

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case number: HC-MD-CIV-APP-ATL-2023/00019

In the matter between:

KALENGA AUGUSTINUS DAVID

APPELLANT

and

EMILIE SIYAMBA

RESPONDENT

Neutral citation: *David v Siyamba* (HC-MD-CIV-APP-ATL-2023/00019) [2024]
NAHCMD 128 (25 March 2024)

Coram: SCHIMMING-CHASE J *et DE JAGER* AJ

Heard: 9 February 2024

Delivered: 25 March 2024

Flynote: Appeal – Magistrate’s Court sitting as court under the Combating of Domestic Violence Act 4 of 2003 – Wide discretion to make orders under s 12(16)(a) to (e) – Depending on the nature of court a quo’s discretion, an appeal court’s power to interfere with the court a quo’s decision is not limited to the trial court having exercised the discretion capriciously or upon a wrong principle or having failed to bring an unbiased judgment to bear on the matter or not having

acted for substantial reasons – Appeal court at liberty in those circumstances to decide matter on its own views of the merits.

Statute – Interpretation – Section 12(17) – ‘Granting’ of protection order includes both ‘positive’ and ‘negative’ orders – Whatever order follows at the conclusion of s 12 enquiry is ‘a final protection order’ – 7 June 2022 order is ‘a final protection order’ under s 12(17) – 7 June 2022 order made under s 12(16) (d) discharging interim order and substituting another order for it.

Statute – Interpretation – Section 1 – Definition protection order – Section 17 applies to interim and final protection orders – 7 June 2022 order is ‘a protection order’ capable of cancellation under s 17 – Section 17(3) and (5) – Legislature’s intention – Person in whose favour and against whom protection order made may apply for cancellation – For s 17(5) appellant should be regarded as ‘the respondent’ – Appellant could apply for cancellation of 7 June 2022 order – Section 17 application was proper before court a quo – Court of first instance erred in refusing to hear and dismissing the application – Appeal succeeds.

Summary: The appellant obtained an interim protection order under the Combating of Domestic Violence Act 4 of 2003 (the Act) in his favour against the respondent with whom he cohabited at the time and with whom he fathered five children. On 7 June 2022, the interim order was cancelled, the application was dismissed thereby, and the respondent was furthermore ordered to stay in the joint residence while the appellant was ordered to vacate it forthwith. The appellant then launched an application under s 17 of the Act to cancel the protection order granted on 7 June 2022 and to have the respondent evicted from the premises. That application was dismissed on 29 August 2023 because, according to the court a quo, the matter was not properly before it under s 17. The appellant appealed against the whole order of 29 August 2023 and prays that the matter be remitted to the court of first instance for the s 17 application to be heard on the merits. The appeal is opposed on the basis that, whereas the interim order was cancelled, there was no final protection order that the appellant could cancel under s 17. The court a quo was furthermore of the view that, whereas the 7 June 2022 order was an order against the appellant, the appellant could not have it cancelled under s 17.

Held that after holding an enquiry under s 12 of the Combating of Domestic Violence Act 4 of 2003, following an interim protection order, the court a quo had a wide discretion to make an order set out in s 12(16)(a) to (e) of the Act.

Held that whereas the court a quo had a wide discretion, the court's power to interfere with the court of first instance's decision is not limited to the trial court having exercised its discretion capriciously or upon a wrong principle or having failed to bring an unbiased judgment to bear on the matter or not having acted for substantial reasons, and the appeal court is thus at liberty to decide the matter according to its own views of the merits.

Held that when s 12(17) of the Act speaks of a protection order being 'granted', it should be interpreted to include both a 'positive' and a 'negative' order. In other words, whatever order is made at the conclusion of an enquiry under s 12 of the Act is 'a final protection order'.

Held that the 7 June 2022 order is 'a final protection order' as envisaged in s 12(17) that was made under s 12(16)(d) discharging the interim order and substituting another order for it, which order did not bring s 15(a) into operation.

Held that s 17 of the Act applies to an interim or final protection order, and the 7 June 2022 order is 'a protection order' for the purpose of s 17 of the Act.

Held that s 17(3) of the Act applies when 'the complainant' or 'an applicant' wants to apply to cancel or modify a protection order, and s 17(5) of the Act applies when 'the respondent' wants to make such application, and it is the legislature's intention that a person in whose favour and against whom a protection order is made may apply for its cancellation under s 17 of the Act.

Held that the appellant should, for the purpose of s 17(5) of the Act, be regarded as 'the respondent', and with such interpretation, which supports the legislature's intention, the appellant could apply to cancel the 7 June 2022 order.

Held that the s 17 application was proper before the court a quo and it erred in refusing to hear it and dismissing it and concluding that the 7 June 2022 order does not amount to a protection order capable of cancellation under s 17 of the Act.

Held that the court a quo should have proceeded to hear the merits of the s 17 application, and the appeal succeeds.

ORDER

1. The appeal succeeds.
2. The order dated 29 August 2023 under case number DV 285/2022 in the magistrate's court for the district of Windhoek sitting as a court in terms of the Combating of Domestic Violence Act 4 of 2003 (the Act) is set aside.
3. The matter is remitted to the court of first instance.
4. The court a quo is directed to hear the application launched under s 17 of the Act on the merits.
5. There is no order as to costs.

JUDGMENT

DE JAGER AJ (SCHIMMING-CHASE J concurring):

Introduction

[1] Before the court is an appeal from the Magistrate's Court for the district of Windhoek sitting as a court of first instance under the Combating of Domestic Violence Act 4 of 2003 (the Act).

[2] The appeal lies against an order dismissing the appellant's application launched in terms of s 17 of the Act to cancel a protection order and to have the respondent evicted from certain premises.

[3] The appellant, the applicant in the court a quo, is referred to as David. The respondent in both courts is referred to as Siyamba.

Background facts

[4] David and Siyamba have five children together. David says they are unmarried, while Siyamba says they were traditionally married from 1996 to 2016. They cohabited at a residence which, according to David, is his house, a fact disputed by Siyamba. David complained about Siyamba's conduct towards him and his property and obtained an interim protection order against her in his favour from the court a quo. After the return date, the court of first instance, on 7 June 2022, made the following order:

'Having read the documents filed of record and having heard the Applicant and the Respondents¹ in person:

IT IS ORDERED:

1. That the Interim order is hereby cancelled and the application is hereby is dismissed.
2. Respondent must stay in the joint residence, . . . with the children.
3. Applicant must vacate the residence forthwith.'

[5] Siyamba was ordered to stay in the 'joint residence', and David was ordered to vacate, with immediate effect, what he calls his house.

[6] David proceeded to launch an application in terms of s 17 to cancel the protection order granted on 7 June 2022 and to have Siyamba evicted from 'his house'.

¹ There was only one respondent in the court a quo. The reference to 'respondents' in the 7 June 2022 order must be a typographical error. So too the third 'is' in paragraph 1 of the said order.

[7] The application was dismissed on 29 August 2023 after hearing submissions from the parties' legal practitioners and considering 'all the papers on record'. The court of first instance was of the view that the matter was not properly before it in terms of s 17.

[8] The appeal lies against the whole order of 29 August 2023.

The notice of appeal

[9] The notice of appeal contains three so-called questions of law and grounds of appeal.

[10] The questions of law, according to David, are that the court of first instance erred in law and fact in:

(a) refusing to hear the matter and dismissing the application on the ground that it was not proper before the court under s 17.

(b) concluding that the 7 June 2022 order does not amount to a protection order and, therefore, it is not capable of cancellation under s 17.

(c) failing to consider the provisions of s 12(16)(d), (e) and (17) of the Act and failing to find that the 7 June 2022 order is an order under those sections and thereby falls within the ambit of s 17.

[11] The grounds of appeal, as set out in the notice of appeal, are as follows:

(a) The court of first instance, under the 7 June 2022 order, on its own initiative as empowered by s 12(16)(d) and (e), added provisions not contained in the interim order, which provisions granted Siyamba exclusive occupation of a residence which David has a right to occupy, and the order brings into operation s (15)(a) of the Act.

(b) Consequently, s 12(16)(d) and (e) may not be interpreted in isolation of ss 12(17) and 15(a) and, as a result, the 7 June 2022 order falls within the ambit of a final protection order capable of being cancelled in terms of s 17.

(c) In the circumstances, no reasonable court could have found that the application was not properly before the court in terms of s 17, and the court a quo should have proceeded to hear it on the merits.

[12] The submissions made on David's behalf were, as per the notice of appeal and are, as a result, not repeated. It was further argued on his behalf there was no application by Siyamba for relief and, on a literal meaning of s 12(17), and having regard to ss 14 and 15, the order that was granted was a final order.

[13] David's legal practitioner made it clear that the appeal court was not approached on whether the 29 August 2023 order should have been made. It is David's case that he should have been heard by the court a quo, but he was denied that opportunity. Against that backdrop, David prays that the order of 29 August 2023 be set aside and that the matter be remitted to the court a quo for the application to be heard on the merits. No cost order is sought in the notice of appeal.

Opposition to the appeal

[14] Siyamba's opposition to the appeal is based on the following arguments.

[15] The 7 June 2022 order is not a protection order that could be cancelled. Siyamba's legal practitioner pointed out that s 17 speaks about the cancellation of an order. Her counsel argued that the effect of cancellation under the 7 June 2022 order was that the interim order no longer existed, and a final order did not come into existence which could be cancelled by David's s 17 application. It was contended on her behalf that a final order could only exist if the interim order was not cancelled and if it was made a final order. It was argued that, as a result, there was no final order before the court a quo, and the court could not cancel that which was not before it and that which did not exist. Siyamba's case is that since there is no final protection order, it is a nullity to seek a remittal of the matter to the court a quo.

[16] The court was referred to case law² that if an interim order is not confirmed, the application is dismissed, and a discharged order cannot be revived as there is no order that can be revived. Further that, the noting of an appeal against the refusal of a final order where interim relief was granted but the final relief was refused, does not revive the interim order. According to Siyamba, the implication of the discharged rule nisi was that David's application was dismissed on the return date, and the effect was that there was no interim or final order. Although the authorities are sound on the principles referred to above, they do not assist Siyamba's arguments. That is illustrated by the court's findings below.

[17] Siyamba's counsel disputes the submission that the two additional orders in the 7 June 2022 order qualified as a protection order. He argued that 'a grant' can only operate in favour of David because Siyamba did not bring any application seeking an order against David. It was argued that the fact that those two orders were made did not make the order a final order because a final order can only be made following confirmation of a rule nisi in the form of an interim order, and the discharge of a rule nisi can never grant relief.

[18] As to the argument made by David's counsel that the 7 June 2022 order was an order made in terms of s 12(16) at the conclusion of an enquiry and accordingly a final protection order by virtue of s 12(17), it was submitted that the application to confirm the interim order was dismissed, and that the interim order was cancelled.

[19] Siyamba prays that the appeal be dismissed with costs.

The appeal court's power

[20] The court firstly deals with its powers on appeal.

[21] Section 18 of the Act enabled David to appeal to the court in accordance with Chapter XI of the Magistrates' Courts Act 32 of 1944 (the Magistrates' Courts Act). Section 87 of that Act provides that the court of appeal may:

² *Tapuch v Aswagen and Others* [2016] ZAGPPHC 572; *Southernwind Shipyard (Pty) Ltd v Jacobs and Others* (C 7002008) (2009) 30 ILJ 1369 (LC) (7 November 2008); *S.H.G v T.S.P and Others* (162223P) [2023] ZAKZDHC 82 (31 August 2023).

'(a) confirm, vary or reverse the judgment appealed from, as justice may require;

(b) if the record does not furnish sufficient evidence or information for the determination of the appeal, remit the matter to the court from which the appeal is brought, with instructions in regard to the taking of further evidence or the setting out of further information;

(c) order the parties or either of them to produce at some convenient time in the court of appeal such further proof as shall to it seem necessary or desirable; or

(d) take any other course which may lead to the just, speedy and as much as may be inexpensive settlement of the case; and

(e) make such order as to costs as justice may require.'

[22] The powers provided by s 87 of the Magistrates' Courts Act are underscored by s 19(1) of the High Court Act 16 of 1990, which states that the court shall have power:

'(a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by the court, or to remit the case to the court of first instance or the court whose judgment is the subject of the appeal, for further hearing, with such instructions relating to the taking of further evidence or any other matter as the High Court may deem necessary;

(b) to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require.'

[23] After holding an enquiry under s 12 of the Act, following an interim protection order, the court a quo had the discretion to make an order set out in s 12(16)(a) to (e) of the Act.³

³ *FN v SM* 2012 (2) NR 709 (HC) para 24.

[24] The extent of the appeal court's power to interfere with the decision of the trial court, which involved the exercise of discretion, depends on whether that discretion was a narrow or wide one.

[25] Even though the court could not find local case law directly on that point, it finds, for the following reasons, that the discretion which the court a quo exercised was a wide one. In *DVT v Bmt*,⁴ the South African Supreme Court of Appeal, when dealing with the South African Domestic Violence Act, stated that the Act endowed the courts with a wide discretion 'both in respect of the manner of the hearing and the form of relief'. The South African legislation is, however, not the same as its Namibian counterpart, but in *FN v SM*⁵ this court stated that it enjoyed wide powers under s 87 of the Magistrates' Courts Act.

[26] Furthermore, having regard to the provisions of s 12 of the Act, including s 12(16), the nature of the discretion given to the court a quo is a wide one, and it relates to both the manner of the hearing and the form of relief which that court may make at the conclusion of an enquiry under s 12. Lastly, this court's finding is supported by the paramount purpose of the Act, which is to provide for the issuing of protection orders in domestic violence matters. If a magistrate's court sitting in terms of the Act did not have wide discretion, its functionality to achieve that purpose would be severely hampered.

[27] Whereas the court a quo had a wide discretion, the court's power to interfere with its decision is not limited to the trial court having exercised its discretion capriciously or upon a wrong principle or having failed to bring an unbiased judgment to bear on the matter or not having acted for substantial reasons. The court is thus at liberty to decide the matter according to its own views of the merits.⁶

Determination

⁴ *DVT v Bmt* 2022 (6) SA 93 (SCA) para 1.

⁵ *Supra* para 28.

⁶ *Northbank Diamonds Ltd v FTK Holland BV and Others* 2002 NR 284 (SC) at 289F-J.

[28] The court now turns to the main issue for determination. That is, whether the 7 June 2022 order constitutes a protection order that David could cancel under s 17 of the Act.

[29] David's application was dismissed on 29 August 2023 because, according to the court of first instance, the matter was not properly before it in terms of s 17. On 7 June 2022, the court a quo cancelled the interim order and dismissed the application, thereby discharging the interim order. That was, however, not the end of the matter. The court made two further orders. Siyamba was ordered to stay in the joint residence and David was ordered to forthwith vacate the residence. One order entitles Siyamba to occupy the residence, and the other prohibits David from doing so.

[30] From the ruling of the 29 August 2023 order, the following is discerned in respect of the 7 June 2022 order:

(a) The court of first instance was of the view that it did not grant a final protection order on 7 June 2022. It dismissed the application after conducting an enquiry and listening to the witnesses and the parties' evidence, and it made a second order ordering Siyamba to return to the residence after the interim protection order ordered her to be removed from it. There was evidence that, at the time, Siyamba stayed in the house with the children, and it was on that basis that the court considered where she should go and stay with the children. On the other hand, David was not in the house at the time as he was staying at his girlfriend's house.

(b) David's application is based on s 17 of the Act. Section 17(3) of the Act is clear that 'the application is not a final protection order application in terms of' s 17 for cancellation. The court a quo can only cancel an order which was made final, and no order was made final. The said court deemed it fit to make an additional order ordering Siyamba, who was in custody of the children, to return to the residence. As such, it was held that the application was not properly before the court.

[31] From the transcript of the court proceedings conducted on 29 August 2023, the following transpires in respect of the 7 June 2022 order. The court a quo was of the view that the second order was not to evict David from his house because he was not there at the time. The court of first instance was alive to the fact that it could make any other order, but it appeared to be of the view that the second order was not a protection order. It referred to s 17(2) of the Act and found that David could not apply for cancellation because the order was 'against him', and therefore, 'unless there is new evidence', he could not approach the court a quo 'again' to say he wants the order to be cancelled. The court a quo opined that David could apply for a new protection order.

[32] It is necessary at this juncture to examine the relevant structure of the Act.

[33] Section 1 defines a protection order to mean 'an interim or final protection order granted under' the Act. The phrases 'interim protection order' and 'final protection order' are not separately defined in s 1.

[34] The phrases 'protection order', 'interim protection order' and 'final protection order' are all used in the Act. The specific phrase used in any particular section should be interpreted in the context in which it is used within the structure of the Act as a whole.

[35] Part II of the Act, consisting of ss 4 to 20, deals with 'protection orders'.

[36] Section 6 makes provision for an application to be made for a protection order. Section 7 deals with the criteria for the granting and contents of a protection order. Section 8 concerns the granting of interim protection orders, and s 9 provides for service of an interim protection order. If a respondent gives notice of intention to oppose the confirmation of a protection order, s 11 provides that a date is set for an enquiry, and the parties are informed thereof. Section 12 deals with the procedure for holding an enquiry before a final protection order can be made.

[37] Section 12(16) sets out the orders the court may make after holding the enquiry. They are:

- (a) confirm or discharge the interim order in its entirety;
- (b) confirm specified provisions of the interim order;
- (c) cancel or vary specified provisions of the 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 were not contained in the interim order.'

[38] Section 12 concludes with subsec (17) reading as follows:

'A protection order granted at the conclusion of an enquiry is a final protection order.'

[39] When s 12(17) speaks of a protection order being 'granted', it should not be interpreted to mean only a 'positive' order. It should be interpreted to include a 'negative' order. In other words, whatever order is made at the conclusion of an enquiry under s 12 is 'a final protection order'. That is so because 'a final protection order' could be a 'negative' order setting the interim protection order aside, and such order would be 'a final protection order'.

[40] That interpretation is supported by the following. Section 13(1) provides that 'a final protection order' granted under section 12 'must be in the prescribed form'. Regulation 10 of the regulations made in terms of the Act provides that 'a final protection order' contemplated in s 13(1), whether or not it is preceded by an interim protection order or an order for its modification or cancellation as contemplated in s 17, 'must be in a form substantially corresponding to Form 9A, accompanied by Form 9B where appropriate'. Form 9A is headed '(Regulation 10) FINAL PROTECTION ORDER', and that form includes the following possible orders:

'The Court orders that the attached interim protection order be set aside.
The Court orders that the attached interim protection order be discharged and replaced by the attached protection order which is hereby declared final.'

[41] An order setting aside an interim order is a 'negative' order, but, as confirmed under s 13(1) and the relevant forms, such order constitutes 'a final protection order'. An order discharging an interim order and replacing it with

another order is a 'negative' and 'positive' order and, as confirmed under s 13(1) and the relevant forms, such order also constitutes 'a final protection order'.

[42] The court thus finds that the 7 June 2022 order is 'a final protection order' as envisaged in s 12(17). In particular, assuming that the court a quo did not act *ultra vires* the Act, the court finds that the 7 June 2022 order is an order made under s 12(16)(d). The court a quo discharged the interim order and substituted another order for it. None of the other subsecs of s 12(16), including subsec (e) relied on by David, finds application to the 7 June 2022 order. The court a quo did not add provisions which were not contained in the interim order. It discharged the interim order and then made other orders going against the grain of the interim order.

[43] The substituted order did, however, not bring s 15(a) into operation as contended for on David's behalf. Section 15(a) deals with a provision granting 'the complainant' exclusive occupation of a residence. David, 'the complainant', was expressly ordered to vacate the property while Siyamba, 'the respondent', who was never a complainant in the court a quo, was granted occupation of the residence allegedly belonging to David and ordered to stay in it with the children. A plain reading of s 15(a) illustrates that it does not apply to the 7 June 2022 order.

[44] The question remains whether the 7 June 2022 order is 'a protection order' for the purpose of s 17, which David could cancel under that section.

[45] Section 17 makes provision for the modification or cancellation of protection orders. Section 17 uses the phrase 'a protection order'. Applying the definition for 'a protection order' provided in s 1, it means 'an interim or final protection order'. Having found that the 7 June 2022 order is 'a final protection order', the court further finds that it is 'a protection order' for the purpose of s 17.

[46] Next is the question whether David could apply for its cancellation as the court a quo said he could not because the order was made against him.

[47] Section 17(1) provides that 'the complainant', 'an applicant' or 'the respondent' may, in writing, make an application to the court which granted the protection order for its modification or cancellation.

[48] Section 1 defines the words 'complainant', 'applicant' and 'respondent'. The definition of the word 'respondent' in s 1, is 'a person against whom a protection order is sought or has been made'. Section 17(1), however, refers to 'the complainant', 'an applicant' or 'the respondent' as the persons who may make the application. The legislature clearly intended to afford 'the complainant' and 'the respondent' to the protection order an opportunity to have it modified or cancelled.

[49] Section 17(2) sets out the procedure if 'the complainant' or 'an applicant' wants to cancel or modify a protection order. An application must be submitted in the prescribed manner, accompanied by an affidavit and any prescribed information.

[50] If 'the complainant' or 'an applicant' wants to cancel an order, the court must, under s 17(3), on receipt of it, grant the application if satisfied that the application is in accordance with the wishes of 'the complainant' made freely and voluntarily and if it would not endanger such party or any child or other person concerned in the matter. It is clear that the legislature intended to afford 'the complainant' an opportunity to cancel an order obtained in such person's favour.

[51] Section 17(5) provides that if the application for cancellation or modification is made by 'the respondent', the court may grant the application only after an enquiry under s 12 with at least ten days' notice to 'the applicant' and if 'the complainant' was not 'the applicant' to 'the complainant'. In terms of s 17(6), the court may, whether or not it is 'the complainant's' wish to oppose the modification or cancellation, grant 'the respondent's' request only if satisfied that it will not endanger 'the complainant' or any child or other person concerned in the matter. The court must be so satisfied on the basis of all information before it, including the record of the original protection order.

[52] There are two options. Section 17(3) should either be interpreted literally, in which event David, 'the complainant', may have applied for cancellation of the 7 June 2022 order, and the court must, on receipt of the application, have granted it if satisfied as provided in s 17(3). That option seems to go against the legislature's intention referred to in paragraph [50] above because the order is not in David's favour.

[53] Alternatively, since the order was made against David, David, 'the complainant', should, for the purpose of s 17, be regarded as 'the respondent', and as such, David may, under s 17(5), have applied for cancellation of the 7 June 2022 order and the court may have granted it only after an enquiry under s 12 with at least ten days prior notice to Siyamba.

[54] The legislature's intention is clear. A person in whose favour and against whom a protection order is made, albeit 'the complainant' or 'the respondent', may apply under s 17 for its cancellation or modification. To interpret s 17 that David could not apply for cancellation of the 7 June 2022 order under s 17 simply because he was 'the complainant' and the order was made 'against him' would lead to an absurd result, and such interpretation is contrary to the legislature's intention. Such an interpretation is rejected. The second option in the preceding paragraph supports the legislature's intention and is accepted.

[55] In addition to the findings already made, the court further finds that:

(a) The 7 June 2022 order (being a final protection order under s 12(17) having been made under s 12(16)(d) and a protection order for the purpose of s 17) could have been cancelled upon application by David, 'the complainant', and David's s 17 application was proper before the court a quo.

(b) The court a quo erred in concluding that the 7 June 2022 order does not amount to a protection order capable of cancellation under s 17 and it erred in refusing to hear and dismissing David's s 17 application.

(c) The court a quo should have proceeded to hear the merits of David's s 17 application.

Conclusion

[56] It follows that the appeal should succeed.

[57] It is ordered that:

1. The appeal succeeds.
2. The order dated 29 August 2023 under case number DV 285/2022 in the magistrate's court for the district of Windhoek sitting as a court in terms of the Combating of Domestic Violence Act 4 of 2003 (the Act) is set aside.
3. The matter is remitted to the court of first instance.
4. The court a quo is directed to hear the application launched under s 17 of the Act on the merits.
5. There is no order as to costs.

B DE JAGER
Acting Judge

E M SCHIMMING-CHASE
Judge

APPEARANCES

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RESPONDENT:

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