

NOT REPORTABLE

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO. HC-MD-CIV-MOT-GEN-2017/00022

In the matter between:

L.T.S

APPLICANT

and

G.P.S

MINISTER OF SAFETY AND SECURITY

MINISTER OF JUSTICE

FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT

Neutral citation: *L.T.S v G.P.S* (HC-MD-CIV-MOT-GEN-2017/00022) [2017]
NAHCMD 56 (3 March 2017)

Coram: ANGULA, DJP

Heard: 16 February 2017

Delivered: 3 March 2017

Flynote: Applications and motions – Urgent Application – Section 18(3) of the Combating of Domestic Violence Act 4 of 2003 (“the Act”) - Where an appeal is lodged in terms of section 18 of the Act against a final protection order, the interim order remains in force until the conclusion of the appeal – Whether a proper notice of appeal has been lodged due to the fact that security has not been filed is a matter for the court before which the appeal has been lodged to determine – Application granted.

Summary: The applicant sought an order to enforce certain provisions of an interim protection order she had obtained in her favour from the Katutura Magistrate’s court. One provision of the interim order provided that the respondent, being the applicant’s husband, shall stay away from the common home pending the return date. When the interim order was made final, it did not include the stay away provisions. The applicant then noted an appeal in terms of section 18. Thereafter, the respondent moved back into the common home.

Section 18(3) provides that where an appeal is lodged in terms of section 18 against a final protection order, the interim order remains in force until the conclusion of the appeal. On the basis of the provisions of section 18, the applicant lodged this urgent application to enforce the provisions of the interim protection order that the respondent stays away from the common home. The respondent opposed the application on the basis that there is no proper appeal before court due to the fact that when the applicant filed the appeal, she failed to furnish security. Therefore, according to the respondent, the provisions of section 18(3) do not arise in this matter and the applicant has no right to enforce the interim protection order.

Held that – the court has inherent jurisdiction to condone the non-compliance with its rules. The applicant still has a right to apply for condonation for her failure to furnish security provided she furnishes the court with an acceptable explanation. It is, however, not for this court to decide whether a proper appeal has been noted as the appeal is not before this court; it is a matter for the court before which the appeal has been filed to determine.

Held that – a notice of appeal was indeed filed and therefore the provisions of section 18(3) of the Combating of Domestic Violence Act came into operation and are in force. The interim protection order therefore remains in force until the appeal is finalised. Application granted.

ORDER

1. The application is hereby granted.
2. The first respondent is ordered to move from the common house of the parties situated at erf 7297, Rhino Street, Rhino Park, Windhoek, in terms of the interim protection order; failing which the second respondent is hereby authorized and ordered to remove the first respondent from the parties' said common home.
3. The first respondent is ordered to abide by the terms and conditions of the interim protection order dated 19 May 2016 issued under case no 245/2016, by the Magistrate at Katutura court, until the finalization of the appeal lodged by the applicant under number 131/2016.
4. The second respondent is hereby ordered, whenever necessary, to enforce the terms and conditions of the interim protection order dated 19 May 2016 under case number 245/2016, issued by the Magistrate, Katutura Magistrate's Court.
5. The respondent is ordered to bear the applicant's costs.

JUDGMENT

ANGULA, DJP:

Introduction

[1] The applicant lodged this application on an urgent basis in which she seeks an order to enforce two provisions of an interim protection order which was issued in her favour in the Magistrate's Court at Katutura on 19 May 2016. It is common cause that applicant and first respondent are married to one another; and that they are currently engaged in divorce proceedings before this court under case number I 2005/2016.

[2] The first term of the order which is sought to be enforced is a no contact term and it reads:

"3.4 You must not enter or come near the complainant's residence which is at the following address : Erf 7297 Rhino Street, Rhino Park.

3.5 You must not enter or come near the complainant's workplace, which is at the following address: Ministry of Safety Security. At Complainant's department."

The second provision of the order reads:

"3.10 You must not enter the joint residence which you share with the complainant at the following address: Erf 7297 Rhino Street, Rhino Park, and you are ordered not to prevent the complainant, or any child or dependant of the complainant, who ordinarily

lives at the joint residence from entering or remaining the premises or any part of the premises. This provision shall remain in force until 5 July 2016.

3.11 You are ordered to leave all of the contents of the joint residence in place for the use of the complainant until 5 July 2016.”

[3] The interim order was made final on 21 November 2016. With regard to the exclusive occupation of the premises by the applicants, the final order provided that such exclusive occupation would cease on 20 December 2016. As a result, after 20 December 2016 and on 23 December the first respondent moved back into the parties' common home.

[4] After the interim order was made final of 21 November 2016 the applicant filed a notice to appeal on 8 December 2016, in terms of section 18 of the Act. Section 18 (3) provides that where an appeal is lodged in terms of that section against a final protection order, the interim order remains in force until the conclusion of the appeal.

[5] Lodging an appeal therefore revives the interim court order and such an order remains in force until the appeal has been finalised. In the present matter, it means therefore that that the interim protection order is still in force due to the fact that a notice to appeal has been filed. It is for this reason that applicant launched this application on an urgent basis. The applicant now seeks an order in the following terms:

“1. Dispensing with the forms and service and compliance with the time limits prescribed by the Rules of this Honourable Court as far as may be necessary, and condoning applicant's failure to comply therewith and directing that this matter be heard as one of urgency as envisaged in Rule 73(3) of the Rules;

2. Ordering and directing the second respondent to enforce the provisions of the interim protection order dated 19 May 2016 under application no 245/206, issued by the Magistrate, Katutura;

3. Ordering and directing the second respondent to remove the first respondent from the premises where applicant resides being erf 7297, Rhino Street, Rhino Park, Windhoek, Republic of Namibia in terms of the interim protection order;

4. *Ordering and directing the first respondent to abide by the provisions of the interim protection order dated 19 May 2016 under application no 245/206, issued by the Magistrate, Katutura until the finalization of the appeal number CA 131/2016 in this matter;*

5. *Costs on an attorney client scale against the first and second respondents, jointly and severally, the one paying the other to be absolved;*

6. *Further and or alternative relief.”*

Disputes between the parties

[6] Initially all the respondents opposed the application. At the initial hearing of the matter, the legal practitioner for the second and third respondents, informed the court that they solely opposed the application for the reason that a cost order was sought against them by the applicant. On 2 February 2017, the applicant informed the court that it no longer persists with the prayer for a cost order against the second and third respondents. Accordingly, the second and the third respondents, so to speak, left the stage. This left the first respondent being the only respondent in this application. I will therefore henceforth, only refer to the first respondent as (“the respondent”).

[7] The first respondent is represented by Mr Elago and the applicant represented by Mrs Petherbridge. Both counsel filed comprehensive heads of argument and the court wishes to thank them for their industry.

[8] Initially the respondent took the point of lack of urgency but during the hearing, Mr Elago, informed the court that the respondent would no longer persists with that point. In my view, it was a wise decision on the part of the respondent. The only point which remains, which is also styled a point in *limine*, is that there is no appeal pending before court.

Issue for determination

[9] In view of the of the clear provisions of section 18 (3) of the Act, that the interim court order remains in force until the appeal has been finalised, it would appear to me that the crispy issue for determination is whether there is a notice of appeal pending before court against the final protection order.

[12] It is common cause that the applicant filed a notice of appeal against the final order on 8 December 2016. It appears, further to be common cause that the applicant has failed to provide security for cost in respect of the appeal as required by the rules. In respect of such failure, it is contended on behalf of the respondent that there is no appeal before court. Accordingly, so the argument goes, the terms and conditions of the interim order have not been revived or differently stated are not in operation.

The respondent's arguments

[13] For his opposition, the respondent relies on the provisions of section 18 Act which deals with lodging appeals and section 84 of the Magistrate's Court Act 32 of 1944 which deals with the time, manner and conditions of appeals; and lastly the respondent relies on rule 51 of the Magistrate's Court Rules which deals with appeals in civil cases. The first respondent, in particular, put emphasis on rule 51(3) and (4) of the Magistrate's Court Rules which stipulates as follows:

“(3) An appeal may be noted within 21 days after the date of the judgment appealed against or within 14 days after the clerk of the court has so supplied a copy of the written judgment to the party applying therefore, whichever period shall be the longer.

(4) An appeal shall be noted by the delivery of notice, and, unless the court of appeal shall otherwise order, by giving security for the respondent's costs of appeal to the amount of N\$5000: ...”

[14] Based on the provisions of the said sections and the rules, the respondent submits that the applicant has failed to properly file a notice of appeal as no security has been furnished, which renders the notice of appeal filed nugatory. It is further submitted that the effect of this failure is that there is no appeal and the interim order has not remained in force pursuant to the provision of section 18(3) of the Act. Mr Elago accordingly submits that the final order is the one which is in force and not the interim order as no security was furnished for the appeal. The applicant therefore has no right at the present moment to seek leave to enforce the provisions of the interim order.

[15] Mr Elago further submits that what the applicant could have done is to have brought an application to this court seeking an extension of time for paying security or for leave to be absolved from paying such security and this has not been done. Furthermore, the time period within which to note an appeal has expired and no condonation has been brought by the applicant.

The parties' arguments considered

[16] It is common cause that the appeal is not before this court. This court cannot determine whether the appeal has been properly noted and whether all the requirements for noting an appeal have been met. This court at the moment is faced with an urgent application in which the applicant seeks to enforce the provisions of the interim order in terms of section 18(3) of the Act.

[17] In support of his contention that there is no appeal before court, Mr Elago places reliance on what was said by the court in the matter of *O'Sullivan v Mantel* ¹1981(1) SA 664(W) at 668 B-C. In the matter the court stated as follows:

'The noting of an appeal is not complete until both the delivery of the notice of appeal and giving of security have occurred.'

¹ 1981 (1) SA 664 (W) at 668 B-C

[18] This indeed is correct, however, it is not an absolute rule. The court, before which the appeal is lodged, has the discretion in deciding whether an appeal has been properly noted or not considering various factors in each case.

[19] Such factors include, *inter alia*, whether the appellant has filed an application for condonation for not adhering to all the prescribed requirements (including failure to pay security) for of noting an appeal. It is for the appeal court to consider those matters. In my view it would be improper for this court to decide in advance whether the appeal has been properly noted. This is so given the fact that, even accepting for a moment, that Mr Elago is right that the appeal is not properly before court, there is still, in terms of the rules an opportunity for the applicant to rectify her non-compliance with the rules of the court by filing an application for condonation. This procedure is trite and appears to be dictated by common sense and rules of the court and therefore in my view no authority is required for this statement. There is great deal of case law on this point. The one which is immediately close to home, is the appeal in the matter of *Moraliswani v Mamil*².

[20] The remarks by the court in the *O' Sullivan (supra)* matter was recently repeated by the South African Court at Bloemfontein in context of an application for condonation for the late filing of an appeal where the court had the following to say:

“6. The appellant, as an experienced attorney, could furthermore not have been unaware of the fact that security for the costs of the appeal had to be paid. Magistrates Court Rule 51(4) specifically provides that:

“An appeal shall be noted by the delivery of notice, and, unless the court of appeal shall otherwise order, by giving security for the respondent’s costs of appeal to the amount of R1000:

The noting of an appeal is not complete until both the delivery of the notice of appeal and giving of security have occurred. See O’Sullivan v Mantel 1981(1) SA 664(W) at 668 B-C. Therefore, even in noting the appeal properly there was an inordinate and unexplained delay of about six months.

² 1989 (4) SA 1

7. *The delay of a further three months after eventually receiving the record is also woefully inadequately explained. There is no reason why the appellant could not have attended to his appeal while he was an acting judge. The explanation of attempting to correct the record is vague and does not account for the two and a half months wasted during this process. Condonation for non-compliance with the Rules is not a mere formality. In Uitenhage Transitional Local Council v South African Revenue Service 2004(1) SA 292 (SCA) the following is stated at 297 I-J thereof: “One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court. Condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.”*

[20] It is clear from the above pronouncements by the courts that the courts have the discretion to condone non-compliance with the rules with regard to the requirements for filing or noting an appeal. However, it bears repeating that it is not for this court to determine. The court before which the appeal was lodged will deal with this should it become an issue before that court.

[21] As matters stand now, this court accepts that there is an appeal before court. In terms of section 18 (3) of the Act, the interim protection order has been resuscitated or revived and is in force and of effect until the appeal has been finalised.

[22] In the result, I make the following orders:

1. The application is hereby granted.
2. The first respondent is ordered to move from the common house of the parties situated at erf 7297, Rhino Street, Rhino Park, Windhoek, in terms of the interim

protection order; failing which the second respondent is hereby authorized and ordered to remove the first respondent from the parties' said common home.

3. The first respondent is ordered to abide by the terms and conditions of the interim protection order dated 19 May 2016 issued under case no 245/2016, by the Magistrate at Katutura court, until the finalization of the appeal lodged by the applicant number CA 131/2016.

4. The second respondent is hereby ordered, whenever necessary, to enforce the terms and conditions of the interim protection order dated 19 May 2016 under case number 245/206, issued by the Magistrate, Katutura Magistrate's Court.

5. The respondent is ordered to bear the applicant's costs.

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H Angula, DJP

APPEARANCES:

For the Applicant:

MS PETHERBRIDGE

Petherbridge Law Chambers

For the First Respondent

MR ELAGO

Tjombe-Elago Inc.