

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: A2023-013223

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED YES/NO
.....
SIGNATURE	DATE

In the matter between :

LW

Appellant

and

KCA

Respondent

JUDGMENT

Protection from Harassment Act 17 of 2011 — whether reporting rape allegations can amount to “harassment” under the PHA — duty of utmost good faith and material non-disclosures when seeking an interim protection order ex parte — the conduct of the appellant did not amount to “harassment” as communications were not unreasonable

DODSON AJ [MOORCROFT AJ CONCURRING]:

Introduction

- [1] The Protection from Harassment Act 17 of 2011 (“PHA”) came into effect on Freedom Day, 27 April 2013. The explanatory memorandum accompanying its preceding Bill announced its “strategic focus” as “transforming justice, state and society and access to justice”. It promised that “[t]he Bill will also contribute to the fight against violence against women and children”.
- [2] This appeal came before the High Court during August 2023, Women’s Month. It is the month in which we celebrate the resilience and bravery of South African women, more than 20,000 of whom marched on the Union Buildings on 9 August 1956 to protest the extension of the notorious pass laws to African women.
- [3] Against this backdrop, one may be surprised to learn that in this appeal the person who sought protection under the PHA, the respondent, is a man. He complains that he is being harassed by a woman, the appellant. She, in turn, says that he raped her and another woman, Ms AS, and sexually assaulted a friend. She and AS reported this to three institutions, two of them arts foundations and one a university. Later, the appellant and AS threatened to “go public”. The respondent says that in doing so the appellant harassed him.
- [4] The magistrate agreed. She made and later confirmed an order prohibiting the appellant from complaining publicly about the rapes and assault. This appeal addresses the question whether the magistrate was correct.

Background

- [5] I begin with an apology. The facts of the matter involve allegations of rape and sexual assault. It is thus unavoidable that this judgment must canvas averments from the affidavits that are disturbing.
- [6] On 11 May 2022, the respondent applied to the Johannesburg North Magistrates Court in terms of section 2 of the PHA, for an urgent protection

order prohibiting the appellant from communicating with third parties on social media and in the press “with regards to false allegations”. He was represented by a firm of attorneys. In support of his application, the respondent lodged a short affidavit along with a confirmatory affidavit by his current romantic partner, Ms CS.

- [7] In his affidavit the respondent describes himself as a professional jazz musician. He says that he was previously in a committed relationship with the appellant from January 2014 to September 2019. The nub of his complaint is as follows:

“The first incident of harassment occurred on the 21st of April 2021 while on a Pro Helvetia (Swiss Arts Organisation) artist residency in Basel, Switzerland. The Respondent, Ms [W] along with two other individuals whose names I will not disclose in this form, made complaints about me to Pro Helvetia. These complaints refer to gender-based violence allegations made against me. I have vehemently denied these allegations repeatedly. In the early months of 2021 Ms [W] also contacted Wits University and the National Arts Festival with these allegations. I was a masters student at Wits on full scholarship, and I am a regular performer at the Standard Bank Youth Jazz Festival associated with the National Arts Festival.

Ms [W]’s allegations are specific to a sexual encounter we had on the 26th of October 2019. In the case of Ms [W], when officially asked to submit evidence for a disciplinary hearing at Wits, I provided our WhatsApp communication, details of our interactions on the day in question, and a voice note from her on the morning of 28th October 2019 asking me to come over and have sex before flying back to Johannesburg from Cape Town (where she lives).

Ms [W] is alleging that this sexual interaction was ... not consensual. It should be noted that Ms [W] has never gone to the South African Police Service with this allegation. She has specifically targeted my personal, work, study and professional life.”

- [8] The respondent also alleges that the appellant had threatened to go public with these allegations. According to the respondent, this conduct jeopardised his artistic name and resulted in loss of income. He attributes the appellant’s conduct to the fact that he informed her during May 2020 of his new

relationship with his current partner, as a result of which she became extremely upset. He says there is no evidence to support the allegations of gender-based violence against him and he has not been convicted of them.

- [9] On the basis of this evidence, on 11 May 2022 the magistrate granted an interim protection order against the appellant in terms of section 3(2) of the PHA, without any prior notice to her. Section 3(2) allows this if the magistrate is satisfied that a *prima facie* case is made. The magistrate's interim order prohibited her from engaging in or attempting to engage in harassment of the respondent by making false allegations against him, threatening or intimidating him, "bad-mouthing" him on social media and from contacting him.
- [10] After service of the order on her, the appellant filed a detailed answering affidavit. In it, she made it clear that she opposed the confirmation of the interim protection order primarily on two broad grounds. First, the rape allegations made by her and AS against the respondent were not false. Second, the lodging of complaints with the three institutions named in his affidavit did not constitute harassment as defined in section 1 of the PHA.
- [11] The appellant provided a detailed account of the history of her relationship with the respondent. The relationship, she said, was an abusive one in which he physically threatened and intimidated her, emotionally manipulated her and psychologically abused her. He "eventually wore [her] down to a frightened, appeasing and submissive person [she] could hardly recognise as being [herself]".
- [12] She also pointed out that she was disabled with greatly limited mobility by reason of her having a large metal prosthesis in her leg. If she falls, there is a risk the prosthesis will break and pierce her skin, risking the loss of her leg. An x-ray was attached to prove this.
- [13] The appellant said that the respondent frequently drank to excess. When drunk, he would come into her home at all hours, ransack the kitchen for food, vomit and urinate on the floor, flick cigarettes at her and so-on. When asked to leave he would refuse. Often, the abuse would intensify the night before she

had a performance. Her profession is performance art. This would erode her self-esteem and self-confidence.

- [14] The appellant went on to describe in detail the two occasions on which she said that she was raped by the respondent. She asserts that the first rape took place during the Cape Town Jazz Festival in March 2018. Prior to the rape, the respondent repeatedly requested her to have anal sex. She refused. On the day in question, she and the respondent were having vaginal sex. Without attempting in any way to seek her consent, he penetrated her anus with his penis. She shouted out at him in shock and in intense pain. She bled. He apologised and said it had been an “accident”. She accepted his explanation at the time but “felt numb, confused and ‘wrong’”.
- [15] The second rape to which the appellant alluded was that which she said had taken place on 26 October 2019. This encounter followed her having earlier published posts on social media about gender-based violence, without naming the respondent. This notwithstanding, the respondent reacted angrily and they argued about it. On her version, the meeting on 26 October 2019 was arranged during the respondent’s visit to Cape Town, in order to clear the air between them.
- [16] The respondent’s WhatsApp messages earlier in the day make it clear that he wished to have sexual intercourse with her. She says in her affidavit that she did not wish to, at least until the air had been cleared. She also pointed out that her 18-year-old son would be at the house at the time that he wished to visit.
- [17] The respondent duly visited the appellant at her home. At first, they spoke to each other outside on a bench. However, the respondent proceeded to lead her by the hand into the bedroom in a manner which, on account of her disability, she could not object to or prevent. Once in the bedroom, his demeanour changed and he became cold towards her. He pushed her down hard onto the bed. She conveyed her distress “by making unhappy whining whimpering noises without saying any words”. She submitted to the

penetration of her vagina but insists that she did not consent to it, and found it painful, forceful and violent.

[18] In the days following these events, the appellant says that “it seemed that my mind would not allow itself to acknowledge what had really happened to me, but I was also completely unable to relax or be myself. The only thing I was thinking about was trying to appease [the respondent]”. This state of mind led to her again inviting him to visit her to try to make up and go back to how their relationship had been in its better moments so that she could “pretend that this horrible thing had never happened”.

[19] She sent the invitation by voice message. In his affidavit, the respondent describes the message as an invitation to come over and have sex. She strongly disputes this and provides a full transcript of the message as follows:

“I was going to suggest that you come here in the morning for a little something and then I could take you to the airport but I think you still sleeping. So, if you had a very late, very boozy evening, I don't know.”

[20] The appellant's efforts were in vain because when the respondent arrived, he was drunk and further arguments ensued between them. She told him that she was upset that he had subjected her to painful and coercive sex. According to her, he did not dispute this, but sought to change the subject.

[21] In July 2020, a “new friend” of the appellant, not AS, confided that she had been sexually assaulted by the respondent in 2017, when the appellant and the respondent were still in a relationship. She was one of the “two other individuals” referred to in the respondent's founding affidavit.

[22] On 5 August 2020, the appellant telephoned the respondent and confronted him with the information regarding the assault of her friend in 2017. This elicited a WhatsApp message in response in which he acknowledged *inter alia* that “I hurt the two girls that felt assaulted by me” and was apologetic. It is common cause that this was a reference to the friend and AS. On the same day, the respondent also addressed a message to AS. This message is dealt with later in the judgment.

- [23] The appellant's answering affidavit then goes on to deal with the complaints that she lodged with the three institutions referred to earlier. I revert to this below in considering whether they constituted harassment.
- [24] Accompanying the appellant's answering affidavit was an affidavit by AS. She said that she had been in a physical relationship with the respondent before he and the appellant formed a relationship. During their relationship, the respondent would frequently request anal sex with her. She always refused but he persisted in his requests anyway. In the early hours of Friday 15 January 2010, he arrived at her flat. She let him in before realising that he was very drunk. He was behaving in an aggressive manner she had not seen before. He ransacked the kitchen that she shared with flatmates looking for food. She was frightened and did not want to be with him in that state. However, she could not think of any way to get him to leave.
- [25] At the time, she was menstruating and informed him that, as a result, they could not have sex. They got into bed and were lying on their sides. The respondent removed her pants and asked to have anal sex with her. She refused. He ignored her refusal and forcefully penetrated her anus with his penis. The penetration was very painful, and in the hope of at least alleviating her pain she submitted and asked him to use lubricant. He got out of bed to look for lubricant but could not find any. He came back to her and asked her "where am I going to fuck you"? She realised that he would not rest until he was satisfied, and so allowed him to climax between her breasts.
- [26] They had sex vaginally the next morning, despite her still menstruating, which was not something she would do willingly. However, by that stage, she was scared of the respondent and had been reduced to a state of submission. Once he had left, she spoke to friends about the events and realised she had been raped.
- [27] The appellant also put up an affidavit by Ms Ronel Koekemoer, the counselling coordinator for Rape Crisis Cape Town Trust, who provided expert evidence in relation to *inter alia* the phenomenon of rape trauma syndrome amongst survivors of sexual violence, the propensity of survivors of sexual violence,

especially those who have been in romantic relationships with the perpetrator, not to report their experiences, the notoriously low conviction rate in rape cases, the problem of silence around sexual offences and her opinion that the behaviour of the appellant was not inconsistent with the conduct of a survivor of sexual violence.

[28] In the short replying affidavit filed by the respondent, he simply took up the attitude that for an allegation of rape to stand as true, he had to have been convicted of rape in a criminal court. For the rest, he simply denied all the averments in the answering affidavits to the extent that they were inconsistent with his founding affidavit.

The magistrate's decisions

[29] Pursuant to the hearing on the return date, the magistrate held that she had no jurisdiction to adjudicate whether the allegations of rape were true or false. She therefore confined her enquiry to whether the appellant's conduct constituted harassment as defined in the PHA. She held that it did. In making this finding, she was also satisfied "*prima facie*" that the respondent suffered mental or psychological harm.

[30] Accordingly, on 21 November 2022, the magistrate granted a final protection order in terms of section 9(4) of the PHA, *inter alia* prohibiting the appellant from mentally or psychologically harassing the respondent, engaging in verbal, electronic, or other communication "aimed at" the respondent and publishing or posting the rape allegations about the complainant on any platform, including any social media platform.

The appeal and cross-appeal

[31] The appellant noted an appeal against the magistrate's judgment. In the heads of argument filed on her behalf, it was argued that her version as set out in the various answering affidavits ought to have prevailed on the basis of the *Plascon-Evans* rule.¹ The respondent therefore failed to satisfy the onus of proving the falsity of the rape allegations on a balance of probabilities. Even if

¹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

it were to be assumed that the allegations made by the appellant were not true, that would not render her conduct in raising her complaints with the three institutions in question unreasonable, particularly considering that she genuinely believed the allegations to be true. The magistrate's assertion that she lacked jurisdiction to enquire into the veracity of the rape allegations was wrong. Final relief ought in any event to be refused on the grounds of the respondent's dishonesty in his founding affidavit, in breach of his duty of the utmost good faith in *ex parte* proceedings.

[32] The respondent failed to file his heads of argument timeously. An application to compel their filing was brought by the appellant. This elicited the filing, a month later, of a belated notice of cross-appeal by the respondent, together with an application to admit further evidence on appeal and for condonation of the late filing of the notice of cross-appeal and heads of argument. The respondent's stance in the notice of cross-appeal and at the hearing was that the magistrate was wrong in holding that she had no jurisdiction to enquire into the veracity of the rape allegations; that she ought not to have granted the final protection order, and that, instead, she ought to have exercised her discretion under section 9(2)(b) of the PHA by referring the matter to oral evidence.

[33] Moreover, at the time of the proceedings in the magistrates' court, the respondent had prepared detailed draft replying affidavits but his then attorneys had negligently advised him against filing them. The respondent therefore asked that the draft replying affidavits should be received as new evidence in the appeal and the matter remitted to the magistrates' court for the hearing of oral evidence to resolve the dispute of fact regarding the veracity of the rape allegations. The respondent also sought condonation of the late filing of the notice of cross-appeal and the heads of argument.

[34] The appellant opposed the condonation application on various grounds, primarily that the six-month delay in lodging the notice of cross-appeal had not been adequately explained.² In the cross-appeal, the appellant argues that whilst it is within a judicial officer's power to refer a matter to oral evidence

² *Uitenhage Transitional Local Council v SARS* 2004 (1) SA 292 (SCA) at para 6.

mero motu, it is generally undesirable and rarely done.³ Moreover, the responsibility to seek a referral to oral evidence is that of the applicant for referral⁴ and an applicant's failure to do so is "at his peril".⁵ Here, the respondent had failed to do so. In these circumstances, the magistrate could not be criticised for not having referred the matter to oral evidence of her own accord. An appeal court will be disinclined to interfere with this exercise of a magistrate's discretion.⁶

[35] The upshot is that both parties accept that the magistrate's order cannot stand. However, they do so for reasons that differ. This court agrees that the magistrate's decision cannot stand. She misdirected herself in finding that she had no jurisdiction to enquire into the veracity of the rape allegations.⁷ This finding impacted her enquiry into whether there was harassment, in that she implicitly conducted it on the assumption that the rape allegations were false.

[36] As a result, all that remains to be decided is whether the appeal should simply be upheld, as the appellant asks, or whether the further forms of relief sought by the respondent should be granted. Ultimately the respondent wishes to have the veracity of the rape allegations determined by way of oral evidence in proceedings on remittal in the magistrates' court; this on the basis of the full replying affidavits that he wants to introduce.

[37] Although the respondent's explanation for the delay was in many respects wanting, it would not be in the interests of justice to refuse condonation of the late filing of the cross-appeal and heads. As regards the question whether the magistrate ought of her own accord to have referred the matter to oral evidence, the appellant approached the matter as if the proceedings before the magistrate were an ordinary opposed application. On her approach, the rule imposing on the applicant primary responsibility for timeously seeking a referral

³ See, for example, *Bula v Minister of Home Affairs* 2012 (4) SA 560 (SCA) at para 53; *Santino Publishers CC v Waylite Marketing CC* 2010 (2) SA 53 (GSJ) at para 5; *Joh-Air (Pty) Ltd v Rudman* 1980 (2) SA 420 (T) at 427-429.

⁴ *Joh-Air* above at 429C.

⁵ *Lombaard v Droprop CC and Others* 2010 (5) SA 1 (SCA) at para 24.

⁶ See, for example, *Florence v Government of the RSA* 2014 (6) SA 456 (CC) at para 113.

⁷ Seemingly this was based on the respondent's point *in limine* that an allegation of rape could only be made once there was a criminal conviction against him. This is not correct. See *DS v AP DS v AP (Centre for Applied Legal Studies and Wise4Afrika (NPC) amicus curiae)* 2022 [ZAWCHC 42; 2022 (2) SACR 81 at paras 24 and 48-54.

to oral evidence is simply transplanted into the PHA as is. This is difficult to justify. The power of the magistrates' court to "consider any further affidavits or oral evidence as it may direct"⁸ suggests that the magistrate is expected to play a more inquisitorial role and does have the power and duty, in appropriate circumstances to require oral evidence *mero motu*.

[38] However, before any ruling can be made that the matter should be remitted for the hearing of oral evidence, this court needs to be satisfied that, in order to arrive at a final decision of the matter, it is necessary to resolve the dispute of fact about the veracity of the rape allegations. In my view, there are two circumstances in which the resolution of this dispute of fact would not be necessary:

- (a) The first is if the respondent had a duty under the PHA of the utmost good faith, requiring full disclosure at the interim protection order stage, and it appears on the common cause facts that he breached it in circumstances warranting refusal of final relief on the return date.
- (b) The second is if, on the common cause facts, there is in any event no harassment as defined in the PHA.

[39] It is therefore appropriate to begin with these two enquiries. However, in order to make a fair assessment of what is common cause, it is necessary to have regard to the main aspects of the draft replying affidavits that the respondent seeks to introduce on appeal. For this purpose, I will assume that this new evidence should be admitted on appeal.

The draft replying affidavits

[40] In relation to the first rape allegation from the time of the Cape Town Jazz Festival, the respondent identifies the date of the alleged rape as being 23 March 2018. His version of events is that they were in his hotel relaxing after a press conference. They proceeded to have "consensually rough" sex with strong body thrusts. In that process, his penis came out of W's vagina and accidentally and unintentionally penetrated her anus. He confirms that she

⁸ Section 9(2)(b).

shouted out in pain. He says he immediately stopped what he was doing. She said that it was just an accident and wanted to continue vaginal sexual intercourse. He declined. He then carried her through to the bathroom carefully, put her in the shower and washed her body.

[41] He alleges further that within hours of these events, the appellant took “selfies” of them in the hotel room and posted them on social media. Copies are attached to the draft. She also attended his performance that evening and filmed some of it. In her social media post of the video she took, she described the respondent as having power and humility in music.

[42] He denies the allegation that before this alleged incident, he repeatedly requested the appellant to have anal sex and says that “we had on one occasion discussed this, and then proceeded to experiment. There was no penetration, and when W told me on this specific occasion to wait and not penetrate, I stopped and we continued having sex in other ways”.

[43] In relation to the alleged rape of 26 October 2019, he refers to WhatsApp messages exchanged between them on 23 and 24 October 2019. He contends that these prove that days before the incident they had already agreed to meet to have sexual intercourse. The relevant WhatsApp exchange went as follows

—

[2019/10/24, 10:49:58] KA: Unfortunately we won't be able to stay at Norval, they are hiring it out. But we can see what would be nice to do.

[2019/10/24, 10:50:07] KA: For private time, that is

[2019/10/24, 11:37:21] LW: I'm sure we can find time

[2019/10/24, 11:38:06] LW: I know Francis is going out workout and movie with Oliver and Adam on sat so maybe if you're not rehearsing ...

...

[2019/10/24, 14:27:15] KA: Friday I have to go out for a fitting at 10:30 – 11:30. So was thinking after that. Maybe sat mid-day or Sunday after potluck.

[2019/10/24, 14:27:31] KA: But also no pressure.

[2019/10/24, 11:27:59] LW: Yeah. Maybe Saturday. Midday.”

[44] The respondent says the reference to “private time” was their way of referring to having sexual intercourse. He insists that their sexual intercourse on 26 October 2019 was consensual. He points out that, at 13h55, within an hour of the alleged rape occurring, the appellant sent him a “smiley emoji” and at 14h25 she sent him a message saying “you wanna choose my outfit?” and sent photographs of herself in various dresses. He provides copies of the photographs. At 15h36 she encouraged him in a message to “have fun with the rehearsal”. He also puts up WhatsApp messages to contest her version of her behaviour at the music event that evening where she ascribed her sitting at the back of the venue to having been raped earlier in the day. He refers to a message where she says “think I won’t sit in front, maybe better back” and goes on to point out that although she left to take her son home, she said “I will come back later”, something he discouraged her from doing out of concern for her, but which she insisted on doing. He also refers to and attaches copies of messages exchanged on the day after the alleged rape in which they express their love and affection for each other repeatedly. They end the exchange with affectionate goodnight wishes.

[45] In relation to the transcribed voice note referred to earlier and exchanged on the morning of 28 October 2019, he insists that “the inflection in her voice when she said ‘a little something’” indicated to him that she was inviting him to have sexual intercourse. He refers further to an affectionate exchange of messages on 29 October 2019.

[46] Turning to AS’s allegation that the respondent raped her, he denies that he frequently asked AS to have anal sex. He said they had discussed it on occasions. She did not refuse. She was “excited to experiment”. As regards his conduct on 15 January 2010, he denies having been “aggressive, demanding or drunk to the extent that [AS] states”. As regards the alleged rape, he says:

“[AS] was menstruating. We were both sexually aroused after kissing and touching and discussed having anal sex as vaginal sex was not an option. [AS] did not protest to this. As we were nearing penetration [AS] told me that she wasn’t feeling up to it. I at this moment asked her if she is sure and attempted to

further the sexual interaction. [AS] then said I should get the lube if we were going to do it. I got up and realized that she was not as enthusiastic as I was. I stopped and we both went to bed.”

[47] He denies any further sexual interaction between them that night or the next morning. He repeats his denial that he penetrated her anally.

[48] On the allegation of sexual assault in 2017 made by the appellant’s new friend, the respondent says that the friend pursued him, attempted to kiss him, placed her hand on his penis over his pants and he responded by moving his hand from her buttocks to her vagina.

Interpretation of the Protection from Harassment Act

[49] In order to decide the points identified in paragraphs and , it is necessary to interpret the procedural provisions of the PHA and the definition of “harassment”. The following considerations must guide this court in doing so:

- (a) the duty in section 39(2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights;
- (b) an interpretation which renders a provision constitutional is to be preferred over one that does not;⁹ and if two constitutionally compliant interpretations are possible, that which best promotes the spirit, purport and objects of the Bill of Rights trumps the other;¹⁰
- (c) the obligation to prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law;¹¹

⁹ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 (1) SA 545 (CC) at paras 22-23.

¹⁰ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) at paras 46, 84 and 107.

¹¹ Section 233 of the Constitution.

- (d) the simultaneous consideration of “text, context and purpose”.¹²

Context

[50] As Barack Obama pointed out, “the single best indicator of whether a nation will succeed is how it treats its women”.¹³ South Africa does not fare well. As was pointed out in helpful heads of argument and oral argument, presented by the Women’s Legal Centre (“WLC”) as *amicus*, the incidence of gender-based violence against women in South Africa, whilst difficult to determine accurately, is staggeringly high. This has not gone unnoticed by the courts. In *Tshabalala*, the Constitutional Court said:

“Violent crimes like rape and abuse of women in our society have not abated. ... Hardly a day passes without any instance of gender-based violence being reported. ... It is sad and a bad reflection of our society that 25 years into our constitutional democracy, underpinned by a Bill of Rights, which places a premium on the right to equality and the right to human dignity, we are still grappling with what is a scourge in our nation.”¹⁴

[51] As pointed out by the WLC:

“Rape is one of the most devastating personal traumas. Women who survive it report experiencing physical, psychological, emotional and mental trauma. They conceal shock, disbelief, numbness, fear, anger, guilt, self-blame, sadness and behavioural changes such as withdrawal from society, sleep disturbances, hypervigilance, poor concentration, lifestyle changes and avoidance of relationships. The emotional scars take years to heal, if they ever do.”

¹² *Betterbridge (Pty) Ltd v Masilo and Others NNO* 2015 (2) SA 936 (GP) at para 8; *Natal Joint Municipal Pension Fund v Endumini Municipality* 2012 (4) SA 593 (SCA) at paras 17 – 26; *Chisuse v Director-General Department of Home Affairs* 2020 (6) SA 40 (CC) at para 52; *University of Johannesburg v Auckland Park Theological Seminary* 2021 (6) SA 1 (CC) at para 65. I deal with them under separate headings for convenience, mindful that the approach is a simultaneous or integrated one.

¹³<https://obamawhitehouse.archives.gov/the-press-office/2016/10/11/fact-sheet-let-girls-learn-comprehensive-investment-adolescentgirls#:~:text=%E2%80%9CThe%20single%20best%20indicator%20of,are%20more%20prosperous>

¹⁴ *Tshabalala v The State; Ntuli v the State* 2020 (5) SA 1 (CC) at para 61.

[52] Central to the perpetuation of this epidemic in South Africa, is the phenomenon of silencing victims. Victims are silenced by their families, by communities, by social stigmas and, unfortunately, by the criminal justice system when it places barriers in the path of the effective reporting, investigation and prosecution of rape. The problem was recognised by the Constitutional Court in *Frankel*¹⁵ where it held as follows:

“Of pivotal importance to the case before us is this: that the systemic sexual exploitation of women and children depends on secrecy, fear and shame. Too often, survivors are stifled by fear of their abusers and the possible responses from their communities if they disclose that they have been sexually assaulted.”

[53] The consequence of silencing is that victims may either remain silent or may delay for long periods before finding the courage to speak out. This has been recognised by the South African legislature. In terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act,¹⁶ the evaluation of evidence must be on the following basis:

“59. Evidence of delay in reporting

In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.”

[54] Context also includes the public campaigns that have been launched in recent years encouraging women-victims to challenge the culture of silencing by speaking out about gender-based violence and identifying their abusers. These have included the international #MeToo campaigns of 2006 and 2017 and the #AmINext campaign in South Africa following the brutal rape and murder of a University of Cape Town student, Ms Uyinene Mrwetyana, in August 2019. While those campaigns may not have precipitated the PHA, they demonstrate the beneficial effect of women-victims exercising their freedom of expression, both in terms of healing and in terms of identifying and prosecuting

¹⁵ *NL and others v Estate Late Frankel and others* 2018 (BCLR) 921 (CC) at para 56.

¹⁶ 32 of 2007.

abusers. If any provision of the PHA can bear more than one constitutionally compliant interpretation, that which better allows victims to speak out, is to be preferred.

Purpose

[55] The preamble of the PHA suggests that its purposes include the following:

- (a) to give effect to the rights to equality, privacy, dignity, freedom and security of the person; and
- (b) protecting the right to be free from all forms of violence whether from public or private sources.

[56] Seemingly, the legislation was introduced to supplement the Domestic Violence Act¹⁷ which confines its remedies to a complainant who is “any person who is or has been in a domestic relationship with a respondent and who is or has been subjected or allegedly subjected to an act of domestic violence”.¹⁸

[57] Guidance as to the purpose of the PHA was provided in *Mnyandu*.¹⁹ The judgment provides insight into the discussion paper and subsequent report of the South African Law Reform Commission (“SALRC”) that led to the enactment of the PHA. Significantly, the legislation has its origins in the concept of “stalking” which forms the primary focus of legislation in other countries aimed at dealing with the problem of harassment. The judgment points out that originally the SALRC recommended that harassment and intimidation be incorporated into a definition of “stalking”. However, in the SALRC’s report of 25 November 2008 containing its final recommendations, it noted that —

“[i]nternationally, the legal understanding of ‘stalking’ [has] evolved to the point where it falls under the broad terms ‘harassment’ and recommended that the

¹⁷ 116 of 1998.

¹⁸ S Sewunker *Inexpensive Civil Remedy for Harassment: The Protection from Harassment Act De Rebus* 1 July 2013 <https://www.derebus.org.za/inexpensive-civil-remedy-harassment-protection-harassment-act/>

¹⁹ *Mnyandu v Padyachi* 2017 (1) SA 151 (KZP).

broader term 'harassment' should be used, in order to provide greater protection under the Act."²⁰

The PHA as a whole

[58] Context is provided, and purpose is discerned, from a reading of the PHA as a whole. In this regard, the following aspects are significant:

- (a) The potential beneficiaries of the legislation are defined broadly and include those that fall within the defined term "complainant", which means "any person who alleges that he or she is being subjected to harassment".
- (b) The PHA envisages a two-stage procedure for a complainant seeking relief in terms of its provisions. Section 2 sets out the preliminary procedure. There is an emphasis on accessibility. Relief under the PHA must be sought in the magistrates' court having jurisdiction.²¹ The clerk of the court must assist a complainant who is not legally represented.²² The application may be brought outside of ordinary court hours and ordinary court days, if the court has a reasonable belief that the complainant or a related person²³ is suffering or may suffer harm if the application is not dealt with immediately.²⁴
- (c) Section 3 governs the consideration and issuing of an interim protection order. The court must consider an application under the PHA "as soon as is reasonably possible".²⁵ In doing so, the court may "consider any additional evidence it deems fit, including oral evidence or evidence by affidavit".²⁶

²⁰ *Mnyandu* at para 49.

²¹ See definition of "court" in section 1(1) of the PHA.

²² Section 2(2).

²³ A "related person" is defined in section 1(1) of the PHA as "any member of the family or household of a complainant, or any other person in a close relationship to the complainant".

²⁴ Section 2(5).

²⁵ Section 3(1).

²⁶ Section 3(1).

- (d) If the court is satisfied that there is *prima facie* evidence that the respondent is engaging or has engaged in harassment, that harm is being or may be suffered by the complainant or a related person as a result if a protection order is not issued immediately, and the protection accorded by an interim protection order is not likely to be achieved if prior notice of application is given to the respondent, the court must, notwithstanding the lack of notice to the respondent, issue an interim protection order.²⁷ The interim protection order “must call on the respondent to show cause on the return date specified in the order why the interim protection order should not be made final”.²⁸
- (e) The proceedings on the return date are dealt with in terms of section 9 of the PHA. If the respondent does not appear and there is sufficient *prima facie* evidence of harassment, the court must issue a protection order.²⁹ If the respondent does appear and opposes the issuing of the order, the court must proceed to hear the matter and consider both the evidence previously received in terms of section 3(1) and any “further affidavits or oral evidence as it may direct”.³⁰
- (f) In the proceedings in terms of section 9, the court may prevent an alleged harasser from directly cross-examining a complainant and may require that questions be put through the presiding officer instead.³¹ Subject to subsection (5), the court is compelled after considering the evidence to issue a protection order in the prescribed form if it finds, on a balance of probabilities, that the respondent has engaged, or is engaging in, harassment.³²
- (g) Subsection (5) requires the court in assessing the reasonableness of the conduct of a respondent to take into account, in addition to any other relevant factor, whether the conduct was engaged in, *inter alia*

²⁷ Section 3(2).

²⁸ Section 3(3)(c).

²⁹ Section 9(1).

³⁰ Section 3(2).

³¹ Section 3(3).

³² Section 9(4).

for the purposes of detecting or preventing an offence, to reveal a threat to public safety or the environment or to comply with a legal duty.

- (h) Upon the issuing of a final protection order in terms of section 10, the court must direct that the original of the order be served on the respondent and that certified copies of the protection order and the warrant of arrest referred to in section 11(1)(a) be forwarded to the police station of the complainant's choice.³³
- (i) A protection order remains in force for a period of five years, unless set aside on good cause shown. Moreover, execution of the order is not automatically suspended by the noting of an appeal against the order.³⁴
- (j) The cross reference in section 9(7) to section 11(1) of the PHA is significant. Section 11(1) provides as follows:
- “Whenever a court issues a protection order, including an interim protection order, the court must make an order –
- (a) authorising the issue of a warrant for the arrest of the respondent, in the prescribed form; and
 - (b) suspending the execution of that warrant subject to compliance with any prohibition, condition, obligation or order imposed in terms of section 10.”
- (k) Section 11(4) then provides as follows:
- “(a) A complainant may hand the warrant of arrest together with an affidavit in the prescribed form, wherein it is stated that the respondent has contravened any specified prohibition, condition, obligation or order contained in the protection order, to any member of the South African Police Service.
- (b) If it appears to the member of the South African Police Service concerned that, subject to subsection (5), there are reasonable grounds to suspect that the complainant or related person is

³³ Section 9(7).

³⁴ Section 9(8).

suffering harm or may suffer imminent harm as a result of the alleged breach of the protection order by the respondent, the member must immediately arrest the respondent for allegedly committing the offence referred to in section 18(1)(a)."³⁵

- (l) Section 18(1)(a) makes it an offence to contravene any prohibition, condition, obligation or order imposed in terms of section 10(1) or (2).
- (m) Section 10 deals with the court's powers in making protection orders. These are wide. The court may prohibit harassment and the commission of any other act it chooses to specify in its order. It allows the court to the order a member of the South African Police Service to seize a weapon in the possession of the respondent and to protect a complainant when collecting her personal property.

[59] From the above, it is apparent that the consequences of the making of an interim or final protection order involve a substantial curtailment of the rights of the respondent. A warrant of arrest is issued automatically and it is open to the complainant to have the respondent arrested by deposing to an affidavit alleging a breach. Where the protection order proscribes one or other form of communication, that may also bring about a significant curtailment of the respondent's freedom of expression.³⁶

³⁵ Subsection (5) provides:

"In considering whether or not the complainant or a related person is suffering harm or may suffer imminent harm, as provided for in subsection (4)(b), the member of the South African Police Service must take into account the –

- (a) risk to the safety or well-being of the complainant or related person;
- (b) seriousness of the conduct comprising an alleged breach of the protection order;
- (c) length of time since the alleged breach occurred; and
- (d) nature and extent of the harm previously suffered by the complainant or related person."

³⁶ See in this regard the judgment of the magistrates' court for the district of Johannesburg North in *Daniel Francois Roodt obh of Stephanus Johannes Hofmeyr v Conrad Koch t/z Chester Missing*. Judgment of magistrate N Sewnarain dated 11 February 2015. The complainant (a well-known singer) espousing right wing and posted a racist and provocative statement on Twitter. The respondent (a ventriloquist and satirist) responded by denouncing the statement on social media and ridiculing the complainant. The respondent also addressed communications to the complainants sponsors in this regard. The complainant secured an interim protection order against the respondent under the PHA. On the return date, the magistrate held that the respondent's communications were legitimate moral persuasion, constituting protected comment. On this basis, the magistrate discharged the interim protection order against the respondent.

[60] On the other hand, the conduct which the PHA seeks to prevent, similarly contemplates conduct by the respondent involving serious curtailment of the rights of victims of harassment, including the fundamental rights listed in the preamble to the PHA.

[61] These considerations point to a heavy responsibility resting on the magistrate applying the PHA neither lightly to grant nor lightly to refuse a request for an interim or final protection order. A balanced approach to the exercise of the discretion is required, infused by a deep awareness of the epidemic scale of gender-based violence that besets our society and the aim of the legislation to prevent it. The correct performance of that responsibility is facilitated by the powers that are given to the magistrate in both section 3(1) and section 9(2)(b) to direct that further oral or affidavit evidence be provided and by careful application of the definition of harassment in section 1, read with section 9(5).

International Law

[62] The primary instrument in this context is the Convention on the Elimination of All Forms of Discrimination Against Women.³⁷ Its implementation is monitored by the Committee on the Elimination of Discrimination against Women.³⁸ In its General Recommendation No. 19, the committee recognised that violence against women is a form of discrimination. It then went on in 2017, in its General Recommendation No. 35, to determine that the prohibition of gender-based violence against women had become a principle of customary international law, binding all states.³⁹ The Convention was supplemented on 20 December 1993 by the Declaration on the Elimination of Violence against Women.⁴⁰

³⁷ Adopted by the United Nations General Assembly in New York on 18 December 1979 and ratified by South Africa in 1995. This was supplemented on 20 December 1993 by the Declaration on the Elimination of Violence against Women by General Assembly of the United Nations. Resolution 48/104.

³⁸ <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women>

³⁹ [https://www.ohchr.org/en/women/gender based violence against women and girls#:~:text=In%201992%2C%20the%20CEDAW%20Committee,or%20that%20affects%20women%20disproportionately.](https://www.ohchr.org/en/women/gender-based-violence-against-women-and-girls#:~:text=In%201992%2C%20the%20CEDAW%20Committee,or%20that%20affects%20women%20disproportionately.)

⁴⁰ Resolution 48/104.

[63] On 11 July 2003, the African Union adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, also known as the Maputo Protocol.⁴¹ It contains a broad definition of "violence against women"⁴² and contains specific measures to address it. Article 4(1) recognises the entitlement of every woman to respect for her life and the integrity and security of her person. Article 4(2) imposes specific obligations on the state parties, including, amongst others —

- (a) "measures to enact and enforce laws to prohibit all forms of violence against women, including unwanted or forced sex whether the violence takes place in private or public";⁴³
- (b) the adoption of "other legislative, administrative, social and economic measures ... to ensure the prevention, punishment and eradication of all forms of violence against women";⁴⁴
- (c) educative measures to this end;⁴⁵
- (d) the implementation of programmes for informing and rehabilitating women victims and providing reparations.⁴⁶

[64] The interpretation of the relevant provisions of the PHA must strive for consistency with these international instruments and the duties they impose.

[65] Against that backdrop, I turn to the two issues identified in paragraph and above.

⁴¹ Ratified by South Africa on 17 December 2004. South Africa deposited its Instrument of ratification with the Chairperson of the Commission of the African Union on 14 January 2005. See JD Mujuzi *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: South Africa's reservations and interpretive declarations*. extension://efaidnbmnnnibpcajpcgiclfindmkaj/https://www.saflii.org/za/journals/LDD/2008/12.pdf

⁴² "Violence against women" means all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war".

⁴³ Article 4(2)(a).

⁴⁴ Article 4(2)(b).

⁴⁵ Article 4(2)(d).

⁴⁶ Article 4(2)(e) and (f).

The duty of full disclosure

[66] A party seeking relief *ex parte*⁴⁷ has a duty of the utmost good faith to the court. This requires the applicant to disclose all material facts impacting upon the court's decision, including facts and potential defences that might favour refusal of the relief sought. If it appears on the return day that the applicant breached this duty, the court has a discretion to set aside the order granted *ex parte* and to refuse relief altogether. This may be so even if the applicant was not wilful or in bad faith. The rationale for the rule is that *ex parte* proceedings depart from the *audi alteram partem*⁴⁸ rule. In the absence of the respondent, the applicant must step in by anticipating and disclosing what the respondent might have raised in opposition to the relief sought.⁴⁹ I will refer to it as the duty of full disclosure.

[67] That duty and its rationale must be taken to be well known by any practising attorney or advocate. Indeed, paragraph 57.4 of the Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities published in terms of section 36(1) of the Legal Practice Act 28 of 2014⁵⁰ provides as follows in this regard:

“A legal practitioner shall, in any *ex parte* proceedings, disclose to a court every fact (save those covered by professional privilege or client confidentiality) known to the legal practitioner that might reasonably have a material bearing on the decision the court is required to make.”

[68] Where a complainant seeks an interim protection order in terms of sections 2 and 3 of the PHA without notice to the respondent, the duty of full disclosure must apply. If not, there is the risk of a serious infringement of the rights of the respondent if an interim protection order is unjustifiably granted. This case illustrates for how long that injustice might endure. Where a complainant is unrepresented, the obligation would still rest on him or her to be scrupulously

⁴⁷ i.e. without notice to the respondent.

⁴⁸ Here both sides.

⁴⁹ *Recycling and Economic Development Initiative of South Africa NPV v Minister of Environment Affairs* 2019 (3) SA 251 (SCA) at paras 45-52 and the authorities there referred to.

⁵⁰ Published under, GenN 168 in GG 42337 of 29 March 2019 (as corrected by GenN 198 in GG 42364 of 29 March 2019) as amended by GenN 537 in GG 45131 of 10 September 2021, GenN 655 in GG 45452 of 12 November 2021 (as replaced by GenN 663 in GG 45482 of 12 November 2021), GenN 659 in GG 45452 of 12 November 2021 (as replaced by GenN 667 in GG 45482 of 12 November 2021) GenN 1230 in GG 46739 of 19 August 2022.

truthful in the evidence he or she gives to the magistrate, and to present both parties' perspectives. However, it could fairly be expected that a lay person would not understand the rationale for, and range of obligations imposed by, the duty of full disclosure. In these circumstances, it would be for the magistrate to step in with appropriately probing enquires to ensure that the necessary full disclosure is made. This includes exploring with the complainant what the absent party's perspective is likely to be. Untruthful or misleading responses to the magistrate's questions should have the same consequence as those visited upon a represented person who fails to comply with the duty.

[69] In this matter, the respondent was represented by attorneys from the outset. The magistrate was therefore entitled to assume compliance with the duty. But was the duty complied with?

[70] It is apparent from the respondent's draft replying affidavits that, on his own version, he had previously discussed anal sex with the appellant and she had told him to "wait and not penetrate". On his own version of the events on 23 March 2018, he penetrated the appellant anally without her consent. And on his version, the consequences were severe. He caused her severe pain resulting in her shouting out. He had to carry her from the bedroom, put her in the shower and wash her body, corroborating her evidence that she bled from his actions.

[71] Even though his explanation for this incident was that the penetration was by accident, these were material facts which may well have influenced the decision of the magistrate as to whether or not to grant an interim protection order. They were essential to the magistrate being given enough information to understand the appellant's perspective. The respondent should have volunteered this information and his attorneys ought to have alerted him to his duty to do so. Yet he made no mention of it at all. By failing to do so, he breached the duty of full disclosure.

[72] In his founding affidavit, the respondent refers to "two other individuals whose names I will not disclose in this form [who] made complaints about me to Pro Helvetia". Again, the respondent could not proceed on this basis. He ought to

have provided full details of the nature of the complaints and the identity of the complainants, even if by way of a confidential disclosure to the magistrate.

[73] In answering to this aspect of his founding affidavit, the appellant says:

“92.1 I admit that the complaints referred to involved allegations of gender-based violence levelled against [the respondent] by me and two other people, one of whom is [AS]. The complaints in question ... involve both me and [AS].”

[74] The respondent asserts in his founding affidavit that “I vehemently denied these allegations repeatedly”, referring to the averments made by both the appellant and “the two other individuals”. The respondent does not dispute that one of those individuals is AS, whose affidavit alleging rape is described above. What is significant for present purposes is that after the alleged rape of AS, certain messages were exchanged between AS and the respondent. On Sunday 17 January 2010, two days after the incident, AS sent the respondent a Facebook Messenger message saying, *inter alia*:

“It was at some point (I am not sure when) that your destructive habits turned on me. Thursday night was the most intense display of this. You were incredibly disrespectful to me. I felt so low on Friday that I couldn’t get up until my roommate came home at 5pm and made me get up. In a lot of ways I was also mad at myself for allowing someone to treat me so badly.”

[75] He replied:

“I’m sorry to hear about how you were on Friday. Thursday night I do remember not treating you well, making you wait on me. ... I’m not also a complete dick, I try to never treat anyone how I have been with you.”

[76] AS responded to this message on 24 January 2010 as follows:

“I really wanted to leave this alone and move on with my life but there is still something that is not resolved and I think I need to air it. From your message it is obvious that you don’t understand the full extent of what happened last Thursday night. You were disrespectful by making me ‘wait’ on you but that is just a small fraction of what happened that night. It made me feel like a speck of dirt.

I told you for weeks that I didn't want to have anal sex with you and on Thursday night you just wouldn't take no for an answer. You were being too forceful with your penis. You shoved it into that area, even as I was telling you 'no'. You physically hurt me and cornered me emotionally into a place of submission. So, while I told you to get lube so I didn't hurt so bad, I was saying that from a very defeated and low place – I made it clear to you that I didn't want to do that. While what you did is illegal, it also hurt me tremendously. Even after I told you how my high school boyfriend had pretty much raped me when I was 16, you still had the audacity to ignore my resistance and force your way in. At one point you even said to me 'where am I going to fuck you?' because I was on my period and wouldn't let you give anal. You treated me like a blow-up doll without feelings.

Whatever happened sexually between us the next morning shouldn't have taken place but I felt too destroyed and confused inside to put a stop to it.

Also, I hate that you gave my number away to one of your friends, as if I am your leftovers to be passed around. That was the nail in the coffin. I thought that you understood I have more self-respect than that.

It was really hard for me to write this. Please don't respond."

[77] The respondent did not respond to this message. It is so that she asked him not to. But in the face of such a clear allegation of brutal, anal rape, one would have expected him to respond immediately with a "vehement denial", as he claimed in his founding affidavit to have done. He did not do so.

[78] In 2011, the respondent tried to strike up a conversation with AS. She responded, "why do you want to be friends with me?" He responded "because I got to know you a bit. I really do feel bad when I think back to how things ended. And I don't want bad energy. Once again I apologise".

[79] She responded "I understand the bad energy part, but I'm still hurt by what happened. I'm not ready to forgive you but I am trying to move on from the whole experience".

[80] In the further messages, she was conversational with him. He went on to say "[I]ook, I'm really sorry for being such a 'A' class penis to you".

[81] Thereafter, the respondent did not contact AS for almost a decade. Then on 5 August 2020, the same day that the appellant confronted the respondent about him assaulting her other friend in 2017, the respondent addressed a message to AS as follows:

“Hi [A].

I wanted to send you a message and speak about the incident that happened between me and you.

I have done a lot of thinking about that incident. Initially I thought that we were both into what we were going [sic] sexually that night. I have thought more about it especially as time has gone on and movements have happened. ... I thought about our interaction over and over. Like I said I thought we were on the same page. But we weren't. And I think I just want to say that I am sorry I made you feel unsafe and violated. Not to correct anything, but just to say that I would never have wanted to make you feel that way and that I would like to apologise for that. If you do not want to engage I also completely understand that. But otherwise, I hope you are well, healthy and happy. [K]”

[82] The next day, 6 August 2020, the respondent sent a message to the appellant in which he acknowledged that “I hurt the 2 girls that felt assaulted by me”.

[83] By no stretch of the imagination can these messages be construed as vehement denials. His assertion to this effect in his founding affidavit was simply a lie. Not only should he have been scrupulously honest in his founding affidavit, but he ought to have put up the entire exchange of messages with AS, and the message of 6 August 2020, of his own accord. This he was obliged to do from the outset in accordance with his duty of full disclosure. And his attorneys should have done their best to ensure that he did so. The messages were material and would in all probability have influenced the magistrate not to grant an interim protection order.

[84] Nor does the respondent's attempt to explain away his last message, withstand scrutiny. He says it contained a typing error. It should have read “I thought that we were both into what we were going *to do* sexually that night”. This because he alleges in essence, that nothing happened. But the more probable typographic error is that he meant “doing” instead of “going”. It is difficult to

conceive how someone could feel violated about what they were going to do but did not do. And in any event, the message is by no means a “vehement denial”.

[85] In *Pashut*,⁵¹ an appeal of a decision of a magistrate to grant interim and final protection orders under the PHA was upheld (and the orders overturned) on the basis of a breach of the duty of full disclosure. There, the respondent annexed the correspondence he was duty-bound to disclose, but failed to draw attention to it in the body of his founding affidavit. This was found not to be good enough. In this case the non-disclosure is far more serious.

[86] Taken together, the respondent’s non-disclosures, his dishonesty and the likelihood that the magistrate would have refused relief in the event of full disclosure, warrant not only the discharge of the interim protection order, but also the denial of a final protection order.⁵² These are circumstances in which the respondent must be “deprived of any advantage he may have derived by that breach of duty”.⁵³ This outcome would stand regardless of whether the draft replying affidavits are admitted on appeal or the matter referred to oral evidence. On this basis alone, the appeal stands to be allowed, the cross-appeal dismissed and the magistrate’s order overturned and replaced with one discharging the interim protection order and dismissing the application for a final protection order.

[87] This outcome notwithstanding, I go on to consider the question of whether, on the common cause facts, the appellant harassed the respondent.

The definition of “harassment”

[88] “Harassment” is defined in section 1 of the PHA as meaning —

“directly or indirectly engaging in conduct that the respondent knows or ought to know-

(a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably-

⁵¹ *Pashut v Klopper* (A391/2018) [2019] ZAGPPHC 552 (19 September 2019).

⁵² *Phillips v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) at para 29.

⁵³ *Recycling* above at para 51, quoting *Brink’s-Mat Ltd v Elcombe and Others* [1988] 3 All ER 188 (CA) at 193.

- (i) following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;
 - (ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or
 - (iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to, or brought to the attention of, the complainant or a related person; or
- (b) amounts to sexual harassment of the complainant or a related person.”

[89] “Harm”, in turn, is defined in section 1 of the PHA as —

“any mental, psychological, physical or economic harm.”

[90] The definition of harassment must be read together with section 9(5), which reads:

- “(5) For the purpose of deciding whether the conduct of a respondent is unreasonable as referred to in paragraph (a) of the definition of 'harassment', the court must, in addition to any other factor, take into account whether the conduct, in the circumstances in question, was engaged in-
- (a) for the purpose of detecting or preventing an offence;
 - (b) to reveal a threat to public safety or the environment;
 - (c) to reveal that an undue advantage is being or was given to a person in a competitive bidding process; or
 - (d) to comply with a legal duty.”

[91] The judgment that has given the most attention to the interpretation of the definition is *Mnyandu*. There, the appellant sent an email to the respondent and others in which she stated that, at a meeting she had attended with them, she had been “verbally and emotionally abused” and that there “were four MEN

attacking a female”. She complained that all employees had the right to be treated with dignity in respect of gender. Relying on this letter, the respondent as complainant sought and was granted both an interim and a final protection order on the basis that he was being harassed by the appellant.⁵⁴

[92] On appeal, the High Court concluded that the appellant was not telling the truth about the meeting and that she had not been subjected to the treatment complained of in the email.⁵⁵ The High Court was therefore satisfied that direct unreasonable conduct, as contemplated in the definition, had been proven against the appellant. The High Court then went on to consider whether, notwithstanding that her conduct was unreasonable, the appellant’s conduct constituted harassment.

[93] Drawing on its analysis of the SALRC reports and the legislation and jurisprudence of foreign jurisdictions, the High Court concluded as follows:

“The definition in the Act states that ‘harassment’ is constituted by ‘directly or indirectly engaging in conduct’. However, although the definition does not refer to ‘a course of conduct’, in my view the conduct engaged in must necessarily either have a repetitive element which makes it oppressive and unreasonable, thereby tormenting or inculcating serious fear or distress in the victim; alternatively, the conduct must be of such an overwhelmingly oppressive nature that a single act has the same consequences, as in the case of a single protracted incident when the victim is physically stalked.”

[94] Applying that understanding of “harassment”, the court went on to find that, despite the appellant’s email being untruthful and unreasonable, it was neither objectively oppressive nor grave enough to constitute harassment.

[95] Whilst the analysis of the SALRC reports and the relevant foreign authority in *Mnyandu* is contextually helpful, the legislation in the foreign jurisdictions considered in *Mnyandu* is differently worded. Most of the foreign authority relied on was English. In the English statute, harassment is not defined. By contrast the PHA had a detailed definition. Nevertheless, it does seem to me that in interpreting the definition in section 1 of the PHA, regard may be had

⁵⁴ *Mnyandu* above at para 6,6.

⁵⁵ *Mnyandu* above at paras 16–36.

both to the dictionary definition of “harassment” and to the focus on stalking which formed part of its legislative history. The Shorter Oxford English Dictionary on Historical Principles⁵⁶ defines “harass” as:

“1. Trouble by repeated attacks. Now freq. subject to constant molesting or persecution. 2. Lay waste, devastate. 3. Tire out, exhaust. 4. Overwhelm with ... misfortunes, etc.”

[96] That, taken together with the provisions for the issuing of a warrant of arrest automatically with the protection order, the special provision permitting a member of the South African Police to seize any weapon in the possession or under the control of the respondent, the lengthy potential sentence for breaching the protection order and the protective provision allowing the magistrate to prevent direct cross-examination of the complainant by the respondent, point to harassment requiring conduct which is predatory or persecutory in nature. The dictionary definition also recognises an element of repetition, but, as recognised in *Mnyandu*, harassment could be constituted by a single act sufficiently severe to have a predatory or persecutory impact.

[97] The approach in *Mnyandu* whereby the falsity of the respondent’s averment did not of necessity give rise to harassment must be correct. There is nothing in the definition of harassment in section 1 of the PHA or in section 9(5) to suggest that the communication of incorrect facts or untruths automatically gives rise to harassment. However, whilst not decisive, it would be relevant to the question of unreasonableness.

[98] This approach was confirmed in *DS v AP*.⁵⁷ In that case, the Western Cape Division of the High Court dealt on appeal with a matter where the appellant alleged that she had been raped by her partner shortly after she had ended their relationship. On her version, which was accepted, she began to tell friends about the rape some two years after it had taken place. This she did as part of her psychological healing process. She also began posting on social media about it, but without naming him. She did name him in private posts to a WhatsApp group named Calling You Out. This group was meant to be a

⁵⁶ 6th Ed Oxford University Press at p 1204.

⁵⁷ *DS v AP (Centre for Applied Legal Studies and Wise4Afrika (NPC) as Amicus Curiae)* 2022 JRD 1097 (WCC).

private, confidential space for women to speak out about their experiences of gender-based violence. It was not a public platform. But, without her consent, her post and his identity were made public by someone else in the group. The respondent then applied for interim and final protection orders under the PHA. These were granted by the magistrate. The final protection order prohibited the appellant from harassing the respondent and from “disclosing to anyone in any manner that the respondent has allegedly raped her”.

[99] The High Court was satisfied *inter alia* on the basis of his failure to dispute rape allegations in earlier email and text messages exchanged between them, that the rape allegation was true. On this basis the High Court found that “she had the right to speak out and to express herself about the experiences she endured”.⁵⁸ Significantly, the court went on to consider whether the position would have been any different if it had been wrong in concluding that she was justified in calling the respondent a rapist.⁵⁹ On the basis that she had never published or publicly named the respondent as her rapist, but had only made the assertion in private discussions and posts, the court was satisfied that her conduct still did not amount to harassment, as she had not intended to harm the respondent.

[100] This judgment reaffirms the principle that the falsity of an allegation does not automatically mean that making it is harassment. It is also important in recognising the healing effect of allowing the victims of gender-based violence to speak about their experiences.

The appellant’s communications

[101] Coming back to what is common cause, the appellant says in her answering affidavit that “having ... undergone years of therapy and having spoken to [AS], I can finally see through the fog of [the respondent’s] psychological abuse and I no longer believe that his penetration of me was an ‘accident’”. Whilst the respondent insists that the anal penetration was accidental, he does not, in his draft replying affidavit, dispute the process of therapy and reflection that the

⁵⁸ At para 52.

⁵⁹ *DS v AP* above from para 55 onwards.

appellant has undergone in the years following the event. Nor does he dispute that the appellant has made contact with AS and learned of the similarity of the facts of and preceding her complaint of non-consensual anal penetration by the respondent. Nor does the respondent dispute the exchange of messages following AS's complaint, in which he apologised and failed squarely to deny her detailed account of the rape. The appellant's communications to and exchanges with the three institutions are also largely common cause.

[102] The first organisation that the appellant and AS contacted was Pro Helvetia, a Swiss Arts Foundation. The appellant had a one-month research grant with the organisation, whilst the respondent had a three-month residency programme with them. The appellant was concerned about having to share an artistic space with the respondent and she and AS decided to inform Pro Helvetia of the situation. They accordingly contacted the head of the organisation in February 2021 and informed him of their allegations about the respondent.

[103] Pro Helvetia later responded saying that they would await the outcome of the enquiry by then being conducted by Wits University before making a decision whether to act on the complaints. In May 2021, Pro Helvetia informed the appellant and AS that they were unwilling to intervene, given that the grant-making process involving the respondent had been completed. However, they were drafting a policy on prevention and handling of harassment which would be published in August 2022.

[104] The respondent questions the appellant's motives and truthfulness in making the statements to Pro Helvetia. He denies that the appellant was afraid of sharing space with him. He says that they were going to be in two different cities in Switzerland and practised in different fields.

[105] On 6 April 2021, the appellant contacted the Wits University Gender Equity Office ("GEO") because the respondent was a student at the University. The appellant informed the GEO of their allegations about the respondent. The GEO delivered a letter of complaint to the respondent and investigated the complaint against him. A hearing was convened for 12 July 2021 but the

respondent's attorney challenged its jurisdiction and this was taken on internal review. The internal review hearing was set for 14 April 2022 but the respondent accused that panel of gross misconduct. A new panel was convened and a hearing date set for 26 April 2022. However, shortly before the hearing, the respondent deregistered as a student. The GEO no longer had jurisdiction over him and the process went no further.

[106] The respondent in his draft replying affidavit accuses the GEO of bias and unfair practice, along with a lack of jurisdiction because the appellant was not a student and the alleged rapes had not taken place on campus. He denies deregistering, but rather put his registration at Wits in abeyance for 12 months.

[107] On 27 April 2021, the appellant learned that the respondent was set to perform at the National Arts Festival ("NAF") of 2021. On the same day she contacted the artistic director of the NAF enquiring whether she would be available for an "urgent and confidential conversation about the NAF's policies about abuse and gender-based violence". A Zoom meeting was held on 27 May 2021. In the meeting, the appellant named the respondent as having raped her. She pointed out that she is a survivor and would have to perform at the same festival as her rapist and that the festival would, as a result, not be a safe space for her and "potentially other survivors of [the respondent]". Hence the NAF needed to offer support to survivors. Nothing further was heard from the artistic director.

[108] On 28 July 2021, the appellant emailed the artistic director and two other representatives of the NAF. It complained about the absence of a follow-up after the meeting on 27 May 2021. It referred to her shock on discovering that her "rapist and abuser" was a featured artist on the NAF 2021 programme. It also expressed her dissatisfaction with the NAF's charter for gender equity, safe space and sexual harassment and the failure to communicate with her in any way before proceeding with it. She demanded inclusion in any further workshops, discussions, planning and development with regard to the charter. She also made reference to the ongoing Wits GEO process.

[109] On the next day, 29 July 2021, the NAF responded, apologising for the distress it had caused her, explaining what the NAF sought to achieve through the charter and giving the assurance that a range of stakeholders would be interacted with. In doing so she gave the assurance that “your inputs will enhance the process and be significant in the development of the set of principles that guide and inform the festival in all of our activities”. The appellant was to be contacted in this regard.

[110] Subsequently, the NAF released a teaser, asking the public to guess who the next Standard Bank Young Artist for Jazz was. The appellant reacted to this on 1 September 2021 by writing to the NAF in confidence and without prejudice. She said:

“It is two months since I identified my rapist to [the artistic director], and it is one month since I received your letter. I just noticed that National Arts Festival is running a teaser asking us to guess who the next Standard Bank Young Artist for jazz is and in the descriptions I see ‘guitarist’. I really hope it’s not [the respondent].”

[111] She went on to say:

“I have still heard nothing from anyone at NAF for support, clarity, feedback etc and this concerns me. It concerns me because I have reported an abuser that you have harboured and featured knowingly and that at this point there is still no attempt to talk to me.”

[112] She referred also to her fight for her right to have justice for herself and for the other two survivors of “his abuse” and gave the website for an organisation that worked with major jazz festivals in relation to GBV related issues. She concluded by saying, *inter alia*, “I hope sincerely that [the respondent] is not a recipient of this award”. This was the first occasion on which the respondent had been named in her written correspondence with the NAF.

[113] The appellant, together with AS, wrote to the NAF again on 5 May 2022 in confidence and without prejudice. They reported on the unsuccessful outcome of the Wits GEO process following what they considered to be his

deregistration. They considered his actions in this regard as “an attempt to avoid the hearing and accountability for his illegal behaviour against us”. Because of his having avoided a hearing at Wits, they asserted that “now the onus and responsibility to conduct an investigation must lie with NAF since he has also effectively managed to escape accountability from your institution”.

[114] She also pointed out that her emails to the NAF of 1 September 2021 and 15 October 2021 had gone unanswered, which she found “avoidant and hurtful”. The letter concluded as follows:

“Please know that should NAF [conduct an investigation] they must be able to offer both of us survivors safety. Safety from litigation from [the respondent] and safety from any other negative consequences. This is one of the reasons there must be robust internal processes in place. Both of us survivors have suffered much in the last year both emotionally and physically. [LW] is currently is battling cancer which leaves her in special need of care.

We are taking advice as to how to proceed. We shall be going public with our allegations. We strongly recommend that you respond to our letter by Tuesday 10 May.”

[115] In explaining this threat of going public in her answering affidavit, the appellant says:

“98.4 I admit that the email of 5 May 2022 states that ‘we shall be going public with our allegations’. However,

98.4.1 the statement in no way contains any suggestion that I intended to publish [the respondent’s] name, only that I intended to publicise the allegations; and

98.4.2 at no stage prior to the launching of this application did I form any intention of naming [the respondent] in relation to the allegations beyond the making of the three complaints that we have made.”

[116] In his draft replying affidavit, the respondent disputes that it was not the appellant’s intention to name him in going public. In support he puts up an Instagram post by AS in which she says “a loser from my past sent myself and

another survivor cease and desist letters last week to try and silence us. ... he poked the bear. full story WITH NAME to follow soon”.

[117] On 7 May 2022 the NAF wrote confirming that the complaint had been escalated to the NAF executive committee, welcoming the appellant and AS' willingness to participate in the investigation, saying that the NAF had “approached the other parties to ascertain their willingness to be included” and recording continued commitment to the development of the charter.

[118] On 9 May 2022, the appellant and AS replied. They welcomed the escalation of their complaint. They however expressed concern about the fact that the respondent had seemingly already been contacted before protocols had been agreed about the process to be followed. They concluded saying:

“We are committed to this process as well as to the wider activism around GBV and artistic spaces and institutions and the transparency that survivors need.”

[119] On 13 May 2022, the NAF wrote to the appellant and AS suggesting that all affected parties avail themselves of interviews to be held on 17 May 2022 on virtual platforms. These interviews were to be conducted privately, individually and informally. This would enable the independent facilitator to make appropriate recommendations to the parties and the NAF as to how best the matters at hand might be dealt with. Suggested terms of reference were set out. The appellant and the respondent were called upon to indicate in writing by 16 May 2022 their willingness to participate in the process, in which event the interview would take place on 17 May 2022.

[120] On 16 May 2022, the appellant and AS' attorney wrote to the NAF in response, pointing out that an interim protection order had been granted against the appellant and that the application in that regard was being opposed, complaining that it was apparent from the application for an interim protection order that communications between the appellant and the NAF had been leaked to the respondent, complaining about the short notice for the proposed interviews, expressing concern about the process, given the leaks and

conveying that they were consulting with their clients with a view to proposing an appropriate process to be followed in dealing with their client's complaints.

[121] That appears to have concluded the communication with the NAF and there is no suggestion that the interviews ever took place. The appellant's communications with the three institutions as set out above form the factual basis of the complaint of harassment.

Did the communications constitute harassment?

[122] The onus rests on the respondent to prove on a balance of probabilities that the appellant has engaged or is engaging in harassment.⁶⁰ In order for the appellant's contribution to the foregoing exchanges between the appellant, AS and the three institutions to constitute harassment, the following had to be present in terms of the definition of harassment in section 1 of the PHA, read with section 9(5):

- (a) Direct or indirect engagement in conduct;
- (b) The conduct was engaged in in circumstances where the appellant knew or ought to have known that harm will be caused to the respondent or that the respondent would reasonably believe that harm may be caused to him or to a related person;
- (c) The conduct must have constituted one of the four forms of proscribed conduct identified in subparagraphs (i), (ii), or (iii) of paragraph (a) of the definition, or paragraph (b) of the definition;
- (d) Where the form of harassment alleged is conduct as contemplated in subparagraphs (i), (ii), or (iii), it must have been unreasonable. In assessing unreasonableness, the factors in section 9(5) must be considered, along with other relevant factors.

[123] As regards the first requirement, I am satisfied that the foregoing exchanges between the appellant and the three institutions amounted to direct conduct.

⁶⁰ Section 9(4); *Mnyandu* above at para 30 above; *Moos v Makgoba* (A238/2019) [2022] ZAGPPHC 359 (25 May 2022) at para 6.

[124] As regards the second requirement, given the career implications for the respondent, the appellant must have known, or at least ought to have known, that her conduct, should the respondent become aware of it, would inspire in him a reasonable belief that harm may be caused. This would at least include a belief that financial harm would be caused.

[125] In relation to the third requirement, the parties were agreed that the only subparagraph under which the making of the reports might fall is (ii) which reads:

“[E]ngaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues.”

[126] Was the verbal and electronic communication between the appellant and the three institutions “aimed at” the respondent? It is so that he was identified in the exchanges with the three institutions. It appears that this was generally done verbally, but in at least one instance, probably more, it was also done in writing in a letter to the NAF.

[127] The Shorter Oxford English Dictionary definition of “aimed at”, in relevant part, is —

“Direct (a missile, blow, remark, act, missive, etc) at; point or level (a firearm etc) at.”⁶¹

[128] It is so that the reports were not addressed to the respondent, but to the institutions concerned. That would not, however, preclude their being aimed at the respondent in the sense used in the subparagraph. Nevertheless, taking into account the dictionary definition, the words “aimed at” suggest a singular focus of attention on the respondent as a requirement. If one looks at the letters, there is no doubt that the institutions were being alerted to the respondent’s alleged conduct. But the letters also reveal additional objectives. The appellant and AS also sought to conscientise the institutions themselves about the problem of the gender-based violence, to encourage them to

⁶¹ *Shorter Oxford English Dictionary on Historical Principles* above at p47.

introduce policies and protocols to deal with the problem, and to give consideration to how they could make their environments safer for women and the victims of such violence. In my view it is open to doubt whether the reports could be said to be aimed at the respondent, where they had these multiple, wider objectives. Nevertheless, I will assume in favour of the respondent that they were aimed at him in the sense contemplated in the subparagraph. On that basis the third requirement must be considered satisfied.

[129] As regards the fourth requirement, the communication in question must have been engaged in unreasonably. In interpreting and applying the word “unreasonably”, the contextual and purposive considerations referred to in paragraphs to above, must come into play. Taking these into account, the following considerations are relevant in determining whether the communication in this case was unreasonably engaged in by the appellant:

- (a) Whilst *Mnyandu* tells us that falsity of an allegation does not automatically render it harassment, an assessment of the reasonableness of a communication must take into consideration the extent to which it is based on the communicator’s sincerely- and reasonably- held belief. If regard is had to the common cause facts, especially the striking similarity of the complaint of AS at the hands of the respondent several years before,⁶² it was not unreasonable for the appellant to conclude, at least in respect of the 2018 incident,⁶³ that she had been raped.

⁶² See the discussion on the admissibility of similar fact evidence in *Savoi v National Director of Public Prosecutions* 2014 (5) SA 317 (CC) at paras 50–59 and the authorities there referred to. Reference is made to the English case of *Makin v Attorney-General for New South Wales* [1894] AC 57 where a category of similar fact evidence recognised as being potentially relevant and admissible is that which “bears upon the question of whether the acts alleged to constitute the crime charged in the indictment were designed or accidental”. Whilst English law has moved on from *Makin* to a more flexible, rather than category-bound, approach to similar fact evidence, the highlighting of this category is significant for the present matter where the respondent relies on accident as his defence to the appellant’s complaint of a rape in 2018. In *S v D* 1991 (2) SACR 543 (A), the Appellate Division adopted a criterion for admissibility of “striking similarity”, discussed at paragraph 56 of *Savoi*. The 2010 and 2018 complaints of AS and the appellant do indeed bear striking similarity.

⁶³ In making the assessment with reference to the two similar incidents involving both AS and the appellant in 2010 and 2018 respectively, I am not rejecting the appellant’s version on the alleged rape on 26 October 2019. I do not reference it because the events in relation to that day cannot be said to be common cause in the way that aspects of the events in 2010 and 2018 are.

- (b) The appellant's delay in communicating the allegations is consistent with the well-known phenomenon that victims may take a long time to come to terms with the fact that they have been raped. Moreover, the appellant was all-the-more entitled to question her original acceptance of the respondent's assertion of accidental penetration once she had compared notes with AS. The delay in the communications is therefore not a pointer to unreasonableness.
- (c) The appellant's communications were sometimes strident and demanding. The language used and tone adopted were not always measured. But that is not the measure of reasonableness in the context of an epidemic of gender-based violence. Nor is it a fair criterion where there is an urgent need to change the behaviour of men. Women are entitled to be angry. At a societal level, they are under attack. They are particularly entitled to express outrage where they have personal experience of gender-based violence. And where society and institutions are perceived as responding with lethargy, quiet diplomacy is not to be expected.
- (d) The conduct of the appellant in sending the communications was neither predatory nor persecutory. The communications were not sent simply for the sake of targeting or harming the respondent. They sought to address concerns about the both the appellant's safety and that of other women. They reflect a strong desire to bring about societal and institutional change, based on sound policies and protocols. That is not unreasonable.
- (e) As regards the reasonableness or otherwise of the threat to "go public", there is no firm basis other than the Instagram post of AS to gainsay the appellant's version that she did not intend to name the respondent in going public. It is significant that there is no complaint that AS, or the appellant for that matter, ever carried out the alleged threat. Moreover, the Instagram post by AS suggesting that naming would take place, could not have been taken seriously by the respondent because he did not seek a protection order against AS.

- (f) With reference to the factors in section 9(5)(a) and (b), it is clear from the appellant's express wish to protect other women and put in place measures to prevent gender-based violence, that she engaged in the communication not only for her own ends, but also to prevent the commission of an offence and to reveal a threat to public safety.

[130] Taking all of these factors into account, it cannot be said that the appellant engaged in the communication unreasonably. Absent unreasonableness, the fourth requirement for harassment is absent.

[131] Accordingly, on the common cause facts, the respondent has failed to prove on a balance of probabilities in terms of section 9(4) of the PHA, that the appellant harassed him. Neither the admission of the draft replying affidavits on appeal, nor a referral to oral evidence on remittal to the magistrates' court could change this outcome.

Conclusion

[132] On account of the failure to comply with the duty of full disclosure and the failure to prove harassment, the appeal stands to be allowed, the cross-appeal dismissed and the magistrate's order overturned and replaced with one discharging the interim protection order and dismissing the application for a final protection order.

[133] Ordinarily, costs orders should not be made in proceedings under the PHA. A default rule of costs following the result would discourage worthy complainants. However, the respondent in this case employed dishonesty and non-disclosure to secure an interim protection order without notice to the appellant. It is appropriate that he pay the appellant's costs on the attorney and client scale in the proceedings before both the magistrates' court and the High Court.

[134] I accordingly make the following order:

- (1) The respondent's application for condonation of the late filing of his notice of cross-appeal is granted.
- (2) The application to admit new evidence on appeal is dismissed.

- (3) The cross-appeal is dismissed.
- (4) The appeal is upheld.
- (5) The order of the Magistrates Court for the district of Johannesburg North dated 21 November 2022 under case no. 507/2022 is set aside and replaced with the following order:
- “(a) The interim protection order granted on 11 May 2022 under case no. 507/2022 is discharged.
- (b) The application for a final protection order is dismissed.
- (c) The applicant must pay the respondent’s costs on the attorney and client scale, such costs to include the costs of two counsel.”
- (6) The respondent must pay the appellant’s costs of the appeal and the cross-appeal, including the costs of the applications referred to in paragraphs (1) and (2) on the attorney and client scale, such costs to include the costs of two counsel.

AC DODSON AJ
Acting Judge of the High Court
Gauteng Division, Johannesburg

I concur

J MOORCROFT AJ
Acting Judge of the High Court
Gauteng Division, Johannesburg

Counsel for the appellant:

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Counsel for the amicus curiae: Ms K Van Heerden; Ms B Meyersfeld and Ms T Pooe instructed by Women's Legal Centre

Date of hearing: 3 August 2023

Date of Judgment: 13 October 2023

This judgment was prepared and authored by the acting judges whose names are reflected and is handed down electronically by circulation to the parties' legal representatives by email and by uploading to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 13 October 2023.