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

IN THE REPUBLIC OF SOUTH AFRICA

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

Case Number: A3069/2021

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

DATE SIGNATURE

In the matter between:

S: C P APPELLANT

and

S: A RESPONDENT

JUDGMENT

STRYDOM, J

Introduction

[1] This appeal lies against a portion of the judgment and order of a Magistrate (the *court a quo*), handed down on 26 April 2021 in terms of which a final

protection order (the final order) in terms of section 6(4) of the Domestic Violence Act[1] (the Act) was granted against appellant in favour of the respondent.

[2] The appeal was only aimed at a portion of the judgment and order as the learned Magistrate only ordered a portion of the interim protection to become final. The appellant was ordered:

a. Not to commit the following acts of domestic violence- not to verbally abuse the Respondent in any manner;

b. Not to enter the residence at […] T[…] […] Street, Glen […] without prior arrangement with the respondent.

[3] The appellant still dissatisfied with the order filed an appeal against the judgment and order. The grounds for appeal are essentially that the learned Magistrate erred in her finding that:

a. A mere denial by the appellant of engaging in any verbal abuse with the Respondent is insufficient to prevent a confirmation of the interim Order;

b. The quoting of exact phrases verbatim by the respondent on several separate occasions was sufficient to have the interim order confirmed in respect of verbal abuse;

c. The respondent had proved on a balance of probabilities that the phrases referred to in paragraph b above had been uttered by the appellant and if so, that such utterances had been directed at the respondent;

d. The appellant had, on a balance of probabilities, engaged in verbal abuse towards the respondent, especially in light of the credibility findings made by the Court in respect of the respondent's conduct and flawed evidence; and

[1] Act 116 of 1998.

e. The respondent had made out a *prima facie* case for verbal abuse.

[4] It is further submitted on behalf of the appellant that the learned magistrate erred in failing to consider the prejudice caused to the appellant by prohibiting the appellant from entering the residence of the respondent without prior email arrangement with the respondent.

[5] It is further stated in the Notice of Appeal that the Court should have found that the respondent had not proved on a balance of probabilities that the appellant had engaged in verbal abuse towards the respondent; that the respondent was not entitled to limit the appellant's access to the residence and that the respondent's Interim Protection Order should have been dismissed with costs.

Factual Matrix

[6] The respondent (complainant in the court *a quo*) made an application for an Interim Protection Order against the appellant (respondent in the court *a quo*), her husband, in terms of s 4(1) of the Act whilst the parties are involved in divorce proceedings.

[7] At the time, the parties were still married, but lived separately; the appellant living with a friend and the respondent in the erstwhile matrimonial home, belonging to the appellant, situated at […] T[…] […] Street, Glen […]. They have two minor children.

[8] In her ex parte application, the respondent highlights the alleged abuses she allegedly experienced, including verbal, emotional, psychological, and financial abuse.

[9] As far as the verbal abuse is concerned the respondent stated that the appellant had sworn at her, has made it a habit to swear at her, and has used swearing at her as a tool to destroy her self-esteem and confidence. In addition she stated that the appellant frequented the erstwhile matrimonial home on a

regular basis not so as to visit the minor child but to harass and intimidate her by spying and starting unnecessary fights with her.

[10] The appellant in his answering affidavit denied that he swore at the respondent but averred that he does not dispute that he swears, but to the knowledge of the respondent, he has always sworn as part of his daily vocabulary. He stated that he does not scream at the respondent and has done his level best not to engage with her since they separated.

[11] Concerning the respondent's allegation that he was showing up at the matrimonial home frequently unannounced, the appellant stated that he visits the children at the former matrimonial home on a regular basis and that the respondent was well aware that he visit the children in the afternoons and has never objected to him doing so. He would enquire from the *au pair* whether the respondent was home to avoid contact with her which could lead to confrontation.

[12] No oral evidence was called for by the court a quo and the matter was decided on affidavit and pursuant to argument.

[13] What becomes clear when the evidence is considered is that a factual dispute manifested itself on the papers. The respondent sketched a picture of regular verbal abuse and swearing, whilst this was denied by the appellant.

How to deal with conflicting evidence on the return day of a protection order?

[14] Section 6(4) of the Act provides that after a hearing on the return day pursuant to the granting of an interim protection order and after considering any evidence previously received and further affidavits or oral evidence, the court must issue a protection order if the applicant has shown on a balance of probabilities that the respondent committed or is committing an act of domestic violence.

[15] The learned magistrate fully set out in her judgment the various acts of domestic violence contained in the definition section of the Act and is not repeated in this judgment.

[16] In paragraph 169 of the judgment the magistrate found and I quote:

> "that sufficient evidence was placed in in the applicant's application to make out a prima facie case that the Respondent was committing or committed acts of domestic violence".

[17] In paragraph 171 of the judgement, the learned magistrate repeats that a *prima facie* case was made out by the applicant. However, I am of the view that the magistrate erred in her finding that what was required of the applicant was to make out a *prima facie* case. The test, rather, is whether the applicant on a balance of probabilities established her case. It should be noted that the magistrate during the course of her judgment applied the correct test but towards the end of her judgment fell back on the incorrect standard of proof.

[18] I now return to the question of how conflicting versions contained in the affidavits of the parties should be dealt with. In *Johnstone v SLS*[2] Windell J, quoting Corbett JA in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* found as follows concerning how the facts should be established upon which a finding on a balance of probabilities can be made:

> "although a court dealing with domestic violence should […] avoid a formalistic and technical approach to the evidence, it is still, required to evaluate the evidence and to make a finding on the probabilities. The approach to be taken to factual disputes on application papers was set out in Plascon-Evans Paints Ltd v Van Riebeeck (Pty) Ltd by Corbett JA to the following effect:
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> 'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide

[2] *Johnstone v SLS* 2022 (1) SACR 250 (GJ).

dispute of fact […] If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court…and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks […] Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers[…]"

[19] Windell J further notes that

"a court must always be cautious about deciding probabilities in the face of conflicts of fact in affidavits. Affidavits are settled by legal advisers with varying degrees of experience, skill and diligence and a litigant should not pay the price for an adviser's shortcomings. Judgment on the credibility of the deponent, absent direct and obvious contradictions, should be left open. It remains then to establish whether the averments in the answering affidavit, are such that they are clearly untenable and can be rejected outright on the papers or whether they give rise to a genuine factual dispute relating to the subsequent events."

[20] The court will now consider the findings of the magistrate applying the test set out hereinabove.

The factual findings of the Magistrate

[21] Pertaining to verbal abuse the court *a quo* found that the respondent was able to quote exact phrases, *verbatim***,** with reference to several separate occasions when she allegedly was verbally abused by the respondent. The verbal abuse consists of swearing, shouting, and threatening the respondent.

[22] The respondent stated that the appellant said to her on occasions that she must "*fucking watch herself", "that she is threading on thin ice"* and that "*her fucking time will come".* She stated that these utterances were made by the appellant as a tool to destroy her self-esteem and confidence. In answer to

these allegations, the appellant stated that he does swear but to the knowledge of the respondent has always sworn as part of his normal vocabulary. He denied that he swore at the respondent. He denied that he uttered the quoted phrases and said that he told her that if he does not see her face again it will be too soon.

[23] It was argued on behalf of the respondent before us that the denial of the appellant was bald and unsubstantiated and, consequently, did not create a real, genuine, or bona fide dispute of fact.

[24] In paragraph 18 of the appellant's answering affidavit, the appellant stated that he cannot recall whether he used the words "*sort me out", "take me out", "take the kids away" or "fuck me up".* If he used these word it was never intended to be a threat and the respondent knew this. He stated that when at the matrimonial home the respondent had the propensity to harass and try to provoke him. He stated that as far as possible he avoided engagement with the respondent as she is the one who would become erratic, moody, and volatile with violent outbursts. The respondent acknowledged that she has been diagnosed being bipolar but stated that the appellant constantly tried to trigger bipolar mood swings.

[25] The appellant filed a supplementary affidavit and attached thereto affidavits from, Ms Devon Prinsloo the *au pair,* and the longstanding helper at the matrimonial home, Ms Nancy Futheni. Ms Futheni described the appellant as a calm man and that she had not seen him get angry in all the time she has been employed by the family. She said that it was the respondent who will shout and scream at the children. She stated that she never saw the appellant scream, swear, or shout at the respondent. Ms Prinsloo also described the appellant as a calm person and stated that he never in her presence acted abusively towards the respondent. It is the respondent's suggestion that Ms Futheni made a false affidavit in order not to lose her employment. It should be noted that this statement about Ms Futheni losing her employment at the matrimonial home in fact materialized as the respondent terminated her employment.

[26] It should further be noted that the respondent on two occasions attempted to have the appellant arrested for alleged breaches of the interim protection order. She could not convince the police persons involved that the appellant was in fact in breach of the order.

[27] The court *a quo,* correctly in my view, found that the alleged acts of domestic violence must be objectively found to give rise to a reasonable apprehension of harm which was deserving of protection by a final order. A reasonable apprehension of harm is one that a reasonable person might entertain on being faced with the facts which a court finds to exist on a balance of probabilities. The court was referred to the judgment of *Silberburg v Silberburg*[3] in this regard.

[28] The court *a quo* disbelieved the respondent on a number of issues and partially set aside the interim protection order to this extent. Pertaining to emotional and psychological abuse the court found "*the Applicant to be disingenuous with the truth."* As far as the allegations of physical abuse are concerned, the court found that the respondent contradicted herself. This would amount to a negative credibility finding. In relation to the alleged financial abuse the court again found that respondent was disingenuous concerning certain aspects.

[29] Despite these credibility findings the court was prepared to accept her evidence as far as verbal abuse is concerned. This was done on the basis that the respondent could quote "verbatim" what the appellant allegedly uttered. This finding in my view, disregarded the version put forward by the appellant. He denied uttering those words but admitted that both parties would use foul language when they spoke to each other. This answer may be bald but in some cases, nothing more can be stated than a denial. If a person says you have sworn at me and the other person denies this, nothing much further can be said to substantiate the denial. In such a case the denial creates a real, genuine or factual dispute. In *Wightman t\a JW Construction v Headfour (Pty) Ltd*[4] it was found as follows:

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[3] [2013] ZAWCHC5.
[4] 2008 SA 371 (SCA) at 371F.

> "A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him."

[30] Moreover, the fact that a person can state "verbatim" what another person allegedly uttered cannot, in itself, provide support for such a version. I am not persuaded that this is so given the accuser has been found not to be a credible witness. In my view, the final protection order should not have been granted in relation to verbal abuse.

[31] This leaves the part of the order that the respondent is not to enter the residence at […] T[…] […] Street, Glen […] without prior arrangement with the respondent.

[32] The appellant has in my view satisfactorily explained why he should be allowed to go to his property where the respondent and his minor children reside. He visits his children and must care for maintenance issues. He must also take groceries and items like dog food. He stated that as far as possible he tries to avoid contact with the respondent. It is clear to this court that the relationship between the parties is acrimonious and contact between the parties should be avoided.

[33] In my view, the order of the court *a quo* that visits can only take place with prior arrangement goes too far. I can foresee trouble if an arrangement cannot be reached. But equally, I accept that the appellant should not simply arrive unannounced, because this might also lead to conflict. If nothing else, common courtesy suggests that the appellant should at least alert the respondent to his intended visit. In my view, the words "*without prior arrangement with the Applicant"* should be amended to read "*without prior notice given to the Applicant".*

[34] As far as cost of this appeal is concerned section 15 of the Act provides that the court may only make an order as to costs against any party if it is satisfied such

party acted frivolously, vexatiously, or unreasonably. This section may only be applicable in relation to the proceedings in the lower court but provides indication that cost should – only in exceptional circumstances – be awarded in a case where a court is dealing with allegations of domestic violence, even on appeal. The court is of the view that no cost order should be made against any party in this matter, more so considering that the entire final order is not set aside.

[35] In the result, the following order is made:

a. The final protection order is set aside save for paragraph 3.1.2.3 of the interim order which is made final in the following terms: The Respondent is not to enter the residence at […] T[…] […] Street, Glen […] without prior notice given to the Applicant.

b. No order as to cost.

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RÉAN STRYDOM

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

JOHANNESBURG

I agree,

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B. LEECH

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

JOHANNESBURG

Date of hearing: 09 February 2023

Date of Judgment: 28 March 2023

Appearances

For the Appellant:	Mr. D Block
Instructed by:	Kamal Natha Attorneys – At Law
For the Respondent:	Mr. Grové
Instructed by:	Lawley Shein Attorneys