



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 287/2021

In the matter between:

DUMISANI VUYISILE TSOBO

APPELLANT

and

BRIDGITTA MATSELISO TSOBO

RESPONDENT

Neutral Citation: *Tsobo v Tsobo* (287/2021) [2022] ZASCA 109 (15 July 2022)

Coram: DAMBUZA, NICHOLLS and HUGHES JJA and SMITH
and SAVAGE AJJA

Heard: 18 May 2022

Delivered: 15 July 2022

Summary: Application for protection order under Domestic Violence Act, 116 of 1198 – applicant must establish, on balance of probabilities, that respondent has committed an act of domestic violence – whether contents of SMSes constituted repeated insults, ridicule or name calling – appellant failed to establish, upon reasonable construction, that contents of the SMSes constituted acts of domestic violence – appeal dismissed with costs.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Reinders J and Nekosie AJ sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Smith AJA (Dambuza, Nicholls, Hughes JJA and Savage AJA concurring):

[1] The primary objective of the Domestic Violence Act 116 of 1998 (the Act) is to provide victims of domestic violence with an effective, uncomplicated and swift legal remedy. It achieves this by providing for a simplified procedure for protection order applications, endowing the courts with a wide discretion – both in respect of the manner of the hearing and the form of relief – and placing upon the courts and law enforcement functionaries extensive obligations to assist and protect victims of domestic violence. While the Act is gender-neutral, the undisputed reality remains that domestic violence is ‘systemic, pervasive and overwhelmingly gender-specific’ and ‘reflects and reinforces patriarchal domination and does so in a particularly brutal form’.¹ It is therefore still the most vulnerable members of society, namely women and children, who are invariably the victims of domestic violence and thus the beneficiaries of the protection accorded by the Act. However, as the facts of this case so vividly demonstrate, the provisions of the very legal instrument which are designed to protect those

¹ *S v Baloyi and Others* 2000 (2) SA 425 (CC).

vulnerable sectors of society from domestic violence, are often abused as a tool of harassment and to reinforce patriarchal domination.

[2] The appellant brought an application for a protection order against the respondent in terms of s 4(1) of the Act in the Bloemfontein Magistrate's Court on 3 June 2019. At the time, the parties were married, but living separately; the appellant living in Pretoria and the respondent in Bloemfontein. They have one minor child, namely a boy who was two years old at the time. They divorced from each other during October 2020.

[3] The appellant sought wide-ranging relief against the respondent, including an order restraining her from committing any act of domestic violence against him. The application was dismissed on the basis that he had failed to establish that the respondent had committed any act of domestic violence. The appellant subsequently appealed against the magistrate's order to the Free State Division of the High Court, Bloemfontein (the high court). That appeal was also dismissed, the high court finding that the appellant had failed to prove that any act of domestic violence had been committed by the respondent. The appeal against the high court order is with the special leave of this Court.

[4] The appellant's application for a protection order was predicated on the following factual matrix. He alleged that during the period 11 December 2017 to 28 April 2019, the respondent had sent him various text messages by way of Short Message Service (SMSes) that were provocative, verbally abusive and vulgar in nature. She had also "verbally and vulgarly" abused him when he had called her to speak to their son and had alienated him from the child. He asserted that her refusal to allow him reasonable contact with the child constituted contempt of a court order. He stated, furthermore, that the respondent had offended him 'to the highest degree', and had insulted and 'derogated' him.

[5] He consequently sought an order prohibiting the respondent from: committing ‘any act of domestic violence’; enlisting the help of another person to commit any act of domestic violence’; entering his residence in Pretoria; entering his place of employment in Bloemfontein; and from directly or indirectly preventing any communication between him and the minor child.

[6] It appears from the record that when the matter was argued in the magistrate’s court, the appellant only contended for an order prohibiting the respondent from committing any acts of domestic violence, and had abandoned all other relief. It seems, however, because the respondent was not represented at the hearing of the appeal in the high court, that the appellant somehow succeeded in resuscitating the abandoned relief in that court. However, in argument before us, counsel for the appellant confirmed that he was pursuing only the relief in respect of the prohibition against acts of domestic violence. This concession was also impelled by the complete absence of any allegations to sustain orders prohibiting the respondent from entering the appellant’s residence or his place of employment. The terms of the appellant’s right of access to the minor child were regulated by the order made in the Rule 43 proceedings. The only issue which accordingly falls for decision is whether or not the contents of the SMSes constitute verbal, emotional, or psychological abuse and harassment as defined in terms of ss 1 (vii)(c) and (f) of the Act.

[7] For some unexplained reason, an unsigned copy of the respondent’s opposing affidavit was placed before the high court, and the matter was accordingly decided only on the appellant’s papers. The high court nevertheless found that the contents of the impugned SMSes could in no way be construed as emotional, verbal or psychological abuse.

[8] Before us, counsel for the appellant confirmed that the respondent had filed a duly attested and commissioned opposing affidavit – a copy of which forms part of the record. He consequently conceded that the contents of that affidavit were properly before us.

[9] In her opposing affidavit, the respondent denied that she had emotionally or otherwise abused the appellant and accused him of abusing legal processes to harass her. She asserted that the appellant was aggrieved by the fact that she had been granted the primary care of the minor child. She mentioned as examples of the appellant's unreasonable conduct, the fact that he had reported her attorney to the Legal Practice Council and had lodged a complaint with the Judicial Services Commission against the Judge who granted the Rule 43 order. He also reported her father to his church council, accusing him of arranging for the baptism of their minor child without his approval.

[10] The appellant's counsel submitted that he was relying on the definition of domestic violence contained in ss 1(vii)(c) and (f) of the Act, namely 'emotional, verbal and psychological abuse' and 'harassment'. The former term is further defined in terms of ss 1(xi) and (xii) as meaning:

'a pattern of degrading or humiliating conduct towards the complainant, including –

(a) repeated insults, ridicule or name calling;

(b) repeated threats to cause emotional pain; or

(c) the repeated exhibition of obsessive possessiveness or jealousy, which is such as to constitute a serious invasion of the complainant's privacy, liberty, integrity or security.'

And the term 'harassment' is defined as:

'engaging in a pattern of conduct that induces the fear of harm to a complainant including –

(a) repeatedly watching, or loitering outside or near the building or place where the complainant resides, works, carries on business, studies or happens to be;

(b) repeatedly making telephone calls or inducing another person to make telephone calls to the complainant, whether or not conversation ensues;

(c) repeatedly sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant.’

[11] Since the appellant’s counsel, in argument before us, relied solely on the contents of the impugned SMSes in support of his submission that the respondent had committed acts of verbal, emotional and psychological abuse, it is necessary to subject them to rigorous scrutiny.

[12] An analysis of the first four SMSes sent on 11 December 2017, between 17:30 and 17:45, reveals that they were really part of the same text message, which had apparently been fragmentised in order to facilitate transmission of their contents. In those SMSes, the respondent blamed the appellant for the breakdown of the marriage and accused him of not loving her and their child. It is clear from the contents that they were written in anger and bitterness. However, there is nothing in those SMSes that could, by any stretch of the imagination, be construed as insulting the appellant to the extent that it amounted to emotional, verbal or psychological abuse.

[13] The next SMS was sent on 1 February 2018. In that SMS, the respondent was remonstrating with the appellant for refusing to hand over her chronic medication, which was in his possession. She also accused him of cruelty.

[14] The respondent again sent SMSes on 10 April, 28 June and 3 July 2018, expressing her unhappiness at being abandoned by the appellant. She cited biblical verses and implored divine justice. She expressed the wish that he had found in his new partner someone who would make him happy, albeit in a sarcastic tone. She also appears to lament the fact that his new partner would have all those things which he apparently did not think she and her son had deserved. There is also nothing in these SMSes that could be construed as abusive in any manner. It is clear that the parties were, at that stage, involved in a bitterly

contested divorce, and it was to be expected that the communication between them would be antagonistic and acerbic.

[15] In the next SMS, sent by the respondent on 1 August 2018, she accused the appellant of infidelity and expressed a desire for the divorce to be finalised. The final SMS was sent almost 8 months later, namely 28 April 2019. In that SMS the respondent described men, in general, to be ‘the enemies’ and said that the last thing she wanted was to have the appellant’s name next to hers. She implored him to finalise the divorce proceedings.

[16] The magistrate did unfortunately not give a reasoned judgment. In his rather terse reasons for the order, he stated that: there were no acts of domestic violence because the appellant resides in Pretoria, whereas the respondent resides in Bloemfontein; the only means of communication between parties was through cellular phone calls and messages; the contents of SMSes were not grave enough to amount to domestic violence; and the appellant only applied for the protection order three months after there had been communication between them. He concluded that “the appellant is therefore not a threat for the respondent neither did he need protection against the respondent”.

[17] The high court found that since there were significant and irregular intervals in the communication between the parties, they were not persistent or repetitive in nature and ‘the erratic occurrence of the communication controverts against acceptance that the communications in this instance amount to emotional, verbal and psychological abuse or harassment’. It furthermore found that even though some of the SMSes contained insults which may well be unlawful, ‘... absent the requisite pattern of repeated conduct, it does not constitute domestic violence’.

[18] In my view, the high court's findings were grounded in a reasonable and judicious construction of the SMSes. Its reasoning was also compelling and cannot be faulted. As I have mentioned previously, although the language used in the SMSes might have been hostile, antagonistic or rancorous, it can by no stretch of the imagination amount to emotional, verbal or psychological abuse. There were relatively long intervals between the SMSes. Furthermore, the SMS in which the respondent accused the appellant of infidelity, and which could possibly, on the appellant's version, be construed as containing some abusive language, was sent more than a year before the application was launched. The last SMS, namely the one sent on 28 April 2019, merely urged the finalisation of the divorce proceedings and did not contain any language that could remotely be construed as abusive.

[19] The contents and tone of the SMSes must be considered against the backdrop of a fiercely contested divorce in which both parties made serious allegations against the other. The appellant was apparently unhappy that the respondent had successfully applied for a Rule 43 order awarding, amongst others, primary care of the minor child to her. According to the respondent this had caused him to become bitter and vindictive. This assertion is indeed borne out by the fact that the appellant has not taken kindly to any person, including judicial officers, whom he perceived to have been on the respondent's side. It was thus not surprising that the tone of the language used by the respondent in those SMSes was occasionally harsh and acerbic. The high court accordingly correctly found that the SMSes did not constitute repeated insults, ridicule or name-calling.

[20] Section 5(2) of the Act requires an applicant for an interim protection order to satisfy the court 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'. In terms of s 6(4), when an application is opposed, the court must, after hearing evidence and if it is satisfied on a balance of probabilities that the respondent has committed or is committing an act of domestic violence, issue a protection order in the prescribed form.

[21] The appellant, having relied on innocuous SMSes, which he received from the respondent months before he launched the application for the protection order, was unsurprisingly unable to establish that he would suffer any hardship as a result of domestic violence if a protection order was not issued immediately. He was also constrained to rely on a contrived construction of the contents of the SMSes, seeking disingenuously to ascribe pejorative meanings to manifestly inoffensive phrases. The appellant has accordingly failed to establish, on a balance of probabilities, that the respondent has committed an act of domestic violence. The appeal must therefore fail.

[22] As I have mentioned earlier, instead of establishing a *prima facie* case of verbal, emotional or psychological abuse, the facts of this case have shown that, in applying for the protection order, the appellant was not *bona fide* and was merely abusing his superior economic position to harass the respondent. Apart from the patently unreasonable and self-serving construction that he has ascribed to the contents of the SMSes, he has also not shirked from confrontation with any person whom he regarded as being on the respondent's side.

[23] In my view his conduct was worthy of sanction by way of a punitive costs order. However, the high court did not make a costs order, probably because the respondent was not represented at the hearing of the appeal. The respondent also did not ask for a punitive costs order against the appellant in this Court, and for that reason the issue was not broached during the hearing. It would accordingly be unfair to burden the appellant with punitive costs, although his conduct may

well be deserving of such an order. However, there is no reason why he should not be ordered to pay the respondent's costs of appeal.

[24] In the result I make the following order:

The appeal is dismissed with costs.

J E SMITH
ACTING JUDGE OF APPEAL

APPEARANCES

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