THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 659/2011

In the matter between:

CHRISTOPHER REDDEN DAFFY **Appellant**

and

STEPHEN REDDEN DAFFY **Respondent**

Neutral citation: *Daffy v Daffy* (659/2011) [2012] ZASCA 149 (28 September 2012)

Coram: Lewis, Van Heerden, Cachalia and Leach JJA and Southwood AJA

Heard: 13 September 2012

Delivered: 28 September 2012

Summary: Domestic violence – definition of domestic relationship under the Domestic Violence Act 116 of 1998 – whether two middle-aged brothers who did not share a common household shared a domestic relationship – whether the conduct of one brother constituted domestic violence as envisaged by the Act.

O R D E R

On appeal from: South Gauteng High Court, Johannesburg (Saldulker and Makume JJ sitting as court of appeal):

The appeal succeeds with costs. The order of the high court is set aside and replaced with the following:

'The appeal is dismissed, with costs.'

J U D G M E N T

LEACH JA (LEWIS, VAN HEERDEN AND CACHALIA JJA AND SOUTHWOOD AJA CONCURRING).

[1] The Daffy brothers, Christopher (the appellant) and Stephen (the respondent), are businessmen of Johannesburg. On 4 December 2009, without giving notice to the appellant, the respondent successfully applied to the Randburg Magistrates' Court under the Domestic Violence Act 116 of 1998 for an interim protection order against the appellant. In due course the appellant opposed the confirmation of the interim order. Both sides proceeded to file affidavits and, after several postponements, the matter eventually came to trial. After hearing the evidence of the respondent and his two witnesses, the magistrate decided that the respondent had failed to make out a case for the relief sought and set aside the interim order. The respondent proceeded to appeal to the South Gauteng High Court which, on 27 May 2011, upheld the appeal, set aside the order of the magistrate and confirmed the protection order. With leave of the high court, the appellant appeals to this court, seeking to have the protection order set aside once more.

[2] Before dealing further with the matter, it is unfortunately necessary to record that both parties launched a range of personal attacks upon each other and, in so doing,

raised many issues entirely irrelevant to their dispute. For example, not only did the appellant allege that the respondent had assaulted their mother and threatened her with a knife, an incident which had occurred several years previously and had no bearing on the present issues, but he (or more properly his legal representatives) also sought to burden the papers with the documents filed in two pending high court applications between the parties which, so it was alleged, were to be regarded as 'incorporated by reference' into his papers. The issues raised in those applications were similarly wholly irrelevant to the issue of a protection order. (Fortunately, common sense finally prevailed and they were excluded from the record in this court.) In addition, the record is replete with extravagant and far-fetched allegations of misconduct, as well as hearsay allegations and assertions which were either speculation or shown to be untrue. I appreciate that emotions often become inflamed in the course of litigation between relatives, but legal practitioners should strive to ensure that objectivity prevails.This does not appear to have occurred during the proceedings in the court of first instance (I must immediately record that counsel for the appellant and leading counsel for the respondent who appeared in the appeal were not involved at that stage).

[3] Turning to the facts, both parties are middle-aged businessmen; the appellant who is now 40 years of age being some five years younger than the respondent. They do not share a common household; the appellant lives in Parktown North while the respondent's home is in Riverclub. At the heart of the unpleasantness that arose between them is their interest in a company known as Core Mobility (Pty) Ltd. Although the respondent describes himself as being Core Mobility's sole director and shareholder, the appellant contends that he holds 50% of the company's shares. The appellant in fact launched high court proceedings for an order declaring that to be the case. (Those proceedings were still pending at the time of the trial, its papers having been 'incorporated by reference' into those filed in the magistrate's court). The respondent relied upon those proceedings, and the fact that the papers therein were served upon him at his work, to found an allegation that there was a course of conduct by the appellant which, together with certain threats and other conduct relevant to the company and their business relationship, justified a protection order being granted in his favour.

[4] Whatever the true state of the company's affairs may be, the appellant was employed by Core Mobility for about 10 years until his employment was terminated after a disciplinary enquiry in November 2009. This was the culmination of a period during which personal relations between the two brothers had soured. It appears that the respondent suspected the appellant of having committed various financial irregularities in the conduct of the company's affairs and having abused his position by taking unnecessary trips abroad at company expense. This led to friction between them and there is evidence of their having argued at times, during the course of which the appellant raised his voice. On occasions, the appellant threatened to assault and financially ruin the respondent, using crude and vulgar language. Eventually, on advice from his attorney, the respondent arranged for the disciplinary enquiry already mentioned to be held. The appellant refused to attend and was dismissed.

[5] In the light of this background, the appellant contended that the respondent had misconstrued his remedy and that the dispute between them was really of a commercial nature and not a matter of domestic violence that ought to be dealt with under the Act. It is to this issue that I first turn.

[6] Section 4 of the Act provides for a protection order to be applied for by a 'complainant' – defined in s 1 as '. . . any person who is or has been in a domestic relationship with the respondent and who is or has been subjected or allegedly subjected to an act of domestic violence, including any child in the care of the complainant'. In turn a 'domestic relationship' is defined as meaning:

'. . . a relationship between a complainant and a respondent in any of the following ways:

(a) they are or were married to each other, including marriage according to any law, custom or religion;

(b) they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;

(c) they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);

(d) they are family members related by consanguinity, affinity or adoption;

(e) they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or

(f) they share or recently shared the same residence.'

[7] The respondent relied upon sub-paragraph *(d)* of this definition, and the common cause fact that he and the appellant are brothers, to allege that there was a 'domestic relationship' between them which qualified him as a 'complainant' as envisaged by the Act. However the sub-paragraph could hardly have been more broadly formulated. No degree of relationship, consanguineous or otherwise, is mentioned: and the concept of 'family' is in itself extremely wide. Could the legislature have envisaged that distant cousins having nothing in common save for an ancient mutual ancestor, are for that reason alone to be regarded as having a domestic relationship? That question must surely be answered in the negative.

[8] So how is the definition to be interpreted? It is often necessary in interpreting legislation to look at the underlying purpose of the statutory provisions in question to avoid a purely literal interpretation giving rise to absurdity. In this regard, as appears from the judgment of the Constitutional Court in *S v Baloyi (Minister of Justice & another intervening)* 2000 (2) SA 425 (CC) paras 11-12, the concept of domestic violence is commonly understood as being violence within the confines of the family unit, often hidden from view by reason of the helplessness of the victim and the position of power of the abuser. Significantly also, the adjective 'domestic' has as its common meaning 'pertaining to the home, house, or household: pertaining to one's home or family affairs'[1] while the word 'family' has as one of its general connotations 'the body of persons who live in one house or under one head, including parents, children, servants etc'.[2] Thus the ordinary connotation of a domestic relationship involves persons sharing a common household. Clearly the legislature envisaged the definition to bear a wider meaning than that for purposes of the Act,[3] but I do not believe that it intended that a mere blood relationship, even if close, would in itself be sufficient. After all, to adhere to a definition 'regardless of subject-matter and context might work the gravest injustice by including cases which were not intended to be

[1] Shorter Oxford English Dictionary on historical principles (6ed).
[2] Oxford English Dictionary (2ed).
[3] Cf the Preamble to the Act.

included'.[4] In the context of the further provisions of the definition, some association more than mere consanguinity is clearly required for there to be a domestic relationship.

[9] The definition is poorly framed and probably incapable of bearing a precise meaning. Although for present purposes it is unnecessary to attempt to determine precisely what would be required for such a relationship, the respondent relied solely on the fact that he and the appellant are brothers. As indicated above, that in itself is insufficient. In my view, bearing in mind their respective ages and the fact that they have not shared a common household for many years, it would be absurd to conclude that the mere fact that the parties are siblings means that they shared a domestic relationship as envisaged by the Act. For this reason alone the respondent failed to show that he was a 'complainant' entitled to the protection of the Act.

[10] That is not the only reason why the respondent must fail. He was also obliged to show that the appellant had committed, or would commit, an act of domestic violence against him. In s 1 of the act, 'domestic violence' is defined as meaning:

'*(a)* physical abuse;
(b) sexual abuse;
(c) emotional, verbal and psychological abuse;
(d) economic abuse;
(e) intimidation;
(f) harassment;
(g) stalking;
(h) damage to property;
(i) entry into the complainant's residence without consent, where the parties do not share the same residence; or
(j) any other controlling or abusive behaviour towards a complainant,

where such conduct harms or may cause imminent harm to, the safety, health or wellbeing of the complainant.' (My emphasis.)

[11] It is not necessary to deal with the facts in any detail. The respondent had to show that his 'safety, health or well-being' were threatened by the appellant's

[4] Per De Villiers ACJ in *Town Council of Springs v Moosa & another* 1929 AD 401 at 417.

conduct. The most relevant event (I hesitate to use that description) occurred after the appellant and the respondent had visited their brother who was in jail serving a period of imprisonment. They then went to the respondent's home where, during an argument and at a time when he was heavily intoxicated, the appellant threw a bottle of vodka at the respondent. Fortunately it missed and no harm was done. This was the only act of attempted violence mentioned by the respondent, and it was an incident that occurred almost a year before the respondent instituted the domestic violence proceedings. Despite the appellant having threatened the respondent in crude terms as already mentioned, and apart from this isolated incident, he never actually attempted to do the respondent any physical harm, and his crude utterances were clearly nothing more than empty threats made in anger. There was therefore no reason to think that the appellant would resort to violence against the respondent.

[12] As already mentioned, the respondent made some play of the appellant having brought high court proceedings against him in relation to an alleged interest in Core Mobility to which he alleged the appellant had no claim. That may or may not be so, but that was an issue for the court hearing that dispute to decide. Certainly there was no room for the magistrate to find either that the institution of those proceedings, or the fact that service of the papers was effected at the company's offices, could constitute 'economic abuse' as envisaged in the context of domestic violence envisaged by the Act.

[13] The respondent also alleged the appellant had somehow hacked into the company's computer system, copied company information and had been reading all his emails. All of this was hearsay and speculation, and was alleged without any factual foundation being laid in evidence. But even if the appellant was guilty of conduct of that nature, while it may have been industrial espionage, I do not see how it can in any way be regarded as domestic violence. What the respondent had heard about the appellant's alleged conduct in that regard certainly annoyed him, but it was not suggested that it had caused harm to his safety, health or well-being.

[14] The respondent also averred that he had been harassed and intimidated by the appellant stalking him. In this regard he alleged that he had seen the appellant driving his wife's car along a street in the vicinity of Core Mobility's premises. This

can hardly be regarded as stalking. The respondent also referred to another occasion when the appellant had been parked in his vehicle outside the company's office. Under cross-examination he conceded that he could not say whether the latter vehicle had indeed been that of the appellant, nor whether it was the appellant who had been seated in it. This is illustrative of the groundless nature of the allegations the respondent was prone to make and speaks of possible paranoia on his part.

[15] Despite the only relevant incident of violence having been that involving the throwing of a bottle more than a year before, the respondent testified that he was scared of the appellant and that 'maybe he is going to get me arrested or something'. He also said that he had upgraded the security systems both at his home and at his work to ensure that appellant did not gain unauthorised access. However none of the evidence he gave in regard to the appellant's actions objectively justified him fearing for his life, as he alleged was the case, nor would they have necessitated any additional security arrangements being made.

[16] It is not necessary to discuss respondent's allegations against the appellant in any further detail. It was common cause that after the respondent had been dismissed, the appellant had not seen him for several months until the trial commenced. During that period the appellant had done nothing that either harmed, or threatened to harm, the respondent in any way. Although the respondent may justifiably have been annoyed or irritated by the appellant's conduct, certainly none of the appellant's past actions, either alone or cumulatively, justified a finding that the appellant had harmed or was threatening to harm the respondent's health, safety or well-being, and it is surprising, to say the least, that the high court appears to have concluded otherwise.

[17] For these reasons, the trial court correctly discharged the interim protection order and the high court erred in allowing the appeal. The appeal to this court must therefore succeed, and there is no reason for the costs not to follow the event.

[18] The appeal succeeds with costs. The order of the high court is set aside and replaced with the following:
'The appeal is dismissed, with costs.'

_____

L E Leach

Judge of Appeal

APPEARANCES:

For Appellant:	D J Joubert
	Instructed by:
	Gerhard Botha Attorneys, Johannesburg
	Symington & De Kok, Bloemfontein
For Respondent:	A A Crutchfield (with her J C Viljoen)
	Instructed by:
	Kevin Hyde Attorneys, Randburg,
	Lovius Block, Bloemfontein