

REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF



JUDGMENT

NAMIBIA MAIN DIVISION

Case no: CA 59/2012

In the matter between

YOLANDA ENSLIN

APPELLANT

and

STEPHANUS JOHANNES ENSLIN

RESPONDENT

Neutral citation: Enslin v Enslin (CA 59/2012) [2013] NAHCMD 51 (26 February 2013)

Coram: Smuts, J

Heard on: 25 February 2013

Delivered on: 26 February 2013

Flynote: Interim protection order struck from the roll by magistrate on the return day because it was not signed. Appeal against this ruling upheld. The original order was sought and granted ex parte. The need for compelling circumstances stressed for granting ex parte orders.

ORDER

The order of the court below is set aside and replaced with an order discharging the interim protection order with no order as to costs.

JUDGMENT

SMUTS, J

[1] On the return date of an interim protection order obtained under the Combating of Domestic Violence Act, 4 of 2003 (the Act), the presiding magistrate struck the matter from the roll, ruling that the order which had been served on the respondent was invalid because it had not been signed by the magistrate who granted the interim protection order.

[2] The applicant appealed against that ruling, and is represented by Ms Nambinga. The respondent has not opposed the appeal.

[3] The applicant had approached the magistrate's court on an ex parte basis for interim protection order on 15 June 2012. The basis for the application was described as economic abuse. It concerned allegations of the respondent seeking to dispossess the applicant of items of a luxury nature in the form of television set and surround sound music and entertainment equipment. The items were purchased in the name of the respondent but the applicant claimed that she had provided the funds for their purchase. The parties were then in the early stages of a contested divorce action.

[4] The applicant obtained an interim protection order without service or notice of the application to the respondent. The order was granted by a magistrate, Ms Anyolo. The order was subsequently served and the applicant secured possession of the items in question.

[5] The respondent filed an extensive answering affidavit in advance of the return date on 2 August 2012, disputing the factual basis for the application. At that hearing, the presiding magistrate, Mr Endjala at the outset raised with the representatives of both parties the fact that the interim protection order had not been signed by Magistrate Anyolo on the designated space. The applicant's representative, who was also then Ms

Nambinga, pointed out that a competent order had been granted and that regard should be had to the recorded proceedings of that day and, if need be, the magistrate who had presided could be called to confirm that she had granted the order.

[6] Mr Denk, who appeared for the respondent opportunistically latched onto the issue. He contended that s8(3) of the Act required that the order should be set out in the prescribed form set out in the regulations which in turn made provision for signature by the magistrate who had granted it. He submitted that, without being signed, there was not sufficient proof that it was issued, and that it should be set aside and the matter struck from the roll with costs. This point had not been taken in the detailed opposing affidavit filed by the respondent. The magistrate then proceeded to express the view that the order was null and void and struck the matter from the roll and directed that the applicant should start proceedings afresh.

[7] As I have said, the applicant appealed against this ruling. In the record of proceedings filed on appeal, there is a handwritten extract from Magistrate Anyolo's book which confirms that the order had been given and briefly sets out her considerations in doing so. Whilst it is correct that the form prescribed in the regulations provides for a place for the presiding magistrate to sign the order, it would certainly not seem to me that the absence of a signature on the order which was served and acted upon would mean that the order was void, as found by the court below. The court had after all granted an order in those terms. That was not disputed. The shortcoming (of not having a signature on the prescribed form) was plainly capable of being rectified and would not result in the invalidity of the order itself, as found by the court a quo. At best the return date could, if need be, have been extended to address this issue. But in this instance, it is not all clear to me this was required. In view of the conclusion I have come to in this matter, it is not necessary to further address this issue.

[8] Ms Nambinga, who appeared for the appellant, argued that the matter should be remitted to the court below for an enquiry as envisaged in s12 of the Act. I enquired from her whether the failure to serve the application before the interim order was

granted should preclude such an eventuality and should have resulted in the rule being discharged. Ms Nambinga submitted that the applicant had in her affidavit stated that she apprehended that the respondent may damage or alienate the moveable property in question. But this statement is made without raising any factual matter in support of the apprehension. Ms Nambinga also referred me to the fact that the respondent had said that the appellant should leave the common home. That statement was however contained in correspondence, exchanged between the parties' lawyers. After receiving the letter in which this statement is contained, the applicant had to wait a few days before being able to secure an appointment with her own lawyers. It was after that consultation that the application was brought as a matter of urgency on an ex parte basis.

[9] This court has made it abundantly clear that whilst a magistrate's court may grant an interim protection order on an ex parte basis, there is no entitlement to such an order from that court on that basis¹. I respectfully agree with the approach adopted in that matter. There would plainly need to be compelling circumstances to justify approaching a court on an ex parte basis, thus depriving a respondent of the right to be heard before such an order is granted, particularly where the issue raised in the application was to the knowledge of the applicant disputed, as was the case in this matter. This application had been preceded by correspondence exchanged between the parties' lawyers raising the very dispute at the heart of this application, namely the ownership of the items in question. To then bring an ex parte application in the absence of compelling circumstances should in my view not be permitted and may even amount to an abuse of process.

[10] The respondent had understandably taken the point that the interim protection order should not have been sought and granted on an ex parte basis. But, as Ms Nambinga points out, this issue was not argued in the court below.

¹LS v MB and Another 2010(2) NR 655 (HC)

[11] I then invited her submissions as to why the rule should not have been discharged for this reason. As I have indicated Ms Nambinga referred me to the unsubstantiated apprehension of damage or alienation in the founding affidavit and the preceding correspondence. There is however a dispute in the correspondence concerning the ownership of the items. This would undermine the unsupported assertion of an apprehension of alienation and damage, seeing that the respondent was asserting ownership of those items.

[12] Whilst the presiding magistrate misdirected himself in striking the matter from the roll because the order was not signed, it would not in my view serve any purpose to remit the matter if the order should have been discharged because of the misuse of ex parte proceedings.

[13] It follows that the order made by the court below is set aside. In view of the failure to have served the application, it is my view that the matter should not be remitted for an enquiry but that the interim protection order should be discharged. As far as costs are concerned, the applicant has succeeded in setting aside an order which was given at the respondent incorrect urging. That would ordinarily entitle her to her costs. But in view of the inappropriate invocation of ex parte proceedings in the first place, I would, in the exercise of my discretion, consider that it would be fair and first that no order as to costs be made.

[14] The order I make is that the order of the court below is set aside and replaced with an order discharging the interim protection order with no order as to costs.

APPEARANCE

APPELLANT:

S Nambinga
AngulaColeman Inc.

RESPONDENT:

No appearance