Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GQEBERHA

NOT REPORTABLE

Case No.: 1217/2020

In the matter between:

T[…] N[…]	Applicant
and	
MAGISTRATE LARSEN NO	First Respondent
M[…] B[…]	Second Respondent

JUDGMENT

ELLIS AJ:

[1] This is an opposed review of the proceedings before the first respondent in the Domestic Violence Court held in the Magistrate's Court for the district Gqeberha, which culminated in a final protection order against the applicant in favour of second respondent, in the applicant's absence.

[2] On the morning of the hearing, I was approached in chambers by the parties' legal representatives, with Ms Nel appearing on behalf of the applicant and Ms Ntsepe on behalf of the first respondent. Ms Nel suggested a postponement at the request of the applicant, and Ms Ntsepe indicated that any application for a postponement would be opposed. I instructed the legal representatives to address me on that issue in open court.

[3] When the matter was called at number one on the roll, there was no appearance on behalf of the applicant. Despite the applicant being legally represented, I requested that his name be called outside court, without response. I considered the absence of the applicant to be wilful as he was without a doubt aware that the matter was on the roll for hearing, given the presence of Ms Nel and as I had specifically advised Ms Nel to bring her application for postponement in open court. In the absence of an application for postponement and the failure of Ms Nel to appear when the matter was called, the matter proceeded, and the first respondent argued for dismissal of the review.

[4] The proceedings forming the subject matter of the review may be summarised as follows.

[5] Following a notice to show cause why a protection order should not be issued in terms of s 5(4) of the Domestic Violence Act, 116 of 1998, issued on 24 October 2019, the applicant and the second respondent appeared before the first respondent on 21 November 2019. The applicant filed his opposing affidavit, and the matter was referred for oral evidence. The second respondent commenced her testimony. The matter was postponed to 5 December 2019 for the second respondent to obtain the assistance of Legal Aid. On 5 December 2019 the matter was again postponed as the second respondent required further time to procure legal assistance. On 19 December 2019 the matter was postponed to 29 January 2020, at which date the continuation of the part-heard matter was set down for 3 March 2020. At that point, the second respondent was represented by Mr Jonas from the Law Clinic.

[6] The proceedings continued on 3 March 2020, with the applicant cross-examining the second respondent. Due to the expiry of the court's hours and before the cross-examination was concluded, the matter had to be postponed again. The date of 10 March 2020 was agreed to, and both the applicant and second respondent were warned by the first respondent to be present on 10 March 2020 at 10:00, failing which the matter would either be removed from the roll, if the second respondent failed to appear, or an order granted in the absence of the applicant if he failed to appear.

[7] When the matter was called on 10 March 2020, the applicant was absent. His name was called three times outside court, and the second respondent's legal representative moved for a final protection order in his absence. The first respondent granted the protection order and as is customary in these matters, issued a warrant for the applicant's arrest.

[8] On 12 March 2020 the applicant delivered an application to set aside the protection order, in terms of s 10(1) of the Domestic Violence Act, colloquially known as a "Form 12" application. The Form 12 application was dismissed by the first respondent on the grounds that no good cause had been established.

[9] The applicant then instituted these current review proceedings on 12 June 2020, listing no less than 18 grounds of review in his founding affidavit, alleging that the first respondent had committed gross irregularities in the proceedings and was biased against the applicant. The applicant alleges that he had listed sufficient grounds for the setting aside of the order granted on 10 March 2020.

[10] It is apparent that the applicant was dissatisfied with the outcome of the proceedings, being the granting of the protection order as well as the outcome of his Form 12 rescission application. The applicant alleges that the order of 10 March 2020 stands to be set aside, so that he could continue with his cross-examination of the

second respondent and proceed with the merits of the matter before the Domestic Violence Court.

[11] As a rule, if the complaint is against the result of the proceedings of the Magistrate's Court, the appropriate remedy is by way of appeal. If the method of the proceedings is attacked, the remedy is to bring the matter on review. Section 22 of the Superior Courts Act, 10 of 2013, deals with the grounds upon which the proceedings of a Magistrate's Court may be reviewed. On appeal the appellant is bound by the record and must argue thereon, but in review proceedings the applicant may traverse matters not appearing on the record since in review proceedings the irregularity complained of usually does not appear on the record. Therefore, evidence outside the record will be considered by the review court.

[12] Ms Ntsepe argued that the application is incompetent, as the relief sought by the applicant amounted to an appeal, which is irreconcilable with review proceedings. Alternatively, Ms Ntsepe argued that the applicant failed to meet the requirements for a review.

[13] Even if I accept that the applicant is entitled to pursue the review proceedings, instead of an appeal, I am of the view that the applicant has failed to establish any gross irregularity in the proceedings, which would prejudice the applicant.[1] A careful perusal of the grounds listed, individually and cumulatively reveals that they are a misstatement of the record, the allegations are factually and contextually inaccurate and in most instances contain frivolous, vexatious and irrelevant matter. The irregularities complained of by the applicant are not supported by the record nor the available evidence on affidavit before me. Absent in the founding affidavit are any allegations that the conduct complained of were calculated to prejudice the applicant and had in fact been to his detriment.

[1] *Absa Bank Ltd v De Villiers and Another* (146/09) [2009] ZASCA 140; [2010] 2 All SA 99 (SCA).

[14] As to the allegation of bias, the applicant alleges that it was at the behest of the first respondent that the applicant sought legal advice. The record reflects that the first respondent explained the right to legal representation to both parties. The Constitution guarantees the right to access courts, a fair hearing and legal representation. The record reflects that the first respondent did no more or less than to ensure just that.

[15] Having said that, I am in agreement with Ms Ntsepe that the appropriate remedy would have been to prosecute on appeal. In the circumstances, the review must fail.

[16] Ms Ntsepe requested me to make a cost order to include counsel fees to be taxed in accordance with Scale B, as set out in rule 69(7) of the Uniform Rules of Court read with rule 67A(1)(c), citing the length of the record, the various grounds of review that had to be carefully considered, the complexity of the matter and the importance of the relief sought in support thereof. Moreover, the conduct of the applicant and his legal representative and their failure to attend roll call, failure to file heads of argument and the prolix drafting, containing vexatious and irrelevant matter warrants Scale B. Following the reasoning of Wilson J in *Mashavha v Enaex Africa (Pty) Ltd* [2] Scale A is the appropriate scale on which to make an award unless application of a higher scale has been justified by careful reference to clearly identified features of the case that mark it out as unusually complex, important, or valuable. Run-of-the-mill cases, which must be the vast majority of cases in the High Court should not attract an order on the B or C scales.[3]

[17] In the present case, the issues were uncomplicated, and the matter was dealt with in the absence of the applicant within a relatively brief time. The first respondent at no stage sought a punitive costs order against the applicant, and I am not inclined to order costs on a scale contrary to the default position under Uniform Rule 67A(3)(c).

[18] In the result, the following order will issue:

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[2] (2022/18404) [2024] ZAGPJHC 387 (22 April 2024)

[3] *Mashavha* para [16]

1. The application is dismissed with costs.

L ELLIS
ACTING JUDGE OF THE HIGH COURT

Appearances:

For Applicant:	No appearance
Instructed by:	Janice Nel
	GQEBERHA
For 1st Respondent:	Adv Ntsepe
Instructed by:	State Attorney
	GQEBERHA
For 2nd Respondent:	No appearance
	Law Clinic – Nelson Mandela University
	GQEBERHA
Date heard	: 02 May 2024
Date delivered	: 14 May 2024