IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)

CASE NO: 2138/2012
DATE HEARD: 08/08/2013
DATE DELIVERED: 23/08/2013

REPORTABLE

In the matter between

P S H	**APPLICANT**
and	
P H	**1ST RESPONDENT**
THE ADDITIONAL MAGISTRATE EAST LONDON MR GOOSEN	**2ND RESPONDENT**

JUDGMENT

ROBERSON J:-

[1] This is an application for an order reviewing and setting aside the second respondent's order confirming, with amendments, an interim protection order obtained by the first respondent against the applicant, in terms of the Domestic Violence Act 116 of 1998 (the Act). The ground for review is alleged gross irregularity in the proceedings, in that the second respondent did not allow the applicant to testify by way of oral evidence, and did not give the applicant and the

first respondent an opportunity to address the court before making the order. The application is opposed by the first respondent.

[2] In his notice of motion the applicant also sought an order condoning the delay in bringing the application for review. The interim protection order was confirmed on 16 May 2012, the second respondent's reasons were furnished on 6 June 2012, and this application was launched on 2 July 2012. It was submitted on behalf of the applicant that the delay was not unreasonable, and Ms Beard, who appeared for the first respondent, fairly conceded that she could not submit to the contrary. The delay was clearly not unreasonable and it follows that an order for condonation was not required.

[3] The interim protection order was granted on 10 May 2012 in terms of s 5 (2) of the Act, which provides as follows:

> "(2) If the court is satisfied that there is *prima facie* evidence that-
>
> *(a)* the respondent is committing, or has committed an act of domestic violence; and
>
> *(b)* undue hardship may be suffered by the complainant as a result of such domestic violence if a protection order is not issued immediately,
>
> the court must, notwithstanding the fact that the respondent has not been given notice of the proceedings contemplated in subsection (1), issue an interim protection order against the respondent, in the prescribed manner."

[4] The first respondent deposed to an affidavit in support of her application. Notice of the application was not given to the applicant and an interim protection order was granted in the following terms:

> "An interim Protection Order is granted; and the Respondent is ordered:
> 1. Not to commit the following acts of domestic violence: not to assault, threaten, abuse or harass applicant or contact her at all;
> 2. Not to enlist the help of another person to commit the acts of domestic violence so specified;
> 3. Not to enter the Complainant's residence at 10 Jasmay, Nahoon Valley[1];
> 4. Not to enter the Complainant's place of employment at Beacon Hill, King Williams Town;
> 5. To make rent or mortgage payments in respect of 10 Jasmay Nahoon Valley".

[5] Under the heading "Additional Orders", it was further ordered that:

> 1. "A member of the South African Police Service at Beacon Bay seizes the following arms or dangerous weapons in the possession of the Respondent i.e. Firearm;
> 2. The Respondent is allowed contact with the following children, Li, L, on the following basis: supervised access to minor children;
> 3. The Respondent provide letter of authority to renew motor vehicle licence of motor vehicle Golf BYS 122 NC;
> 4. A warrant is authorised for the arrest of the Respondent, the execution of which is suspended subject to the Respondent's compliance with the provisions of the Protection order as stated above."

[6] The applicant was informed of his right to appear in court on 28 May 2012 in order to give reasons why the interim protection order should not be confirmed and made final, and of his right to anticipate the return date on 24 hours' written notice to the applicant and the court.

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[1]The correct address is 10 Jasmay Place, Nahoon Valley. This was also the residence of the applicant at the time of the application for an interim order.

[7] On 11 May 2012, after the interim order was served on him, the applicant served a written notice on the first respondent's attorneys and the court, in terms of which he anticipated the return date and stated that the matter would be placed on the roll for hearing on 14 May 2012. The notice further stated that the applicant's opposing affidavit and confirmatory affidavits would be served and filed as soon as they were completed. On 14 May 2012 the applicant served a further notice on the first respondent's attorneys (it is not clear if it was filed at court) in terms of which he filed the affidavits of three other persons[2], and stated that on the return date he would "adduce oral evidence".

[8] On 14 May 2012 the matter was postponed to 16 May 2012, on which date the second respondent confirmed the interim order, with certain amendments. The protection order was contained in the prescribed form and read as follows:

> "Whereas the Applicant successfully applied for a protection order which was issued on 10 May 2012, and after the considering the facts of the matter;
>
> The Court orders that the attached interim protection order be:
>
> 1. Confirmed
> 2. Amended as follows: para 4.1.6[3] is removed (scrapped). Para 4.1.5[4] to read access by prior arrangements."

[2]These persons were a former domestic employee and two relatives of the applicant.
[3]The paragraph dealing with the renewal of the motor vehicle licence.
[4]The paragraph dealing with contact with the children.

[9] The matter was heard in chambers, and the proceedings were apparently not mechanically recorded. The record of proceedings on 14 and 16 May 2012 which was furnished is very brief. On 14 May 2012 the following was recorded by hand:

> "Presiding Officer: F. Goosen
> For Applicant: Mrs. Underwood
> Mr. Hole appears in person
>
> Postponed 16/05/2012 for instructions from the applicant's[5] client. The respondent to have opportunity to collect his personal property at his home this morning and leave 12h00 (10h00)."

On 16 May 2012 the following was recorded by hand:

> "Parties as before. See file."

[10] The reference to "file" presumably means the protection order issued by the second respondent. No further record of proceedings on 16 May 2012 was furnished.

[11] A protection order is issued in terms of s 6 of the Act. The relevant portions of that section provide:

> "**6 Issuing of protection order**
> (1) ……
> (2) If the respondent appears on the return date in order to oppose the issuing of a protection order, the court must proceed to hear the matter and-

[5] This must be a reference to the attorney's client

> *(a)* consider any evidence previously received in terms of section 5 (1); and
> *(b)* consider such further affidavits or oral evidence as it may direct, which shall form part of the record of the proceedings.
> (3) ……..
> (4) The court must, after a hearing as contemplated in subsection (2), issue a 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.
> (5) ……..
> (6) ……
> (7) ……."

[12] It is not necessary to summarise at length the contents of the affidavits in this application, as there was very little in dispute concerning what took place at court on 14 and 16 May 2012. The proceedings can be summarised as follows. On 14 May 2012 the second respondent ruled that the applicant, who had not delivered an affidavit, could adduce oral evidence. On 16 May 2012 the second respondent suggested that the parties try to settle their dispute, to no avail. According to the applicant, when the hearing resumed, the second respondent conducted the proceedings by asking the applicant whether or not he objected to each paragraph of the order. The applicant objected but was not allowed to testify or address the second respondent. Most disturbingly, in relation to the first paragraph of the order, the second respondent asked the applicant if he wished to continue to assault the first respondent. (This allegation by the applicant was not denied by the first respondent.) According to the first respondent, the second respondent gave the applicant and the first respondent's attorney an opportunity to respond to each of the paragraphs of the order but the applicant refused to agree or debate each paragraph and objected to the granting of a final order.

[13] In my view there is little difference in effect between the two versions of how the second respondent conducted the proceedings, following which he confirmed the interim order in the terms mentioned above.

[14] In his reasons for judgment the second respondent stated that after the parties' attempt at settlement, he tried to establish which of the provisions of the interim order were still in dispute, and the reasons therefor. He listed each paragraph of the order and mentioned each party's views on whether or not it should be confirmed. The final portion of his reasons reads as follows:

> "It is clear from the Domestic Violence Act 116 of 1998 that the court and not the parties decides whether additional affidavits should be filed (**as the court may directed).** The court and not the parties decides what further evidence should be admitted (**as the court may direct)**
>
> The demeanor of the complainant was evidence of the fact that the complaint suffered some kind of abuse. She was visibly scared of the respondent. She was seated next to the respondent and shifted away from the respondent and was seated on the edge of her chair far as possible away from the respondent, never looked at the respondent and avoided all eye contact with the respondent.
>
> After taking all the evidence into consideration including all the affidavits that were filed the court was in the position to make a proper decision without the viva voce evidence of the respondent. The court was satisfied that the respondent had been afforded enough opportunities to answer every allegation against him.
>
> The preamble of the act recognizes that victims of domestic violence are among the most vulnerable members of society and guidance as to the wide procedural favors which the court may use to protect them can be obtained from various High Court decisions.
>
> From the evidence, the court was satisfied that on a balance of probabilities the respondent committed an act of domestic violence and that the complainant and her children needed urgent protection and the interim order was confirmed with amendments."

[15] In my view the failure to allow the applicant to adduce oral evidence amounted to a gross irregularity and is decisive of this application. The mere fact that the applicant was asked whether or not he objected to confirmation of the order was no substitute whatsoever for the opportunity to testify and substantively answer the allegations made by the first respondent in her affidavit. The irregularity was compounded by the fact that the second respondent contradicted his earlier ruling to allow oral evidence.

[16] The second respondent committed other irregularities. He regarded the first respondent's demeanour, while she sat in his chambers, as evidence that she had suffered "some kind of abuse". The first respondent did not testify and it was improper to draw a conclusion from her demeanour and use such conclusion to support a finding on a balance of probabilities, especially when the applicant was not allowed to testify and, apparently, was not given an opportunity to comment on her demeanour as observed by the second respondent. Further, the second respondent asked the applicant if he wanted to continue to assault the first respondent. This question demonstrated that the second respondent had already concluded that the applicant had assaulted the first respondent and that he was biased against the applicant.

[17] It is all very well for the second respondent to refer to the preamble to the Act and the vulnerability of victims of domestic violence, but these considerations

do not mean that a final protection order, which may include drastic provisions[6], can be granted after hearing only one side, or otherwise in a procedurally unfair manner. The Act can and should only effectively serve its purpose by the holding of a proper, fair hearing when the interim order is opposed, as envisaged in s 6 (2) of the Act. The power of the court to direct further evidence (presumably one of the "wide procedural favors" the second respondent had in mind) can in no way be interpreted to include a refusal to consider evidence from the person against whom a drastic order may be made. The three affidavits delivered by the applicant did not and could not answer all the substantive allegations made by the first respondent in her affidavit. One wonders how the second respondent could have reached a conclusion on a balance of probabilities when he had not heard the evidence of the applicant.

[18] In my view the manner in which the second respondent conducted the proceedings was a fundamental and serious violation of the applicant's right to be heard, and the decision confirming the interim protection order must accordingly be set aside.

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[6]An example of a drastic provision is an order concerning contact with a child. Section 7 (6) of the Act provides:

"If the court is satisfied that it is in the best interests of any child it may –

(a) refuse the respondent contact with such child: or

(b) order contact with such child on such conditions as it may consider appropriate."

Such an order not only affects the rights of a parent of a child, but more importantly affects the interests of a child. The best interests of a child may be adversely affected by the failure to hear the evidence of a respondent.

[19] In this event the applicant had no objection to an extension of the interim order pending the setting down of the matter by the first respondent in the magistrate's court. I think it preferable that such an order should also provide for the applicant to set the matter down, in order to avoid the situation where the interim order is left in limbo. In view of the bias displayed by the second respondent against the applicant, the further proceedings in the magistrate's court should resume before another magistrate.

[20] The applicant has succeeded in obtaining the relief claimed. It was submitted on behalf of the first respondent that he should not be entitled to his costs because there was no guarantee that the interim order would be extended by this Court. I do not think that this is a ground for depriving a successful party of his costs. The order sought by the applicant made it clear that the subject of the review was the decision of the second respondent on 16 May 2012 confirming the interim order. Costs should therefore follow the result.

[21] This application was set down for hearing on 6 December 2012 and 27 June 2013. On both dates the matter could not be heard because on each date Tshiki J was obliged to recuse himself and two further judges were not available. The costs occasioned by both postponements were reserved. It was submitted on behalf of the first respondent that the costs occasioned by the postponement on 27 June 2013 should be paid by the applicant because he made no attempt to have two judges allocated who were able to hear the case. I do not agree with

this submission. The allocation of judges is the prerogative of the Judge President after being advised by the Registrar that a particular matter is to be heard by two judges. The reserved costs should therefore be costs in the application.

[22] The following order will issue:

[22.1] The decision of the second respondent of 16 May 2012 confirming the interim protection order granted on 10 May 2012 in favour of the first respondent against the applicant, is hereby reviewed and set aside.

[22.2] The said interim protection order is extended to the date on which the proceedings in terms of s 6 of the Domestic Violence Act 116 of 1998 are re-enrolled by either party on notice to the other party. The proceedings in terms of s 6 of Act 116 of 1998 are to be heard by a magistrate other than the second respondent.

[22.3] The first respondent is ordered to pay the costs of this application, including the costs which were reserved on 6 December 2012 and 27 June 2012.

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J M ROBERSON
JUDGE OF THE HIGH COURT

PLASKET J:-

I agree

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C M PLASKET
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Adv J Koekemoer, instructed by Enzo Meyers Attorneys, C/o Whitesides Attorneys, Grahamstown

For the First Respondent: Adv M Beard, instructed by Drake Flemmer & Orsmond Inc., C/o Netteltons Attorneys, Grahamstown