CASE NO.: CA 77/2011

IN THE HIGH COURT OF NAMIBIA

MAIN DIVISION, HELD AT WINDHOEK

In the matter between:

F.N **APPELLANT**

and

S. M. **RESPONDENT**

CORAM: **SMUTS, J**

Heard on: 2 August 2012
Delivered on: 8 August 2012

JUDGMENT

SMUTS, J.: [1] The appellant was granted an interim protection order on 3 October 2011. After an enquiry was held, contemplated by s12 of the Combating of Domestic Violence Act, 4 of 2003 (the Act), the magistrate discharged the interim order on 24

October 2011. This appeal is directed against the discharge of that interim protection order.

[2] The appellant and respondent are divorced and are the parents of three children. At the time of the proceedings in the court below, they were aged 13, 10 and 8 respectively. Although the parties' names were referred to in the papers, this appeal concerns violence perpetrated upon minor children. I have resolved that the names of the parties and the children are not to be published to protect the identity of the children.

[3] At the time of her divorce, the custody of the children was, pursuant to an agreement between the parties, awarded to the respondent subject to the appellant's right of reasonable access.

[4] The interim protection order was granted on 3 October 2011 upon the application of the appellant as a result of an assault on J (a boy aged 13) although an assault upon P (a girl aged 8) a week before that was also referred to. The protection order granted the appellant interim custody of the three children, J, D and P, subject to access to the respondent upon arrangement with the appellant. The interim protection order also restrained the respondent from any further acts of domestic violence against the children. On the return day on 24 October 2011, the magistrate held an enquiry where the appellant testified and called the respondent's sister in law, Ms G.M. as a witness. Ms G. M. is married to the respondent's brother and is thus not related to the appellant.

The respondent then gave evidence and called his current wife and also the nanny of the children to give evidence as well.

[5] At the conclusion of the hearing, the magistrate discharged the interim order. Before referring to his reasons for doing so, the evidence of the various witnesses is first referred to.

The evidence

[6] The appellant testified that she was divorced from the respondent in 2008.On 30 September 2011 (incorrectly referred to in the transcript of the record as 13 September 2011), she collected her children from the respondent and was informed by the youngest P, that J (aged 13) had been beaten by the respondent. Upon enquiry, J confirmed this to the appellant and proceeded to show her the bruises on his arms, legs and back. He informed her that he was beaten because he was unable to account for the change of N$100 given to him by the respondent to pay for something at school. He told her that he did not know what had happened to the money and that it had probably fallen out of his pocket. But this explanation had not been accepted by the respondent who had beaten him until he provided a different version to his satisfaction. The appellant took J to a medical doctor and caused a case of assault with intent to do grievous bodily harm to be opened with the police on the same day.

[7] Later on the same evening, the appellant took photographs, depicting the marks of the assault. When her evidence was lead by her legal representative, there was an

intention to hand up these photographs in evidence. She testified that she took the photographs herself and confirmed the date and time of doing so. Notwithstanding this, the respondent's legal representative inexplicably objected to those photographs which did not accord with the respondent's version. The following was thus stated by the respondent's representative:

> *"The respondent does not agree to all photos because his version is that he only beat the child on certain parts of the body and he only confirms those photographs."*

[8] The photographs depicting the legs and arms of the child were objected to on this basis, despite the unequivocal evidence of the appellant that she had taken them. The magistrate astonishingly made the following ruling:

> *"Yes but he can object if he feels that it is not the part of the body he hit. If he says, I hit the boy only on this side and those parts as I object to, if it is on the part that he says he did not hit the boy and he object to those (indistinct), then he has got a right to object."(sic)*

Some photographs, in accordance with this extraordinary approach, were only provisionally admitted. Fortunately all 10 photographs, which were provided in those proceedings, form part of the record.

[9] To my even greater astonishment, Ms Shifotoka, who represented the respondent supported this untenable ruling. It flies in the face of the law of evidence. Once photographs are properly identified by the person who took them, they constitute

admissible evidence. It is clearly not open to a party then to object to some of the photographs on the basis that they do not accord with his version. This totally misplaced objection should have been trenchantly overruled.

[10] The photographs depict massive and extensive bruising on the legs, back, shoulder and arms. The bruises are invariably in the form of wide lines which are consistent with injuries inflicted by an object such as a club, stick or, as was testified by the respondent himself, a belt. The photographs would indicate several different blows although I accept that a single strike with a belt could cause bruising on both the back and arm. The bruises on the back of his thighs would indicate at least five strikers on his legs alone. There were a number of further bruises on the upper back and arms. The child's buttocks, which the respondent admitted to beating, were covered and no bruising there was visible. It would appear from the photographs that the skin was slightly ruptured in the middle of scars on the child's upper back.

[11] The appellant also testified that the children were fearful and that they had been traumatised by the event and that this had necessitated taking them for counselling. The appellant also referred to an incident a week previously when P was beaten and said that she had sustained bruises on her leg.

[12] Ms G. M. testified that she saw the children on the following day. It was apparent from the evidence that she knows the children well and that observed fear on their part. She indicated that she had once previously also noted that P had exhibited fear. She

also noted the bruises on J's body and also saw scars on P's body in respect of the assault the week before. Both children gave her accounts of the assaults which accorded with those given by appellant.

[13] The respondent in his evidence said that he had given J's six lashes. But he denied that the beating was severe or that J's skin was torn as a consequence of the beating. He was not able to give any account for the extensive bruising and scars visible elsewhere on the child's body which were strikingly similar to those on the back and torso (which he admitted had been caused by his beatings). He said that the beating was confined to the back and buttocks. He stated that the beatings were necessitated because J was not telling the truth and that he would require a beating until he was satisfied with what the child had told him accorded with his own assessment of what the truth should be. He also admitted that he had also given his daughter, P, then only eight years old, what he termed three lashes with a belt. This was, he said, also for disciplinary reasons. The respondent denied that these lashes had given rise to bruises.

[14] When repeatedly asked if he felt any regret with hindsight concerning the severing of the beating upon J, he eventually indicated that the "six lashes" was "a lot" but said that he would have not done otherwise. The children's nanny, called by the respondent, did not see anything wrong with the beatings. Nor did the respondent's current wife.

The findings of the magistrate

[15] The magistrate was correctly satisfied after listening to the witnesses and perusing the photographs that there had in fact been a severe beating of J by the respondent. He further stated:

> *"I would agree that the spanking was too harsh, looking at the photographs which were handed up".*

[16] The magistrate also accepted that P had been hit by the respondent but because there was conflicting evidence as to whether she has suffered bruises as a consequence, he accepted that "there were no bruises caused by the respondent's spanking of P as both the defence witnesses testified that she never had bruises after the spanking". This despite the fact that the evidence of the appellant and Ms G.M. was unequivocal that there had been bruises on P. Given the fact that the respondent had himself admitted giving P three lashes with the same belt, I find it inexplicable that the magistrate could conclude that the beatings did not result in bruising simply because this was denied by the respondent and the witnesses called by him. This finding is entirely unsustainable upon the evidence and probabilities viewed as a whole.

[17] The magistrate further found that he was not satisfied that there had been domestic violence or abuse committed by the respondent which necessitated the removal of the children from his custody. This approach was premised upon his conclusion that, based upon the evidence before him, this was "an isolated incident" and that there was no evidence that the respondent has "an abusive behaviour (sic) in

general towards the children or that he is a danger for the children". The magistrate then proceeded to discharge the interim protection order in its entirety.

Appeal against the ruling

[18] Mr Marcus, who appeared for the appellant in the appeal submitted that the magistrate's approach was entirely flawed as it was based upon what was termed an isolated incident – presumably with reference to the beating of J. This finding, he argued, ignored the fact that P had been beaten, also with a belt, only a week before. He submitted that the finding that there had been a severe beating was correct but that the magistrate had erred in discharging the interim order in the face of the evidence of a such a severe assault together with the further evidence of the prior assault upon P in the context of the evidence of both the appellant and Ms G. M. concerning the fear of the children. He submitted that the protection order should have been confirmed, particularly because of the fact that children were staying in a home where the other adults were not only unwilling to intervene in order to stop physical abuse but had in fact in their evidence under oath made it clear that they condoned and in fact supported the use of such physical beatings if they considered that it was necessary for the discipline of the children.

[19] Mr Marcus also referred to the approach of this court in stressing the important need of society to root out the evil of domestic violence in giving effect to the protection of the core constitutional value of the inviolability of human dignity[1]. He referred to the definitions in the Act and submitted that that violence upon biological children also constituted domestic violence for the purpose of the Act. This was not disputed by Ms Shifotoka. Mr Marcus also referred to the approach of the South African Constitutional Court in S v Baloyi[2] in referring to domestic violence and its adverse consequences, such as the impact on children "who learn from it that violence is an acceptable way to cope with stress or problems or to gain control over another person".

[20] Ms Shifotoka accepted that both children had been subjected to beatings. In her oral argument, she repeated also referred to the term "beatings" with respect to what had occurred. While she did not fully accept the magistrate's finding that there had been a severe beating of J, she did not vigorously dispute the correctness of that finding. Ms Shifotoka however stressed that the beatings had occurred in the context of disciplining the children and despite the evidence of both the appellant and Ms G. M., stated that it had not been established that the children feared the respondent. She submitted any fear they had was in any event merely temporary and that children would be scared if they had done something wrong and the parent had disagreed with that conduct. Ms Shifotoka even argued that even though the photographs showed excessive bruising, it had not been established that this was the consequence of the respondent's beating. I find this submission entirely untenable (and astounding) in view of the respondent's

[1] S v Bohitile 2007(1) NR 137 HC at 141
[2] 2000(1) SACR 81 (CC)

admission of administering the lashes to J on his back and buttocks with a belt and where no other explanation was ever tendered as to how the further bruising, completely consistent with the bruises which were admitted to have been the result of the beating, could have occurred. Ms Shifotoka submitted that in the absence of the medical evidence, the injuries depicted on the photographs were not properly corroborated. I was astonished how submission of this nature could have been made, given the corroboration provided by her client's unequivocal admission of administering the lashes upon the child. Ms Shifotoka further submitted that this was not a case where the court should interfere with discretion exercised by the magistrate in discharging the interim order.

[21] The beating of both children by the respondent constitutes domestic violence for the purposes of the Act which includes in its definition of domestic relationship the relationship between a parent and a child.

[22] The compelling need to combat the evil of domestic violence is evidenced by the terms of the Act which requires a court to grant a protection order if satisfied that there is evidence that a respondent commits or has committed domestic violence towards a complainant. In this instance, there was plainly sufficient evidence that the respondent had committed domestic violence towards both children. The court had correctly initially granted an interim protection order.

[23] The farreaching impact of protection orders is demonstrated by the statutory injunction[3] upon the part of the clerk of the court in instances of violence upon children to provide a copy of the order to the permanent secretary of the ministry responsible for child welfare to consider taking appropriate action as provided for in legislation relating to the care and protection of children. What concerns me is that I was unable to establish any evidence in the appeal record of a copy of the protection order having been sent to the ministry in question. This important duty must be fulfilled in every matter involving children. The clerk of court is required in peremptory terms to do so and there should be evidence of this fact in a record of proceedings. This is because that ministry is enjoined by the Act to consider such action as may be provided for in other legislation relating to the care and protection of children.

[24] After the holding of an enquiry following the grant of an interim protection order, the magistrate has a discretion to:

(a) confirm or discharge the interim order in its entirety;

(b) confirm specified provisions of the interim protection order;

(c) cancel or vary specified provisions of interim order;

(d) discharge the interim order and substitute another order for the interim order;

(e) if the respondent is present at the enquiry, at the request of the applicant or at its own initiative, add provisions which are not contained in the interim order[4].

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[3]In s8 of the Act.
[4]Section 12(16) of the Act

[25] The submissions by Mr Marcus that the magistrate had erred in discharging the interim order on a basis of being an isolated incident is my view sound. The beating of J which the magistrate himself had acknowledged was severe, was not an isolated incident. There had been the beating of P in like fashion (but not to the same extent) only a week before. The respondent himself had acknowledged that he had administered lashes with a belt upon her.

[26] Having found that there had been a severe beating, it was in view incumbent upon the magistrate to confirm the interim order with or without some variations relating to the issue of control and custody. This was however not done.

[27] The photographs depicting the injuries sustained by J in my view indicate a very severe beating of that child. The beating was not confined to his back and buttocks but left him with extensive bruising on his legs as well as on his arms. The evidence of fear on the part of the children which was hardly disturbed in cross-examination. This is also of importance. As was rightly contended by Mr Marcus, the failure of the other adults in the respondent's home to take any action and in fact by condoning the assault further exacerbates the need for a protection order in the best interests of the children. The fact that the respondent exhibited no remorse and his statement that he would do the same again is yet a further factor which should have led to a final protection order being granted instead of the discharging of the interim order . It would seem to me that not only is a final protection order justified given the respondent's conduct and stated

commitment to the use of excessive violence for the purpose of discipline, but it would seem to me that the entire question of the control and custody of the children would need to be revisited in view of his admitting beatings of two of the three children and his attitude to such violence.

[28] Appeals to this court are governed by s18 of the Act. This section in turn provides that appeals lodged under the Act or to be governed by the provisions of the Magistrate Court Act, 32 of 1944. This court enjoys wide powers under s87 of the latter Act, including confirming, varying or reversing a judgment, as justice may require and taking such further course which may lead to the just, speedy and inexpensive resolution of a matter[5].

[29] Mr Marcus proposed that I consider the provisions of the Children's Status Act, 6 of 2006 in the considering an appropriate course concerning the question of control and custody of the children. A final protection order would need to be of sufficient duration for an application by the appellant to the children's court under s4(3) read with s12 of that Act to be finally determined or for a review of the order of the High Court concerning custody and control of the children under s5 of that Act. It would seem that the duration of the final protection would need to be for 12 months and until 31 July 2013 to enable this process to be finally determined. The Registrar would need to provide a copy of these proceedings to the Ministry of Gender Equality and Child Welfare for the purpose of a welfare report to be prepared and provided to the Commissioner of Child Welfare, Magistrate Court, Windhoek by 30 November 2012 so that the children's court can

[5]Section 87(a) and (d)

further deal with the matter. The appellant would also need to bring her application for a review of the custody regime under s5 or an application under s4(3) read with s12 of Act 6 of 2006 by 15 September 2012.

[30] After both counsel had completed their arguments, I enquired from them as to the issue of both access and maintenance if I were to set aside the order of the magistrate and provide for a final protection order. I also enquired from them as to the duration of such an order. Custody and access to the children, in terms of the interim order, was to be arranged with the appellant. Given the fact the beatings had occurred in a context of seeking to discipline the children, it would not seem to me that the respondent should at this stage be deprived to all access to the children or that it should be dependent upon an arrangement with their mother. It would seem to me that pending the determination of the question of the further custody and control of the children, the respondent should enjoy reasonable access to the children. I stress however that should there be any violation of the protection order which I propose to reinstate with reference to restraining the respondent from committing any act of violence or physical abuse upon the children, the aspect of access would need to be urgently reconsidered.

[31] After a short adjournment, I was informed that the access regime which had previously applied to the appellant could then apply to the respondent, namely reasonable access to the children in the form of alternative weekends and alternative school holidays. The question of maintenance could not be agreed upon. What was however agreed upon was that the respondent would continue to pay for the school

fees of two of the children, namely J and P and that the appellant would continue pay the school fees of D and that all three children would remain on the respondent's medical aid with the appellant to pay any excess in respect of medical treatment. The appellant had in the interim order proceedings claimed N$500.00 as maintenance per child. The respondent has however tendered only N$200.00 as maintenance per child. This aspect would need to be the subject of a further enquiry and determined then. The arrangement which I make below would only be of an interim, nature, pending that further enquiry. I have determined that the sum of N$400.00 in maintenance per child should be paid in that interim period.

[32] As to the question of costs, Mr Marcus informed me that there was no charge in respect of his appearances on 16 July and 2 August 2012 and that costs would only be sought in respect of preparation in respect of both dates. I have no hesitation in granting such order. It would not seem that costs before the court a quo arise.

[33] I accordingly make the following order.

1. The appeal succeeds and the discharge of the interim protection order is set aside and replaced with a final protection order in terms whereof –
   (a) the respondent is ordered not to commit any further acts of violence against his minor children; and
   (b) custody of the minor children born between the appellant and respondent is granted to the appellant for the duration of this order,

subject to reasonable access by the respondent of alternate weekends and school holidays;

(c) the respondent is directed to pay the school fees of the eldest and youngest children (J and P) and contribute to his medical aid in respect of all three children and maintain them on such fund, and further to pay N$400.00 per month maintenance per child.

2. The final protection order is to operate until 31 July 2013.
3. If the appellant seeks to apply the further custody of the children thereafter, she is to bring an application for review under s5 or an application for custody under s4(3) read with s12 of Act 6 of 2006 by 15 September 2012.
4. The Registrar is directed to provide a copy of these proceedings to the Ministry of Gender Equality and Child Welfare (and access to the original photographs) which ministry is to prepare a welfare report for the Commissioner of Child Welfare, Windhoek by no later than 30 November 2012.
5. The respondent is to pay the appellant’s costs of appeal limited to counsel’s preparation including heads of argument in respect of the proceedings on 16 July 2012 and 2 August 2012.
6. The identities of the parties and the children are not to be published and the court file is to be safeguarded and not to be accessible except to the parties, their legal practitioners and the Ministry of Gender Equality and Child Welfare.

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SMUTS, J

ON BEHALF OF THE APPELLANT:	**MR MARCUS**
Instructed by:	**NIXON MARCUS PUBLIC LAW OFFICE**
ON BEHALF OF THE RESPONDENT:	**MS SHIFOTOKA**
Instructed by:	**DIEDERICKS INC.**