the fourth respondent is biased, and simultaneously a joinder of the fourth respondent to the main application.

(b) On the other hand, first respondent avers that the rule *nisi* and interim relief in terms of the protection order cannot be revived because it has been discharged, which has the effect of it being dismissed. Further, there is no evidence that fourth respondent is biased.

Oral Argument

[39] In support of this interlocutory application, applicant alleges:

(a) Magistrate Ngubane was seen engaging in a private discussion with the first respondent's attorney of record prior to hearing of the application.

(b) Magistrate Ngubane spent time in the second respondent's office before hearing the matter.

(c) Magistrate Ngubane entered the courtroom via the adjourning door of the second respondent's office.

(d) Applicant did appear in court on 15 February 2023 which is evidenced from a Roneo form which recorded the details of the matter in the manuscript. Although the Roneo form made reference to first respondent's application for a protection order being 14/7/2-23/2023 and not applicant's matter, being 14/7/2-28/2023; both matters were being dealt with because they are both counter applications.[27]

(e) Magistrate Ngubane ignored the order of this honourable court dated 7 February 2023 which reinstated the original interim order and ensures that it is effective pending the finalisation of the 'domestic violence application'.

(f) Magistrate Ngubane ignored the submissions regarding s 5(9) of the Domestic Violence Act which reads: 'an interim protection order issued in terms of the section remains in force until it is set aside by a competent court'.

[40] Applicant further argues that a reinstatement application is credible due to the precedent of the order granted by this honourable court dated 7 February 2023 where the order of the third respondent's amendment was set aside, and in terms of the Latin maxim *ubi jus ibi remedium* which translates to 'where there is a right there is a remedy'.

[41] Applicant cites various authorities[28] where the point is made that in motion proceedings, facts that are not disputed and/or not seriously disputed should be taken as admitted. Accordingly, on the papers it must be taken as admitted that Magistrate Ngubane did meet with first respondent's attorney and second respondent prior to hearing the matter, because it is not explicitly denied.

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[27] The interlocutory application vol 1 at 24.

[28] I Ellis and M Dendy 'Civil Procedure' in WA Joubert (ed) *Lawsa* 3(1) (First reissue) para 1.37; *Engar and others v Omar Salem Essa Trust* 1970 (1) SA 77 (N) at 83; [1970] (1) ALL SA 48 (N) at 55.

[42] Applicant also cites the case of *S v Le Grange*[29] where the court makes the point that:

'The requirement that justice must not only be done, but also be seen to be done has been recognised as lying at the heart of the right to a fair trial.'

[43] In argument, the first respondent avers that the relief sought in the present application is differentiable from the relief sought and granted on 7 February 2023 because on 7 February 2023, the rule *nisi* was still in place, accordingly, the matter was not disposed of. Presently, the rule is discharged which means that the matter is currently disposed of. Accordingly, this court does not have an inherent jurisdiction to revive the rule *nisi* but applicant may have other rights such as an appeal and review.

[44] First respondent also avers that a recusal of Magistrate Ngubane was never brought before him on the ground that he was bias, but only alleged in this application. The belated argument or assertion of this point lends credence to the fact that this point is an afterthought. First respondent further states that the founding affidavit is rather vague because the matter was argued before Magistrate Ngubane on three occasions; however, the answering affidavit does not identify on which occasion the first respondent's attorney had spoken to Magistrate Ngubane.

[45] The first respondent brought to my attention the case of *Tapuch v Aswagen*[30] where the court remarked:

'[18] The law in this regard is set out succinctly in Erasmus: *Superior Court Practice* as follows:

> ". . . Where an interim order is not confirmed, irrespective of the wording used, the application is effectively dismissed. There is accordingly no order that can be revived by the noting of the appeal and there is nothing that can be suspended . . ."

[19] The following was further said in *Southernwind Shipyard (Pty) Ltd v Jacobs and Others* at para [23]

> "[23] What was strange for the Court in respect of the interim order that was granted on 26 September 2008 was that it sought to revive the interim interdict, which on proper consideration of the authorities cited above, such an order could not be revived. The

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[29] *S v Le Grange* 2009 (2) SA 434 (SCA) para 14.
[30] *Tapuch v Aswagen and others* [2016] ZAGPPHC 572.

> true position, therefore, is that an Applicant, if it seeks further protection has to bring a fresh application which sets out the basis upon which the court should grant a temporary interdict."

[20] The authorities are clear, a discharged interim order, cannot be revived as there is actually nothing to revive. A litigant in such a situation, that is, where an interim order is discharged, and who desires further protection by way of an interdict pending determination of an appeal, is urged to apply for a new interim order pending the appeal.

[21] The applicant's submission that where an interlocutory order has been discharged it can be revived on application thereof by a litigant, is thus, not correct. One cannot revive something that is not there. It is quite clear that once an interim interdict is discharged same is gone and cannot be revived, except by agreement or through making a fresh application. The applicant misconstrued the principle as laid down in the Ismael-judgment above which he used in support of this submission. The passage at 688A of that judgment requires no interpretation as it aptly sets out this principle as follows:

> "It seems to me that if a litigant desires further protection by way of interdict pending the determination of an appeal he must make application therefor . . . In my opinion the noting of an appeal does not automatically revive an interdict granted *pendente lite*."' (footnotes omitted)

[46] In *National Director of Public Prosecutions v Walsh*,[31] the court held the view that a rule *nisi* is an interim order and is conditional upon confirmation by the court. Accordingly, a court has no authority to *mero motu* extend the life of a lapsed order.

[47] Applicant's counsel brought to my attention rule 27(4) of the Uniform Rules, which was inserted in 1987 in light of *Fischer v Fischer*[32] and the rule reads as follows: 'After a rule *nisi* has been discharged by default of appearance by the applicant, the court or judge may revive the rule and direct that the rule so revived may not be served again.'

[48] I am of the view that rule 27(4) is incongruent to the facts of the current case because in the current case, the rule *nisi* was discharged (correctly or incorrectly) for lack of appearance and not merely for default of appearance. In other words, a magistrate discharged the rule, or as he put it, dismissed the matter due to a default

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[31] *National Director of Public Prosecutions v Walsh and others* 2009 (1) SACR 603 (T) paras 24 and 25.

[32] *Fischer v Fischer* 1965 (4) SA 644 (W).

of appearance by the applicant. Further, rule 27(4) relates to the Uniform Rules and not to the Magistrate's Court Rules. While I am mindful that there are circumstances where the Uniform Rules will have application in the Magistrate's Court, my view is that this is not one of those circumstances.

Legal principles and discussion

[49] An appropriate starting point is to consider if an apprehension of bias can be inferred from Magistrate Ngubane's conduct. As can be noted from the authorities hereunder, the test for recusal of a presiding officer is an apprehension of bias – the courts have explained that it is not necessary to prove that the presiding officer was subjectively biased, but whether they are perceived to be biased.

[50] In *President of the Republic of South Africa v South African Rugby Football Union*,[33] the court held that:

'. . . the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. *The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel.* The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.' (footnotes omitted)

And *in Bernert v Absa Bank Ltd*,[34] the court stated:

'It is, by now, axiomatic that a judicial officer who sits on a case in which he or she should not be sitting, because seen objectively, the judicial officer is either actually biased or there exists a reasonable apprehension that the judicial officer might be biased, acts in a manner that is

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[33] *President of the Republic of South Africa and others v South African Rugby Football Union and others* [1999] ZACC 9, 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC) para 48.

[34] *Bernert v Absa Bank Ltd* [2010] ZACC 28, 2011 (3) SA 92 (CC), 2011 (4) BCLR 329 (CC) para 28.

inconsistent with the Constitution. This case concerns the apprehension of bias. The apprehension of bias may arise either from the association or interest that the judicial officer has in one of the litigants before the court or from the interest that the judicial officer has in the outcome of the case. Or it may arise from the conduct or utterances by a judicial officer prior to or during proceedings. In all these situations, the judicial officer must ordinarily recuse himself or herself. The apprehension of bias principle reflects the fundamental principle of our Constitution that courts must be independent and impartial. And fundamental to our judicial system is that courts must not only be independent and impartial, but they must be seen to be independent and impartial.' (footnotes omitted)

[51] It is common cause that an application for recusal was not brought before Magistrate Ngubane, and there is no explanation proffered in the papers for the applicant's failure to bring the recusal application before him. Notwithstanding, I am now asked to infer from his conduct, that the order he made discharging the interim protection order, were a result of his bias.

[52] It is also apparent from the papers that this interlocutory application was a result of first respondent taking an irregular step to applicant's notice of set down to hold an enquiry. It has not been disclosed in these papers as to what was to be probed in the enquiry, nor why first respondent's notice was of such an irregularity that it was so contemptuous that it became necessary to approach this court, and how that irregular step links to Magistrate Ngubane's bias alleged in this application.

[53] The allegation of bias against Magistrate Ngubane is noted on a single page of the founding affidavit, which I repeat hereunder:

'13. Ngubane engaged in a private discussion with First Respondent's attorney. Prior to hearing the application.

14. Thereafter, Ngubane entered the Second Respondent's office, while she was present in her office. He spent some time in her office prior to entering the court, when she opened the door for him to walk into the Courtroom, as her office and the courtroom were adjoined.

15. It is instructive that this Honourable Court held that the 'independent magistrate' shall preside over the application due to the concerns over her independence, as set out in the Founding Affidavit.

16. She opened the adjoining door between her office and the court whereupon Ngubane entered the court, thereby reinforced the inevitable conclusion. That they were engaging in a discussion.'

[54] There are two issues here, one, applicant infers bias from Magistrate Ngubane: engaging in a private discussion with first respondent's attorney; two, entering the court room through second respondent's chambers and spending time in her chambers.

[55] Regarding the first issue, in my view the allegation lacks sufficient detail to infer bias because, one cannot help but wonder, where did this private discussion take place? In his chambers? In the attorney's office? In a public place such as the corridor or car park? For how long did the discussion take place? Accordingly, the allegations of bias are spurious and conjecture.

[56] The second issue must be rejected out of hand because there is just no foundation to infer bias. It is common practice to walk through chambers into the court room if there is an interleading door. The chambers just happen to be occupied by the second respondent. Further, there is nothing sinister about two magistrates speaking to each other. Magistrates are by their appointment, independent; accordingly, details of the discussion would be necessary to infer bias. In addition, as I have already stated above, it is apparent from the factual matrix above that there is no foundation to impute bias or unprofessionalism to either second or third respondent.

[57] In the premises, I find that neither second, third, nor Magistrate Ngubane's conduct to be biased.

[58] Of concern, is that having regard to the transcripts, the scant facts and the conjecture in the papers, which clearly demonstrate that the allegations made by applicant are spurious, applicant's attorney of record, being an officer of the court still saw it fit to reduce the allegations to writing and prosecute this matter, on these facts. I shall return to this point below.

[59] Having found that there is no bias, this should be the end of the matter; however, for prudence, I deal with first respondent's second ground of opposition, being that the interim order cannot be revived.

[60] Section 16 of the Act provides appeals and reviews as follows:

'The provisions in respect of appeal and review contemplated in the Magistrates' Courts Act, 1944, and the Superior Courts Act, 2013 (Act 10 of 2013), apply to any proceedings in terms of this Act.'

[61] In the premises, it appears from s 6 of the Act that the discharge of the interim protection order in domestic violence matters means that the decision and/or proceedings need to be appealed or reviewed. Accordingly, an appeal or review should follow the ordinary course of appeals and reviews in terms of the civil procedure.

[62] *Zweni v Minister of Law and Order*,[35] sets out the test to determine whether an order, including an interim order, is final, and thus appealable. The test was succinctly described by Howie P in *S v Western Areas Ltd*[36] as follows:

'Appeals are, generally, precluded before final determination of a case unless the judicial pronouncement sought to be appealed against, whether referred to as a judgment, order, ruling, decision or declaration, has three attributes. First, it must be final in effect. That means it must not be susceptible of alteration by the court appealed from. Second, it must be definitive of the rights of the parties, for example, because it grants definite and distinct relief. Thirdly, it must have the effect of disposing of at least a substantial portion of the relief claimed. Clearly, whether these criteria are met does not depend on judicial discretion.' (footnote omitted)

[63] It is instructive that *Reddell v Mineral Sands Resources (Pty) Ltd*[37] confirmed and applied the above test, however, *United Democratic Movement v Lebashe Investment Group (Pty) Ltd*[38] points out that there may be instances where the interests of justice will dictate whether or not an interim order or any order is

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[35] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 563A-C.
[36] *S v Western Areas Ltd and others* 2005 (5) SA 214 (SCA) para 20.
[37] *Reddell and others v Mineral Sands Resources (Pty) Ltd and others* [2022] ZACC 38; 2023 (2) SA 404 (CC); 2023 (7) BCLR 830 (CC) para 32.
[38] *United Democratic Movement and another v Lebashe Investment Group (Pty) Ltd and others* [2022] ZACC 34; 2023 (1) SA 353 (CC); 2022 (12) BCLR 1521 (CC) para 43.

appealable. However, generally the main approach is still to follow the common law principles enunciated in *Zweni*.

[64] It is apposite that bias is a ground of review of Magistrates' Court proceedings in terms of s 22(1) of the Superior Courts Act 10 of 2013:

'The grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are-

(a) absence of jurisdiction on the part of the court;

(b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;

(c) gross irregularity in the proceedings; and

(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.'

[65] It is apparent from a reading of the Act, in relation to domestic violence matters, where an order is made in terms of s 6(4) of the Act, which requires that a court 'must, after a hearing as contemplated in subsection (2), issue a final protection order in the prescribed form if it finds, on a balance of probabilities, that the respondent has committed or is committing an act of domestic violence', will amount to a final order irrespective of whether the interim protection order is confirmed or discharged. Accordingly, even if there is an appeal or review before the high court, the high court generally will either alter the order or confirm the order of the domestic violence court on appeal or review, and not send it back to the domestic violence court to deal with afresh.[39]

[66] However, this court is not sitting as either an appeal or review court but is asked to revive a rule *nisi* on the ground that the interim protection order was dismissed due to bias.

[67] In the circumstances, I cannot but share the view of first respondent that it would be incompetent of this court to revive the interim protection order, because the protection order has been dismissed. Accordingly, applicant's remedy would lay in

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[39] *DVT v BMT* [2022] ZASCA 109; 2022 (6) SA 93 (SCA), and *Naidoo v Pillay* [2017] ZAKZPHC 10.

either bringing a review or an appeal, and I would add recission to that list since applicant alleges an error in law and fact.

[68] Before dealing with the issue of costs, it is important that I deal with the conduct of the parties.

[69] Before doing so, it is instructive that my remarks hereunder are with the endorsement of *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd*[40] where the court held:

'. . . attorneys and counsel are expected to pursue their client's rights and interests fearlessly and vigorously without undue regard for their personal convenience. In that context they ought not to be intimidated either by their opponent or even, I may add, by the court. Legal practitioners must present their case fearlessly and vigorously, but always within the context of set ethical rules that pertain to them, and which are aimed at preventing practitioners from becoming parties to a deception of the court. It is in this context that society and the courts and the professions demand absolute personal integrity and scrupulous honesty of each practitioner.'

[70] While it is not necessary to make any findings on first respondent's conduct herein and therefore, I do not make any adverse findings regarding his conduct; should there be any credence to the allegations that: he evicted applicant's mother and domestic worker at night, cut off applicant's water supply and electricity, and disabled the gate, no matter the grievance he holds towards applicant, his conduct would be reprehensible and deserving of censor by the courts. I can think of very few examples of persons more vulnerable to crime than applicant being a female living alone with a two-year old child; therefore, she should not have to endure additional anxiety, stress and discomfort caused by first respondent. Accordingly, persons in the position of applicant must not be discouraged from approaching the courts. However, when approaching the courts, applicant must do so bona fide and honestly.

[71] With that said, the case of *Zuma v Downer*,[41] is instructive where the court remarked:

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[40] *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* 2014 (3) SA 265 (GP) para 34.

[41] *Zuma v Downer and another* [2023] ZASCA 132.

'[33] Costs remain: In the heads of argument filed with this Court, Mr Zuma alleges bias on the part of the members of the high court. The allegation is scandalous. The bias is said to arise from the attitude of the judges towards counsel and/or his client and some of the inexplicable findings made. No explanation is given as to what it is about the "attitude" of the judges or which of them demonstrated bias toward either counsel or Mr Zuma. It is a mere allegation, without any attempt to produce any evidence to justify it. It is improper. As to the "inexplicable findings", for the reasons set out above, the findings of the high court can hardly be faulted. However, even if they could, that does not give rise to a complaint of bias.

[34] In *Zuma v Democratic Alliance and Another*, where similar allegations of bias were raised by Mr Zuma, it was stated:

> "The contention, absent any factual foundation, that all three judges who heard the matter had left their judicial station, scandalises the court. If true, that all three either independently of each other, or worse still acting in concert, would have renounced their judicial impartiality is a most serious allegation. Imputing bias to a judicial officer should not lightly be made. Nor, should the imputation of a political motive. This is not to suggest that courts are immune from criticism, even robust criticism for that matter. But, the criticism encountered here falls outside acceptable bounds."

[35] There is nothing on record to sustain the suggestion that the presiding judges in this matter were biased or not open-minded, impartial or fair. The allegations were made with a reckless disregard for the truth. And, whilst not advanced during oral argument, they were not retracted. However, they ought not to have been made at all. Moreover, the previous admonition of this Court appears to have fallen on deaf ears. The propensity to accuse judicial officers of bias, absent a proper factual foundation, is plainly deserving of censure. The respondents argue that Mr Zuma should be penalised with a punitive costs order as a mark of this Court's displeasure and to vindicate the integrity of the high court and the judiciary. A submission with which I cannot but agree.' (footnote omitted)

[72] In the circumstances, it is concerning that in her replying affidavit to the interlocutory application, which I assume was drafted by the applicant's attorney of record, where at various paragraphs, the applicant either due to a misunderstanding of the law, processes and/or facts, and without a factual basis, makes scandalous, grave and spurious allegations against the court staff, the magistrates and/or the SAPS. Examples are as follows:[42]

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[42] The interlocutory application vol 2 at 114 – 115.

'11.2 . . . the clerk of the court should not serve on behalf of the Respondent. This is the level of collusion and corruption that I have faced at the Vryheid Court from the onset of my Application. It indicates the applicant's influence in Vryheid.

. . .

11.3 The complaint was swept under the proverbial carpet due to the fact that the "cancer of corruption and collusion" seems to go all the way to the top'.

And:[43]

'12.1 . . . the First Respondent and his attorney seemed to be receiving preferential treatment by the Court as they were able to irregularly serve me on the morning of the matter, in front of the magistrate, through the service of the clerk of the court, whereupon I was chastised by the magistrate for seeking a postponement in order to secure legal representation.

. . .

12.3 . . . the court "bent over backwards" to accommodate the First Respondent and his attorney, which is why he tried to bizarrely anticipate the same Protection Order for a second time thereafter, within a further week.

12.4 It is fitting for me to mention that First Respondent's attorney is resident in Vryheid and my observation of his conduct at the Court shows that he never misses an opportunity to loudly declare that he was an attorney for a very prominent national politician and that he was part of the politician's widely publicised legal team. As such, he has the Minister of Finance on "speed dial".

12.5 This was done several times in my presence so that everyone within earshot would be aware that this attorney represents this politician. Without making any presumptions, it is important for me to state that the magistrate who have made irregular rulings in my matter thus far are "Acting Magistrate's" who for all intents and purposes would be extremely amenable to permanent appointment. The First Respondent's attorney can apparently expedite such permanent appointment who has the Minister of Justice on "speed dial".'

And further[44]

'13.3 This led to Magistrate Gropp [the second respondent herein] becoming very vindicative towards me and her requesting that I phone my friend. The phone was on speaker whilst myself, Magistrate Gropp and the clerk of the court were present in her office. Magistrate Gropp then addressed my friend in a very condescending manner which resulted in a fitting retort from the attorney.

. . .

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[43] The interlocutory application vol 2 at 115 – 117.
[44] The interlocutory application vol 2 at 118 – 119.

13.5 The blatant corruption and collusion at the Vryheid Magistrate's Court is yet again amplified by the fact that the recording for the morning session of 27 January 2023 where Magistrate Gropp presided, conveniently "disappeared" with the record as per annexure "TSP4".'

[73] Legal practitioners are officers of the court and as such owe a duty of inter alia honesty and integrity towards the court. This does not mean that legal practitioners don't make mistakes or get either the facts or the legal principles wrong. What it does mean however, is that they should not and must not simply regurgitate the instructions of clients, especially where those instructions undermine the courts; but should interrogate the instructions they receive, and properly advise clients of any misconceptions of processes and facts.

[74] In an articled penned by PJ Henning entitled, 'Lawyers, Truth, and Honesty in Representing Clients'[45], the learned author opines:

'Representation of a client requires the attorney to persuade the decision-maker, and the most basic understanding of the judicial process should include the knowledge that an ad hominem attack on judges will not be persuasive absent evidence of actual bias or corruption.'

[75] A Nicolaides & S Vettori concludes in a journal article entitled, 'The Duty of Lawyers: Virtue Ethics and Pursuing a Hopeless Legal Case'[46]:

'Lawyers in especially civil cases ought to have an ethical choice available to either agree or refuse to support a potential client after careful consideration presented facts and likely taking into account both the facts of the client's position, and the probable significance intended for a third party.'

[76] Seegobin J, in light of the litigant's behaviour in Chetty v Perumal [2021] ZAKZPHC 66 (which he penned with Mossop J) penned an article entitled 'Restoring dignity to our courts: the duties of legal practitioners'[47], where he states:

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[45] PJ Henning 'Lawyers, Truth, and Honesty in Representing Clients' (2006) 20 Notre Dame Journal of Law Ethics & Public Policy 209

[46] A Nicolaides & S Vettori 'The Duty of Lawyers: Virtue Ethics and Pursuing a Hopeless Legal Case' (2019) 5 Athens Journal of Law 149 at 162

[47] R Seegobin 'Restoring dignity to our courts: the duties of legal practitioners' 14 September 2022 Groundup. Available at https://www.groundup.org.za/article/restoring-dignity-to-our-courts-the-duties-legal-practitioners/ (accessed 24 October 2023), cited by the SCA in Gaone Jack Siamisang Montshiwa (Ex Parte Application) [2023] ZASCA 19 para 37.

'As officers of the court there is a paramount duty on all legal practitioners to conduct themselves with the highest degree of integrity and honesty at all times, to ensure that the dignity and decorum of the court is maintained and to remember at all times, that their first duty is to the court and to no one else. The effective functioning of our courts and the proper administration of justice are highly dependent on how legal practitioners go about discharging this duty. Sadly, the paramountcy of the duty to the court appears to be lost on many legal practitioners of late.'

And further he writes:

'A growing tendency in recent times is for legal practitioners to use insulting, inappropriate, vulgar, and disparaging language towards judicial officers, court staff and even towards their fellow practitioners. It is becoming more commonplace for such language to find its way into affidavits and other court documents, with legal practitioners embarking on emotive and unacceptable language rather than stating the facts to advance their case. This ends up setting the tone for the rest of the proceedings. The Code of Conduct[48] is clear in this regard, and requires legal practitioners to refrain from including such material and unsubstantiated allegations in affidavits and other court documents. Legal practitioners are also expressly required to treat judicial officers, court personnel, and all other people at court with respect and to refrain from uttering personal remarks about their colleagues.'

[77] In *Grundler N.O v Zulu*,[49] the court made the following observation:

'There is a rising trend in the legal profession of practitioners demonstrating disrespect (if not outright contempt) for courts and the judiciary. One does not need to look far to find examples of this sort of behaviour, from the ranks of senior counsel to the most junior of candidate attorneys. It manifests not only in how practitioners interact with opponents and judges in and out of court but also in the launching of prima facie spurious applications, lacking in factual or legal foundation, that are designed to "snatch bargains", achieve ulterior objectives, delay and/or obstruct. It is a "win at all costs" attitude that does a disservice to the profession and to the country and sets an appalling example to the public at large. It ignores not only the oath that all lawyers take upon their admission but also the distinction between the duty that practitioners owe to their clients and the separate duty that they owe to the Court.'

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[48] LPC Code of Conduct – see generally rules 3 and 9. See especially rule 9.7:
'A legal practitioner shall in the composition of pleadings and of affidavits rely upon the facts given to him or her by the instructing attorney or client, as the case may be, and in so doing:
9.7.1 shall not gratuitously disparage, defame or otherwise use invective;
9.7.2 shall not recklessly make averments or allegations unsubstantiated by the information given to the legal practitioner.'

[49] *Grundler N.O and another v Zulu and others* [2023] ZAKZDHC 7 para 37.

[78] It has been demonstrated that applicant's version, considering her various affidavits under oath; from the main application to and including the replying affidavit to this interlocutory affidavit, have evolved to suit the circumstances, and contains material contradictions. Further, it has also been demonstrated when considering the papers as a whole, that the allegations of bias against the magistrates are without substance. It is similarly concerning that spurious allegations have been made against the Minister of Justice with the suggestion that he appoints magistrates and may do so in mala fide circumstances. Anyone working in the legal fraternity ought to know that magistrates are appointed by the Magistrates Commission and not the minister, yet the applicant's legal representative blindly makes this allegation without correcting applicant.

[79] Having regard to the court file, it is apparent that applicant has been represented by the same set of attorneys in the matters before the family court, in the main application and in this interlocutory application. Accordingly, it is concerning that an officer of this court has associated itself with these spurious allegations, conjecture and potentially defamatory allegations against court staff and magistrates. His actions are reckless and potentially contemptuous.

[80] Having found that this application lacks merit, the remaining issue is that of costs. Since no argument has been presented that costs should not follow the result, the only issue remaining is the scale of the costs. Considering that in *Grundler*[50], a costs award against the attorney in their personal capacity as a form of censure was made, and in *Zuma*[51], in circumstances where it was found that the allegations of bias against judicial officers were scandalous and unsubstantiated, the SCA marked its displeasure with costs on an attorney and client scale, I am of the view that a punitive costs order would be appropriate. I have also noted that Senior Counsel appeared for: first respondent in this interlocutory application and for applicant in the main application. Accordingly, I deem it appropriate to include the costs of senior counsel.

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[50] supra
[51] supra

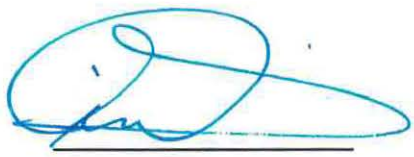
[81] Considering certain of my findings herein, I deemed it appropriate not to include the names of the legal representatives hereinbelow.

Order

[82] In the result, I make the following order:

(1) The interlocutory application prosecuted with the notice of motion dated, 23 August 2023 is dismissed.

(2) The applicant is directed to pay the costs of the interlocutory application on an attorney and client scale, and such costs should include the costs of senior counsel.



WAJ NICHOLSON AJ

Date heard: 23 August 2023

Date handed down: 31 August 2023

Appearances

For applicant:

Instructed by:

For respondents:

Instructed by: