

TANYA ROBYN HADEN TEBB
versus
DENTON LESLIE BOSHI
and
MAGISTRATE NYASHA MARUFU N.O

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 18 July & 24 August 2022

Application For Review

Mr T Rujuwa, for the applicant
Mr A Gumbo, for the 1st respondent
No appearance, for the 2nd respondent

MHURI J: On 31 March 2020 applicant applied for a protection order in terms of the Domestic Violence Act [*Chapter 5:16*] against first respondent. An interim order was issued by second respondent and on 11 June 2020 second respondent after hearing submissions from the parties, granted a reciprocal protection order which order was meant to protect the parties against each other.

Aggrieved by the second respondent's ruling granting such an order, applicant approached this court on review on the following grounds:-

1. that second respondent's decision was grossly irregular
2. that second respondent was also grossly unreasonable and irrational
3. that second respondent's decision was mulcted with bias and malice

Her prayer as per the draft order was that:-

1. the application succeeds
2. second respondent's decision on 11 June 2020 granting a reciprocal protection order to both parties be set aside and substituted with "a protection order in favour of the applicant and her family is hereby granted."
3. Costs of suit

The application is opposed by first respondent and a point was raised that the application is improperly before the court as the order being sought to be reviewed is a

result of a concession made in the court *a quo* as such it is not reviewable but can only be set aside by way of an application.

The parties counsel agreed that they make submissions on both the point *in limine* and the merits and the court makes a determination on both at once.

Applicant's case was that her application before the court *a quo* was guided by the provisions of the Domestic Violence Act (THE ACT) in particular ss 7 to 14 of Part III thereof which outline the procedures a litigant has to adopt from application to decision. The court is bound by the four corners of the Act. First respondent did not make any application in terms of the Act, rendering what the second respondent did, that is issuing a reciprocal order, *ultra vires* the Act.

Applicant submitted further that, the court *a quo* may have seen it prudent to grant a reciprocal order but this had to be done following the procedures provided in the Act. It was her contention that even if a concession was made, if it was made outside the parameters of the Act it is still irregular, null and void. The function of a court is to grant orders that have been properly sought.

Respondent's submissions were that the order that has been brought on review is not one which culminated from the Magistrate's evaluation and conclusions of evidence led by Parties but it was an order made after both Parties counsel chose and consented to curtail the proceedings by agreeing that an order be made which worked in favour of both parties. Such an order cannot be taken on review in terms of s 27 of the High Court Act. There is a different procedure that deals with the setting aside of orders by consent. Respondent referred to the cases of *WASHAYA v WASHAYA* 1989(2) ZLR 195 and *MUKUNDADZVITI v MUTASA* 1990(1) ZLR 342.

The Domestic Violence Act [*Chapter 5:16*] (The Act), provides the procedure to be followed by a complainant who is seeking a protection order against someone. In particular s 7 of the Act is the application form. Section 9 of the Act is the interim order form to be filled and issued by the Magistrate.

In the present case, applicant duly applied for a protection order against first respondent. The application was opposed. An interim order was granted. On the return date, first respondent's legal practitioner made the submission that first respondent is willing to have the court make an order which protects both parties, which is more of a reciprocal order and that this was not a concession but that first respondent did not want to waste the court's

time. In response to the first respondent's suggestion above, applicant's erstwhile legal practitioner submitted he was not opposed to the granting of a reciprocal protection order.

The second respondent then issued a ruling granting the reciprocal order on the reasoning that no evidence was presented to the court by applicant to support the claim that respondent made threats to kill her and have her gang raped, that she did not attach any responses to an email in which first respondent was insulting her, that in as much as the parties are no longer living together, there is need for both of them to be protected and in light of that a reciprocal protection order will be granted as there are fears that applicant might abuse the order if it is granted in her favour to the effect that she will disrupt respondent in instituting his proceedings in so far as the issue of property is concerned and that first respondent counsel made an undertaking to liaise with the other party as regards the return of the property.

From the above reasons in the ruling it is quite evident that the reciprocal protection order was not issued only on the basis of the applicant's consent to first respondent's suggestion. It was also as a result of a consideration and analysis of the evidence placed before second respondent. In that regard, the proceedings or decision are reviewable. The procedures of setting aside an order by consent as enunciated in the case of *Washaya (supra)* referred to by respondent will not apply in this case as applicant is not seeking the setting aside of the consent. Applicant is saying second respondents' decision was grossly irregular unreasonable, irrational and mulcted with bias and malice.

The question is, was the second respondent's decision grossly irregular, unreasonable irrational with bias and malice? The procedures of obtaining a protection order are outlined in the Act, as I have already stated. *In casu*, this was followed, the application was opposed and it is on the return date that first respondent did an about turn towards the end after which the Parties did not make any further submissions. It was at this juncture after applicant had acceded to first respondent's submission on the reciprocal order, that second respondent then proceeded to make a ruling and granted a reciprocal protection order. On the basis of this, I do not find the decision to be tainted with the irregularities applicant is complaining of. Whilst first respondent did not apply for a protection order as is required in terms of the Act, the parties agreed at a later stage that a reciprocal order be granted. It would have been grossly irregular in my view if second respondent had dismissed applicant's application and granted first respondent a protection order. The order was not

a separate order but one order which took into account both parties' interests. It protects both parties from each other.

To that end therefore, the application for review cannot succeed. It is in the result ordered that the review application be and is hereby dismissed with costs.

Rungwandi Mari Rujawa, applicants' legal practitioners
Corius & Co. Attorneys, first respondents' legal practitioners