



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

CASE NO: CA & R: 140/2023

Delivered on 19 September 2023

In the matter between:

THE STATE

and

AKHONA BENYA

REVIEW JUDGMENT

Bloem J

1. The accused was charged in the magistrate's court, East London "of contravening section 17(b), read with sections 1, 5, 6, 7 and 17 of the Domestic Violence Act, Act 116 of 1998 – contravening a protection order". His legal representative handed a written statement by the accused into court, in which the accused set out the facts which he admitted and on which he pleaded guilty. The magistrate was satisfied that the accused had contravened the prohibitions contained in the protection order that was granted against him on 29 March 2022. According to the protection order, he was prohibited from abusing, assaulting, threatening, harassing or stalking the complainant, his grandmother. He was convicted of "the offence" with which he was charged and sentenced to pay a fine of R4 000 or to undergo twelve months' imprisonment, which was wholly suspended for five years on condition that he not be "*convicted of the contravention of section 17(1) of Act 116 of 1998, committed during the period of suspension*".

2. My preliminary view was that there were two difficulties with the proceedings before the magistrate. The first was the section of the Domestic Violence Act under which the accused was charged. The second was the section of the Domestic Violence Act to which reference was made in the suspensive condition in the sentence.

3. The first difficulty is dealt with. Section 17 of the Domestic Violence Act was amended by section 22 of the Domestic Violence Amendment Act 14 of 2021. The amendment commenced on 14 April 2023. Since the alleged offence herein was committed on 19 September 2022, the unamended provisions of the Domestic Violence Act apply. Until 14 April 2023, section 17 of the Domestic Violence Act read as follows:

“Notwithstanding the provisions of any other law, any person who-

 - (a) contravenes any prohibition, condition, obligation or order imposed in terms of section 7;
 - (b) contravenes the provisions of section 11 (2) (a);
 - (c) fails to comply with any direction in terms of the provisions of section 11 (2) (b); or
 - (d) in an affidavit referred to section 8 (4) (a), wilfully makes a false statement in a material respect,

is guilty of an offence and liable on conviction in the case of an offence referred to in paragraph (a) to a fine or imprisonment for a period not exceeding five years or to both such fine and such imprisonment, and in the case of an offence contemplated in paragraph (b), (c), or (d), to a fine or imprisonment for a period not exceeding two years or to both such fine and such imprisonment”.

4. There was no evidence before the magistrate to support a conviction in terms of section 17(b) of the unamended Domestic Violence Act, but sufficient evidence to support a conviction in terms of section 17(a) thereof. On the facts, the accused should have been charged with and convicted of having contravened the provisions of the unamended section 17(a) of the Domestic Violence Act.

5. The second difficulty is that the sentence refers to section 17(1) of the unamended Domestic Violence Act, when there was no such section.

6. The magistrate requested that the above difficulties be reviewed and corrected. I requested the office of the Deputy Director of Public Prosecutions in Makhanda to express an opinion on the magistrate’s request, particularly whether the charge sheet can, at this stage, be amended, regard being had that section 86 of the Criminal Procedure Act which allows for the amendment

of a charge “*at any time before judgment*”; and what should happen to the conviction and sentence if the charge cannot be amended at this stage.

7. The Director of Public Prosecutions provided this court with an opinion prepared by Mr Maarman of that office. I expressed my gratitude to Mr Maarman for his helpful opinion. Counsel submitted that it was apparent from his plea, that the accused, although not mentioning section 17(a) therein, intended to plead guilty to having contravened the prohibitions contained in the protection order in accordance with the unamended section 17(a), and not section 17(b), of the Domestic Violence Act. He was of the view that the accused was accordingly not prejudiced by the erroneous reference in the charge sheet to section 17(b) of the Domestic Violence Act.
8. Regarding the reference to section 17(1) of the Domestic Violence Act in the sentence, counsel submitted that it appears to have been an error on the part of the magistrate, who evidently had the provisions of the unamended section 17(a) in mind. In my view, the magistrate must have laboured under the erroneous impression that the amended section 17(1) applied to this case. The provisions of the unamended section 17(a) are the same as those of the amended section 17(1). I agree with Mr Baartman, that in both instances, there was reference to a wrong section of the Domestic Violence Act with no prejudice to the accused.
9. Counsel’s submission, that the charge sheet cannot be amended on review, must be sustained. Section 86(1) of the Criminal Procedure Act provides that a charge sheet may be amended at any time before judgment. In this case the magistrate had already delivered judgment. It follows that the effect of the delivery of the judgment is that the charge sheet cannot be amended under section 86 of the Criminal Procedure Act.¹
10. Mr Baartman submitted that the solution to the first problem is to be found in section 270 of the Criminal Procedure Act, which reads as follows:
 “If the evidence on a charge for any offence not referred to in the preceding sections of this Chapter does not prove the commission of the offence so charged but proves the commission

¹ *S v Mgqele* 2006 (GDR) 0977 (T) paras 11 and 12.

of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved.”

11. The first point to be made is that section 270 can be invoked only in respect of an offence not referred to in Chapter 26 (sections 256 to 269A) of the Criminal Procedure Act. In this case, the charge that was put to the accused was not in respect of an offence referred to in any of the above sections. The next enquiry is whether the essential elements of the alleged competent verdict, that is a conviction under the unamended section 17(a), were included in the original charge. As pointed out above, the difference between the unamended section 17(a) and the amended section 17(1)(a) is only the section numbering. The content of both sections is the same. It follows that the charge included the essential elements of the offence under the unamended section 17(a) of the Domestic Violence Act. In the circumstances, the accused should have been convicted, not as charged but, of the offence committed under the unamended section 17(a) of the Domestic Violence Act.
12. Regarding the reference to section 17(1) in the suspensive condition in the sentence, it must follow, regard being had to the preceding paragraphs hereof, that reference should have been made to the unamended section 17(a) of the Domestic Violence Act. For the sake of clarity, the conviction and sentence, as they should have read, are set out in the order hereunder.
13. In the result, it is ordered that the conviction and sentence be and are hereby altered to read as follows:
 - “1. The accused is convicted of the offence contemplated in section 17(a) of the Domestic Violence Act 116 of 1998, in that he contravened the prohibitions imposed on him in a protection order issued on 29 March 2020.
 2. The accused is sentenced to pay a fine of R4 000 or to undergo imprisonment for 12 months. The entire sentence is suspended for five years on condition that the accused is not convicted of a contravention of section 17(a) of the Domestic Violence Act, committed during the period of suspension.”

GH BLOEM
Judge of the High Court

I agree.

BR TOKOTA
Acting Deputy Judge President of the High Court