



**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE LOCAL DIVISION, BHISHO)**

**Case No: EL1207/2021**

In the matter between:

**VUKILE VIWE TEMBE**

**Applicant**

And

**ZINGISA TEMBE**

**Respondent**

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**JUDGMENT**

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**BESHE J:**

[1] Applicant approached this court on an urgent basis seeking suspension of an order that was granted by the East London Magistrates' Court on the 27 August 2021.

[2] The said order can be aptly described as a protection order following respondent's application in terms of *Section 4 (1) of the Domestic Violence Act<sup>1</sup>* (DVA). The order was granted in favour of the respondent against the applicant. The order *inter alia* precludes the applicant from entering number 18 Coral Meadows, Beacon Bay, East London pending the division of the party's estate.

[3] The following facts are common cause between the parties:

The parties were married to each other out of community of property with the inclusion of the accrual system on 6 January 2011. Two minor children were

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<sup>1</sup> Act 116 of 1998.

born of the marriage. The parties are joint owners of the property which is the subject matter of the application. The parties got divorced on 29 July 2020. They however continued living at the property as family.

[4] According to the applicant, from around December 2020 their relationship got under strain and became acrimonious. In a bid to stop what applicant alleges was verbal and physical abuse by the respondent, he sought a protection order against her. He succeeded in obtaining an interim protection order against her, which was returnable on the 11 November 2021. On 3 August 2021 applicant caused a letter to be addressed to the respondent demanding his share of the movable assets in terms of the deed of settlement as well as for their immovable property to be sold. The respondent in turn approached the Magistrates' Court for a protection order against the applicant. An interim order was issued in her favour. Same was confirmed on the 27 August 2021 (The impugned order). The applicant has noted an appeal against the said order.

[5] In addition to the suspension of the Magistrate's order, the applicant also seeks an order that the respondent be interdicted and restrained from denying him access to the property.

[6] Not only is the application opposed by the respondent, in addition to the opposition, respondent makes a counter-application for an order in the following terms:

*That the order of the Magistrate, East London sought to be appealed against be carried into execution regardless of the pending appeal and that the protection order granted against the applicant (main application) continues to operate.*

[7] Applicant complains that he has no place to stay. Further, that he does not have means to arrange alternative accommodation. He sleeps in his car. He does not have access to his children. He does not have access to his medication.

[8] *Section 18 (1) of the Superior Court Act*<sup>2</sup> provides that unless the court, under exceptional circumstances orders otherwise, the operation of and execution of a decision which is the subject of an application for leave to appeal or appeal, is suspended pending the decision of the appeal or application for leave to appeal. *Subsection (5)* provides that for the purposes of *Subsections 1 and 2*, a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal is lodged with the Registrar in terms of the *Rules*.

[9] In this regard in *Section 78 of the Magistrates' Court Act*<sup>3</sup> provides that: *where an appeal has been noted, the court may direct either that the judgment shall be carried into execution or that the execution thereof shall be suspended pending the decision upon the appeal. That the direction may be made on such terms, as the court may determine as to security for the due performance of any judgment which may be given upon appeal.*

It is trite that at common law generally, the execution of a judgment is automatically suspended upon the noting of an appeal and that judgment cannot be carried out and no effect is to be given to it.

[10] It is not clear why this application(s) was not made in the Magistrates' Court, in the court where the order sought to be appealed against was issued.<sup>4</sup> But as I indicated, strictly speaking, that application was not necessary because at common law the process of an appeal has the effect of suspending the order appealed against. It is also clear from authorities referred to above that a decision becomes the subject of an appeal upon an appeal being noted against that decision. This therefore puts paid to the submission on behalf of the respondent that because no security has been furnished by the applicant there is no pending appeal to speak of.

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<sup>2</sup> Act 10 of 2013.

<sup>3</sup> Act 30 of 1944.

<sup>4</sup> See Jones & Buckle: *The Practice of the Magistrate's Court in South Africa* 10<sup>th</sup> Edition Volume 1 Van Loggerenberg.

[11] Having said there was no need for an application for the suspension of the Magistrate's order, it is a feature of this case that applicant also seeks an interdict against the respondent – that she be restrained from refusing him access into the house they jointly own. So, it will serve no purpose to remit the matter back to the Magistrates' Court. I have already alluded to the reasons applicant has proffered in support of this prayer.

[12] This has been met not only by resistance by the respondent by also by a counter-application that this court should order that the order sought to be appealed against should continue operate and be carried into execution during the course of the pending appeal.

[13] The opposition and counter-application are essentially premised on the ground that the acrimony between the parties adversely affects their minor children. This seriousness of the situation is also borne out by the fact that there are two contending protection orders. Which is indicative of the constant quarrelling between the parties.

[14] Respondent denies that he applicant does not have a place to stay, that he sleeps in his car.

[15] It was submitted on behalf of the respondent that the exceptional circumstances warranting the order that the impugned order should continue to operate regardless of the appeal of the appeal is that:

The parties are divorced, though they continued sharing the home they own jointly after the dissolution of their marriage, are constantly fighting. Further, that happens in the presence of their children. The Magistrate's order has the effect of protecting both the children and the respondent from the applicant.

[16] It appears to be common cause that the respondent gave instructions to the children's school that applicant should be denied access to them. In the said letter the school authorities are urged not to allow anyone else to collect or have

released to them, the two children other than the respondent. This, however, does not form part of the impugned order. No basis has been laid why the applicant should not have access to his children / denied access to his children. Surely this is not a decision respondent can take unilaterally, arbitrarily and without any due process. The deed of settlement entered into between the parties to incorporation into the divorce decree, the parties agreed that the applicant will have reasonable rights of access to the children.

[17] No case is made in the papers of the applicant being of a danger to the safety or well-being of children. The suggestion made by respondent is that having the applicant back in the house will destroy their children when they witness “*a quarrel between their divorced parents*”. Respondent asserts that because the marriage between the parties has been dissolved, never to be resumed again, applicant no longer has their joint property as his *domicillium* address.<sup>5</sup> That seems to be the high water mark of her case.

[18] In my view, no exceptional circumstances have been shown to exist why the order of the Magistrate should continue to operate pending the appeal. No case has been made that the applicant poses any danger to their children or to the respondent.

[19] In the circumstances, in order to safeguard the respondent and the children, I will order that the Magistrate’s order be and is hereby suspended only in so far as it relates to applicant’s access to the property. The rest of the Magistrate’s order is not suspended.

**[20] Accordingly, the following order will issue:**

**The following parts of the order issued by the Magistrate, Eastern Cape on 27 August 2021 are to remain in force (are not suspended pending the appeal).**

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<sup>5</sup> Paragraph 4 of the respondent’s answering affidavit.

- (a) The applicant is not to threaten the respondent (Mrs Tembe).**
- (b) The applicant is not to insult the respondent.**
- (c) The applicant is not to share respondent's personal information.**
- (d) The applicant is not to intimidate the respondent.**
- (e) The applicant is not to defame the respondent's character.**
- (f) The operation of the remaining part of the Magistrate's order mentioned above is suspended on the following terms:**

**The applicant is to be allowed back into the property on condition that he uses the secondary bedroom as well as the common bathroom. The respondent will use the main bedroom as well as the ensuite bathroom. Applicant is not to enter the main bedroom and ensuite. In respect of those parts of the property that are shared by both parties, namely the kitchen and the living area, the applicant is not to enter those areas in the presence of the respondent.**

**There will be no order as to costs.**

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**N G BESHE  
JUDGE OF THE HIGH COURT**

**APPEARANCES**

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Date Heard : 16 September 2021  
Date Reserved : 16 September 2021  
Date Delivered : 17 September 2021