/SG

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 05/02/2007

CASE NO: 24337/2007
UNREPORTABLE

In the matter between:

LEANNE VAN NIEKERK APPLICANT

And

MAGISTRATE J.S. MBULI N.O. 1ST RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

JUDGMENT

POSWA, J

[1] This application came before me in the unopposed roll, it being for review of the judgment of the first respondent, a magistrate in the district court of Standerton. In the notice of motion the applicant seeks the following orders: –

AGAINST THE FIRST RESPONDENT

"*1.1*

THAT *the First Respondent's decision to make an Interim*

<u>Ex Parte</u> Protection Order against Applicant on the 19th March 2007 under the Domestic Violence case 284/07 in the Standerton Magistrates Court be reviewed and set aside.

1.2

***THAT** the First Respondent be ordered to notify the Applicant in terms of s 5(4) of The Domestic Violence Act, 116 of 1998, to show cause [on a return date specified in the notice] why a protection order should not be issued against Applicant.*

1.3

***THAT** the First Respondent pay the costs of this application only in the event of this matter being opposed by herself.*

1.4
Granting of further and/or alternative relief.

1.5

***AND TAKE NOTICE FURTHER** that the Applicant applies for review on the basis that the Honourable Magistrate J.S. Mbuli N.O. in considering the application*

by the husband of Applicant for an Interim Ex Part protection order against Applicant, admitted incompetent and inadmissible evidence in exercising her discretion as to whether an Interim Ex Parte protection order should be made in the circumstance, and or that Magistrate J.S. Mbuli N.O. merely should have issued a notice calling on Applicant as (sic) to show cause on a return date why a protection order should not be issued against Applicant and that First Respondent, by failing to considering (sic) whether prima facie evidence exists for an Interim Ex Parte protection order, committed a gross irregularity in the proceedings and failed to exercise her discretion judiciously."

AGAINST THE SECOND RESPONDENT

"*2.*
2.1

THAT *the Second Respondent be interdicted from prosecuting Applicant for contempt of court in the Standerton Magistrates Court under criminal case no. B 173/07 on a charge of allegedly breaking the Interim Ex*

Parte Domestic Violence Interdict issued by the Standerton Magistrates Court on the 19th March 2007 under Domestic Violence case no 284/07.

2.2 ***THAT*** the Second Respondent be ordered to stay its prosecution against Applicant, pending the review proceedings of the above mentioned court on the validity of the *Interim Ex Parte* Domestic Violence Interdict issued by the Standerton Magistrates Court on the 19th March 2007 under Domestic Violence case no 284/07.

2.3 ***THAT*** the Second Respondent pay the costs of this application only in the event of this matter being opposed.

2.4 Granting of further and/or alternative relief."

The notice of motion is dated 8 June 2007. Neither respondent has opposed the application.

BACKGROUND

[2] The applicant is married to one Pieter Schalk van Niekerk and their marriage is currently experiencing turbulence, to the extent that they are engaged in a heated dispute in divorce proceedings, under case number 234/07, in this Division. The applicant is the plaintiff in the divorce action. There is one minor child born of the marriage, Alischa, a girl of 6 years. The applicant left the matrimonial home on 11 October 2006. Both parties claim custody of the minor child.

[3] The applicant alleges that the respondent obtained an interim *ex parte* protection order against her, at the Standerton magistrate's court, on 16 October 2006, under Domestic Violence Case Number 911/06. The effect of the order was that she was deprived of the minor child's custody. The child was then living with her. She was prevented from having custody and control over the child, pending final determination, on 29 October 2006, of the dispute between her and the husband. On the latter date, the magistrate awarded custody of the child to her husband, with the applicant being granted access "on an alternate basis", as the applicant puts it in paragraph 16 of her founding affidavit.

[4] The applicant's founding affidavit is silent regarding what transpired on 29 October 2006. In paragraph 17 and 18 of her founding affidavit she states the following:

> "*17.*
>
> *On the 30th of March 2007 I have (sic) issued in the above mentioned Honourable Court under case no 13442/07 a review application against the magistrate who made the final 'Domestic Violence Order' granting joint custody of Alischa [the minor child] to myself and my husband under the pretext of "domestic violence".*
>
> *18.*
>
> *In my notice of motion of the said review application I humbly requested the above Honourable Court to review and set aside the Domestic Violence court order made under case no 911/2006 dated the 16th October 2006 and the 29th day of November 2006 in terms of which my husband was granted custody every alternate week of the child Alischa."*

In paragraphs 19 to 19.12, the applicant made submissions, relying on the provisions of the Magistrates Court Act 32 of 1944, the Matrimonial Affairs Act 37 of 1953 and the Domestic Violence Act (the Act), to the effect that the first respondent, in her capacity as the magistrate, had no jurisdiction to "make either the said interim or final order, since the interim order amounts to a custody order, and the final order to a joint custody order". (Para 19.1)

[5] Why the applicant found it necessary to include in her founding affidavit the court orders of 2007 and the application for review in respect thereof is not apparent. When I initially read the papers, in preparation for the hearing, I discovered that there was non-compliance with the Practice Manual for this Division, to the extent that the annexures were not, as required in C.14.1 of the Practice Manual for this Division, "briefly described". I did not then read the papers. When, however, counsel explained the problems encountered by the applicant and what the striking off of the application would mean to her, also highlighting that the first and second respondents had elected not to oppose the application, I relented and prepared myself to hear argument from Mr Van der

Westhuizen, the applicant's attorney, who represented her in the proceedings before me. Due to time constraints, I did not get as much, by way of argument and submissions, from Mr Van der Westhuizen as I would have liked to have. Consequently, I only became aware of this anomaly, the inclusion of the previous court orders that are not related to the application before me, only when I was preparing the judgment. I have since established that the review application in case number 13442/07 is currently being handled by another Judge in the opposed motions court, in this Division. On the facts before me that application has no bearing on my judgment. Had this application been opposed, I would, in all probability, have ordered the applicant's attorney(s) to pay costs, *de bonis propiis*, for non-compliance with the Practice Manual and, possibly, inclusion of extraneous matters in the application.

[6] What is of relevance in the current application is the averment by the applicant that, on 19 March 2007, the first respondent issued an "interim protection order" against her, in her absence, in which she was "**purportedly acting in terms of s 5(2) of the Act [the**

Domestic Violence Act 116 of 1998], read together with Reg 6 of the Domestic Violence Regulations and Form 4 of the annexure to such regulations". There is no documentary support on these papers for the submission that the first respondent was relying on the mentioned section and regulations of the Act. Form 4 is attached as an annexure to the founding affidavit.

[7] The applicant submits that the respondent, her husband, is engaged in an abuse of the legal protection provided by the Act for individuals who are genuinely in need of such protection in respect of family relations. She submits that the respondent is aggrieved by the fact that she has a love affair with one Herman Divilliers, who is mentioned in the papers, and submits, further, that he is also busy trying to accumulate evidence for use in the divorce proceedings between her and the respondent.

[8] Section 5 of the Act reads as follows:

> "*5. Consideration of application and issuing of interim protection order. –*

(1) The court must as soon as is reasonably possible consider an application submitted to it in terms of section 4(7) and may, for that purpose, consider such additional evidence as it deems fit, including oral evidence or evidence by affidavit, which shall form part of the record of the proceedings.

(2) If the court is satisfied that there is ***prima facie*** *evidence that –*

(a) the respondent is committing, or has committed, an act of domestic violence; and

(b) undue hardship may be suffered by the complainant as a result of such domestic violence if a protection order is not issued immediately, the court must, notwithstanding the fact that the

respondent has not been given notice of the proceedings contemplated in subsection 1, issue an interim protection order against the respondent, in the prescribed manner.

(3)

(a) An interim protection order must be served on the respondent in the prescribed manner and must call upon the respondent to show cause on the return date specified in the order why a protection order should not be issued.

(b) A copy of the application referred to in section 4(1) and the record of any evidence noted in terms of subsection (1) must be served on the respondent together with the interim protection order.

> *(4) If the court does not issue an interim protection order in terms of subsection (2), the court must direct the clerk of the court to cause certified copies of the application concerned and any supporting affidavits to be served on the respondent in the prescribed manner, together with a prescribed notice calling on the respondent to show cause on the return date specified in the notice why a protection order should not be issued.*"

[9] Evidence on the basis whereof the first respondent issued the interim order is contained in a document attached as annexure "B1" to "B2". The relevant portion thereof, in manuscript, being the report by the applicant's husband, in the first person reads:

> "*Ek en respondent is tans besig om te skei. Ek en respondent het ooreengekom dat ons kind weekliks afwissel mbt verblyf tussen ons. Resp. het egter nou 'n verhouding met Herman de Villiers* ***wie tereg staan op kriminele klagtes*** *te Christiana. Ek is bekommerd oor my kind se*

veiligheid wanneer die persoon by respondent kom kuier en oornag. ***Die kind meld dat sy nie van die man hou nie en nie by hom wil wees nie.***" (Emphasis added)

[A simple rendition of that passage is: "*I and the respondent are currently busy divorcing. I and the respondent had an agreement that our child would move between us weekly. The respondent now has a love affair with one Herman de Villiers who is* ***facing criminal charges*** *at Christiana. I am worried about my child's safety when this person visits the respondent overnight.* ***The child tells me that she does not like this man and does not want to be with him***."]

[10] The first respondent's order, as contained in Form 4, appears in the following paragraphs and reads as hereinafter stated:

"*3.1.2.1 om nie die volgende handeling van gesinsgeweld te pleeg nie: [not to commit the following acts family violence]:*

[Then the following appears in manuscript.]

"Nie die kind se selfoon weg te neem sodat Applikant nie met kind kontak kan maak nie."

[Not to take away the child's cellphone, so that the applicant may not contact the child.]

"*4.1.5 Die RESPONDENT word kontak met die volgende kind(ers) vergun:*

[Then follows a name in manuscript.]

Alliscka [should be Alischa].

Op die volgende grondslag: soos gereël waar sonder die teenwoordigheid van Herman de Villiers."

"*4.1.6 Die RESPONDENT moet die kind aan applikant besorg tydens besoeke van Herman de Villiers.*"

The first of 4.1.5 and 4.1.6 is that the respondent (the applicant

herein) is permitted access to the minor child "Allischa" (Alischa, in fact) on condition as per arrangement, that the visit in the absence of Herman de Villiers.

[The Respondent must leave the child in the applicant's care during Herman de Villiers' visits.]

[11] The applicant's husband had also requested the following:

"*Die RESPONDENT moet die volgende huur- of verband-betalings betaal:*

'n Bedrag van R1 650.- p/m asook die agterstallige bedrag van R3 300,00 t.o.v."

[The RESPONDENT must pay the following rent or bond payments in the amount of R1 650.00 pm, as well as the arrear amount of R3 300.00 i.r.o.]

[12] The applicant avers that the first respondent declined to make that order. It does appear, however, that she had already begun making it before she changed her mind. I say so because of the following in paragraph 3.1.2.9:

"*3.1.2.9 om verbandbetalings ten bedrae van R1 650,00 per maand te betaal asook a/s bedrag van R3 300,00; voor1/4/2007*", [to pay bond payments in the amount of R1 6500.00 per month before 1/4/2007],

which was later cancelled, with the first respondent's signature and the words "Add Mag, dated 19/3/07" being proof of the cancellation.

The basis for this demand by the applicant's husband is an alleged discussion between his attorney and the applicant's attorney about an alleged debt owed by the applicant to her husband. A letter attached to the founding affidavit, from the husband's attorneys to the applicant's attorney, refers to the applicant's willingness to pay R90 000.00 to the respondent, who had purchased a car on her behalf. There is also reference to R5 000.00 which the husband had advanced her for her Foschini account. In the letter, the husband's attorney is recorded as having made certain propositions for the refund of the total of R95 000.00, in instalments, if the applicant did not have sufficient funds to repay it in full. The applicant refers to "the content of the letter [as] a fraud and

fabrication".

[13] On 3 May 2007, three weeks before the return date for the interim protection order, the applicant was arrested by the police, based on a complaint by her husband that she had breached the interim protection order. She was released on warning, to appear in the Standerton Criminal Court on 4 May 2007. The relevant portion of the police docket, attached as an annexure to the founding affidavit, reads:

> "*On Saturday 2007/04/07 I phoned my child Alischa and the phone was off. Then on Monday 2007/04/09 at approximately 13h00 I was at home … my wife Leanne van Niekerk came at my house accompanied by my child Alischa Van Niekerk. My wife delivered the child and left. Then while my wife was away,* ***my child Alischa informed me*** *that Mr. Herman De Villiers came to the farm at Pretotius Vlei with a truck on Saturday 2007/04/09 at night ± 21:00. Mr. Herman slept at home and left on the following day. Mr. Herman contravened the court order.*" (Emphasis added)

It was on the strength of that report by her husband, based on the hearsay evidence of the child, that the applicant was arrested and charged.

[14] The applicant denied contravening the interim protection order and annexed Mr Van Niekerk's supporting affidavit in support of her denial. This is in addition to her challenging, before this Court, the validity thereof. Both respondents, having been duly served with the copies of the application, have not filed answering affidavits. Mr Van der Westhuizen, on behalf of the applicant, informed me during the hearing that the second respondent has written a letter in which he indicates that he will abide the judgment of the Court. That leaves the applicant's version totally uncontested.

[15] On the applicant's version, the interim protection order against her was made in her absence. I have already pointed out that the Court must – if it is "satisfied" that there is *prima facie* evidence that the respondent is committing or has committed an act of domestic violence and that undue hardship may be suffered by the complainant as a result of such domestic violence if a protection

order is not issued immediately – issue an interim protection order against the respondent. There can be no doubt that the question as to whether or not there is *prima facie* evidence is to be found on the record of the proceedings before the magistrate. The magistrate did not, in this case, in so many words, state that there was *prima facie* evidence to that effect. I do not, however, think that it is necessary for a judicial officer to state that in so may words, provided that the evidence is objectively in existence from what is before him or her.

[16] On the facts of this case, however, I am of the view that there is no such *prima facie* evidence. The first respondent acted entirely on hearsay evidence. That evidence, in any event, is that of a young child and it is not, in my view, of such a nature that it would entitle the first respondent to take such a drastic step. The applicant's rights in terms of the Constitution of the Republic of South Africa, 1996 (the Constitution) to, *inter alia*, dignity (s 10), freedom and security of the person (s 12), and freedom of access to courts (s 34) are relevant in this context.

[17] Whilst access to courts may not be so obvious, the other rights are

fairly straightforward. It may seem, at first blush, that the right of access to courts refers to a party that wants to bring an action and not one that is defending an action I am, however, of the view that that would be an incorrect interpretation of the section. Just as one has a right to bring his or her concerns before a court of law, so does one against whom a case is being made have the right to defend it in the same court of law before which it is brought. There have, therefore, to be good reasons for denying him or her the opportunity to have his or her defence considered in the same court of law. There was, in my view, in the light of all that I have said herein, no *prima facie* case before the first respondent, against the applicant.

It follows, therefore, that the interim protection order was irregularly issued and that it ought to be set aside. On the evidence, breach thereof has, in any event, not been proved. However, even if it had been breached no offence would have been created – it simply does not exist in law. Consequently, the applicant was wrongly charged with a breach of this non-existent interim protection order. I, therefore, make the following order:

1. *The interim ex parte protection order issued by the first respondent, under case number 284/07, is declared null and void and is set aside.*

2. *The second respondent is interdicted from prosecuting the applicant under the case number B173/07 or at all, on the basis of her alleged contravention of the interim* ***ex parte*** *protection order under case number 284/07.*

3. *There is no order as to costs.*

J N M POSWA
JUDGE OF THE HIGH COURT

24337/2007

Heard on: 18 September 2007
For the Applicant: J.D.T van der Westhuizen Attorneys, Pretoria
Date of Judgment: 05 February 2008