IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A3098/19

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES

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SIGNATURE	**DATE**

In the matter between:

YASHKAR HARRICHAND JUGWANTH **Appellant**

and

VINCENT LEENDERT VAROY **Respondent**

JUDGMENT

DE VILLIERS, AJ:

[1] The appellant sought condonation for any failure to comply with a rule of court in prosecuting the appeal. The appeal is before us, the record is complete, there has been no culpable remissness, any condonation would not prejudice the respondent, and the prospects of success are good. It would serve no

purpose to list the instances of non-compliance by the appellant. In so far as condonation and/or reinstatement may be required, it is granted.

[2] This is an appeal against a final Protection Order in terms of the provisions of the **Domestic Violence Act** 116 of 1998 ("***the Act***") by the Magistrate for the district of Johannesburg North on 3 April 2019. The learned magistrate issued an order that the appellant was interdicted from committing acts of domestic violence by physically abusing the respondent. The interdict was issued consequent to an incident that occurred during the night of 23 September 2018 at a property jointly owned by the parties, but where neither resided.

[3] In order for the Act to apply, the learned magistrate had to find that the parties were in a "*domestic relationship*" as defined in the Act. The appellant denies both that the incident and that the Act applies to the relationship between the parties.

[4] The background to the incident and the proceedings in terms of the Act, is that the parties were in a relationship from about August 2009, and shared a home from about September 2011. It is in dispute when the relationship ended. On the appellant's version it ended in about June 2014. On the respondent's version it ended in about July 2014, but resumed for August 2016. On the respondent's version the parties lived in the same home from August 2016 to August 2017. The factual disputes and exact nature of the relationship between the parties from time-to-time cannot be determined without oral evidence. On both versions the parties were no longer in a romantic relationship and lived apart for more than a year before the date of the incident. It seems that their only contact was through electronic means.

[5] The papers do not reflect the full facts as to when, why, and how many immovable properties were acquired, but it is common cause that the parties still owned certain immovable properties jointly at the time of the incident. One of those properties was the one where the incident occurred.

[6] On the respondent's version, his friend "Mayoor" lived with his consent at the property owned by the respondent and the appellant. There is no suggestion that the appellant knew of the arrangement. On their way to a nightclub, the respondent and his friend stopped at the property to collect clothes. They were

packing belongings in the car when the appellant approached them at the vehicle. A scuffle commenced, the appellant was aggressive and pushed Mayoor against the vehicle, pulled him by his hair towards the respondent whom he the pepper-sprayed. Mayoor ran away. The appellant followed the respondent, grabbed him by the collar, kicked his legs out under him, and pepper-sprayed him more, whilst kicking him all over his body.

[7] On the appellant's version he noticed a vehicle in the property's driveway when driving past the property, with an open boot. He approached the house and suspected foul play when he saw bags in the car. He did not recognise the person standing at the car. The person was only clothed in shorts or underwear and seemed to have been under the influence of drugs. He was then attacked by the respondent and Mayoor, defended himself and escaped. According to the person who was with him, he asked the appellant to take the pepper spray with him, as he was scared when he saw the man at the property. He confirms the attack on the appellant, and stated that the appellant sprayed pepper spray in the air.

[8] Faced with the conflicting versions, the learned magistrate determined the matter on the probabilities and rejected the appellant's version. Initially the presiding magistrate on 3 April 2019 issued an order, after an opposed hearing without giving reasons. The fact that litigants are entitled to reasons for decisions against them require no further attention in this matter apart from pointing out this fact.

[9] Our practice has become more robust, but the room for deciding factual disputes in motion matters for final relief, remains constrained. This matter was not an exceptional matter where the appellant's denial of the assault was correctly rejected on paper a not being a genuine dispute of fact, and the factual disputes should have been referred to oral evidence. The law is trite. See **Wightman t/a J W Construction v Headfour (Pty) Ltd and Another** 2008 (3) SA 371 (SCA) para 12-13 that summarises the position having regard to **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634E-635C and see too the caution expressed in **Fakie NO v CCII Systems (Pty) Ltd** 2006 (4) SA 326 (SCA) para 55-56. Long ago Colman J in

Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd 1971 (2) SA 388 (W) at 390C-H gave expression to the cautious approach even in those cases where a denial seems improbable on paper:

> "*Senior counsel for the applicant pressed upon me, as apposite to my duties in the present case, the dictum of PRICE, J.P., in Soffiantini v. Mould, 1956 (4) SA 150 at p. 154 (E). The learned Judge-President is there reported to have said:*
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> > "*It is necessary to make a robust , common sense approach to a dispute on motion, as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits."*
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> *It is my view, on a consideration of the papers before me, that the probabilities are against the respondent on the issue which I am now considering. I think it undesirable that I should mention the reasons for my view in that regard because, despite the urgings of senior counsel for the applicant, and the admonition of PRICE, J.P. which I have quoted, I do not think that it would be safe or just to deny the respondent the benefit of the oral hearing for which it has asked.*
>
> *I do not think that in forming that view I have been unduly fastidious or lacking in robustness: and I can but express the hope that I have not shown myself to be deficient in common sense. My conclusion rests upon my experience, and the experience of others before me, which shows that an assertion or a denial which seems very probable or improbable on a reading of a set of affidavits often takes on a different colour when the veracity of the person which has made it is tested by cross-examination. There is the rare case, of course, in which a disputed statement made on affidavit is so manifestly untrue, or so grossly improbable and unconvincing that the Court is justified in disregarding it without recourse to oral evidence. But I cannot say that Mr. Rowe's assertions on the point in dispute fall into one of those categories. They fall rather into the class of assertions which, although apparently improbable, might be accepted after an oral hearing. It seems to me, therefore, that on the principles recognised in Frank v. Ohlsson's Cape Breweries, Ltd., 1924 AD 289 at p. 294, and in Peterson v. Cuthbert & Co. Ltd., 1945 AD 10 at p. 428, the dispute under discussion is one which ought not to be resolved without an oral hearing*."

[10] Accordingly, the order by the learned magistrate should be set aside, an oral hearing should take place, and the matter be decided thereafter. The remining issue is costs of the appeal. It seems that a just order in the circumstances is that each party must pay its own costs of the appeal, if any as the appeal proceeded on an unopposed basis. The appeal record is of such poor quality

that it is very difficult to read parts thereof. This court would have been within normal practice had it removed the appeal from the roll due to the illegible record. The costs order reflects this court's displeasure. In addition, the appellant had to apply to have the appeal reinstated and caused part of the costs of the hearing.

Accordingly, I propose that the following order be made:

1. The appeal is upheld;
2. Each party is to pay its own costs of the appeal;
3. The order made by the magistrate is set aside and the following is substituted therefor:

"(1) The matter is referred for the hearing of oral evidence, before a different magistrate, at a time to be arranged with the clerk of the court, on the question if the respondent has assaulted the applicant on 23 September 2018;

(2) The evidence shall be that of any witnesses whom the parties or either of them may elect to call, subject, however, to what is provided in paragraph 3 hereof.

(3) Save in the case of applicant and the respondent, neither party shall be entitled to call any witness unless:

(a) it has served on the other party at least 15 days before the date appointed for the hearing (in the case of a witness to be called by the respondent) and at least 10 days before such date (in the case of a witness to be called by the applicant), a statement wherein the evidence to be given in chief by such person is set out; or

(b) the Court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of his evidence.

(4) Either party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not.

(5) The fact that a party has served a statement in terms of paragraph 3 hereof, or has subpoenad a witness, shall not oblige such party to call the witness concerned.

(6) Upon the conclusion of the oral evidence and such further evidence as the learned magistrate may direct to be heard in terms of section 6(1)(2)(b) of the Domestic Violence Act 116 of 1998, determine the matter in terms of sections 6(4) and 7 of that act." ……

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DP de Villiers
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

I agree

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CG Lamont
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

Heard on:	24 May 2021
Delivered on:	25 May 202, by uploading on CaseLines
On behalf of the Appellant	Mr R Krause
Instructed by:	BDK ATTORNEYS
On behalf of the Respondent:	No appearance