THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

(Coram: Henney, J et Thulare, J)

CASE NO: A177/21

In the matter between:

DANIELL SEGERMAN	Appellant
and	
ANEES PETERSEN	Respondent
CENTRE FOR APPLIED LEGAL STUDIES	First *Amicus Curiae*
WISE4AFRIKA (NPC)	Second *Amicus Curiae*

Date of hearing: 22 October 2021

Date of Judgment: 24 March 2022 (to be delivered via email to the respective counsel)

JUDGMENT: 24 MARCH 2022

HENNEY, J

Introduction:

[1] This is an appeal against the whole order and judgment of an Acting District Magistrate, handed down on 26 November 2020, in the District Court in Cape Town. Pursuant to a judgment in terms of the provisions of the Protection from Harassment Act 17 of 2011 ("the PHA"), an order was granted in favour of the respondent (the claimant in the court a quo) against the appellant (the respondent in the court a quo).

[2] One of the essential terms of the order is that it, inter alia, prohibits the appellant from telling any other person that the respondent raped her. In this appeal, the appellant argues that the order is wrong in law and in fact, and that it also constitutes regression in the national fight against gender-based violence. According to the appellant, the order stands to be overruled both because it is erroneous, and also because of its impact on millions of women in South Africa.

Amicus application and condonation:

[3] The Centre for Applied Legal Studies ("CALS"), as well as Wise4Afrika, sought leave to be admitted as amicus curiae in terms of Rule 16A of the Uniform Rules of court. Both amici sought condonation for the late filing of their application in terms of the rule. The appellant and respondent did not oppose the application of these two organisations to be admitted as amici and, furthermore, did not oppose their respective applications for condonation. Both amici, in their applications, briefly described their interest in these proceedings in terms of Uniform rule 16 (A)(6)(a) and (b).

The submissions of CALS are based on the fact that for decades it has advocated and litigated for victims and survivors of sexual offences to have their rights realised in terms of the Constitution and the law. They submitted that they are thus well-placed to make written and oral legal submissions in this matter, which would be of assistance to this court in the determination of the important constitutional and public interest issues that are at stake.

[4] The second amicus, Wise4Afrika (NPC) ("WISE"), is a registered association not for gain which operates to advance the empowerment of women by challenging patriarchy

through advocacy, and advancing women inspired solutions for empowerment. It is a key role player in the fight against the challenges facing women in South Africa, ranging from survivors and victims of gender-based violence Wise submits that the nature of the present matter falls squarely within the realm of the work that WISE undertakes in its gender-based violence programme. WISE submits that this matter raises pertinent constitutional considerations, as the effect of the court order sought to be appealed has a significant impact on women who are victims of sexual violence, and the existing cases WISE is currently assisting with. It asks to be admitted as amicus herein to address an important aspect which is of relevance to the determination of the present case.

The application for condonation in respect of both amici in terms of Uniform rule 16(A)(9) is granted. The application to be admitted as amici in respect of both parties is granted.

Background:

[5] The appellant and the respondent were in a romantic relationship between 2012 and 2015. They both worked in the fashion industry. The appellant owns a modelling agency and the respondent owned a streetwear clothing brand named "Young and Lazy" ("Y&L"). According to the appellant, during the course of the relationship the respondent emotionally and mentally abused her. As a result of concerns about his temper, the respondent's mother placed him in a clinic and, when he was discharged, the appellant ended their relationship. On the appellant's version, at that time the respondent raped her; she tried to move on with her life and was advised by a social worker not to report the rape to the police, but rather to find a way to keep herself safe from continuing to be abused by the respondent.

[6] It seems that after the termination of the relationship the appellant applied for a protection order against the respondent, in and around 15 December 2016. There is a dispute as to whether the respondent also applied for a protection order in return at that time. Also as to whether he also withdrew his application against her. The first paragraph of the settlement agreement, however, states that the settlement agreement was concluded pursuant to an application for a protection order on 15 December 2016, by the appellant, which application was subsequently withdrawn by her on 2 March 2017. On the face of it, therefore, it seems that the settlement agreement was concluded subsequent to the

withdrawal of the appellant's application for a protection order. No mention is made that the respondent also applied for a protection order.

[7] In terms of the settlement agreement they undertook, inter alia, not to make any contact with each other for an indefinite period of time, unless directed in writing by both parties that such undertaking is no longer of any force and effect. This included, but was not limited to, contact via social media, text messages, phone calls, WhatsApp and electronic mail. They further agreed that should either of them fail to adhere to any of these conditions, the non-defaulting party would be entitled to institute legal proceedings against the party breaching the agreement.

[8] The settlement agreement made no reference to the appellant's social media discussions of the rape allegedly perpetrated on her by the respondent. There was also no agreement between the parties that the appellant would refrain from making the allegation that the respondent had raped her. It seems that the reason why the parties came to such an agreement was because of a series of WhatsApp and SMS exchanges between them, starting in 2016, prior to the appellant having sought a protection order on 15 December 2016, wherein she repeatedly made the allegation that he raped her. These were private exchanges between the two of them. In my view these exchanges are relevant to the outcome of this case, especially when I deal with some of the magistrate's findings later in this judgment.

The appellant's submissions:

[9] On the appellant's version, which cannot be disputed, she began over time to tell people about the alleged rape, after she and the Respondent had entered into the settlement agreement. According to the respondent the first time he heard about this was from a friend of his, around 25 October 2018, after this friend had spoken to the appellant who told her about it. He also heard about it from other friends.

[10] The appellant submits that by telling other people about her experience, she created a community with other victims and also saw this as a form of healing for herself. She engaged on social media about the crisis of sexual violence, in general and in the fashion

industry specifically. At no time did she publish or publicly name the respondent as her rapist. Her social media engagements amounted to the following:

1) public posts regarding the extent of rape in Cape Town and South Africa. For example, the appellant wrote "@rapist I see you". According to her, these were more general statements against unnamed perpetrators, and she never named or identified the respondent;
2) public posts regarding allegations of rape against men in the so-called "streetwear" industry. When she made these posts she again did not name or identify the respondent;
3) private posts to a Whatsapp group of survivors and a private Instagram group called "Calling You Out CT" (CYO), in which she identified the respondent as a rapist. CYO is a private space for women to speak out about their experiences, it is not a public platform.

[11] She further submits that the public posts were on "Instagram Stories", which disappear within 24 hours after being posted, and that at that time her Instagram following was insignificant. On 3 September 2019 she was alerted to the fact that the private messages about the rape, including the identity of the respondent, had been made public. She never consented to the publication, nor did she know about the publication until she was contacted by a third party, and the publication was in violation of the privacy rules of CYO.

[12] The publication of the details of her rape, without her permission, was devastating to her and she felt that the publication without her consent was similar to the experienced of rape. At that time, she felt powerless and exposed. These messages were posted on public Twitter accounts by third parties who are raising awareness about gender-based violence, and warning other women about alleged perpetrators. This was done during a national outcry following the murder of Uyinene Mrwetyana. As a result of these public posts by third parties, the respondent approached the Cape Town Magistrate's Court for a protection order in terms of the PHA.

[13] On 3 October 2019 the respondent applied for urgent protection order in terms of section 10 (1) of the PHA, against the appellant, wherein he specifically alleged that the appellant had

1) made allegations that the respondent had raped/sexually abused her whenever the respondent's business received any favourable media attention, which had a negative impact on his business;
2) enlisted third parties to harass the respondent every other month through social media or whenever his clothing brand received media attention;
3) enlisted third parties four weeks prior to the respondent's application for an interim PHA order, to allege on social media that the respondent raped/sexually assaulted her.

[14] In the interim application the respondent, supported by an affidavit, requested of the court to prohibit the appellant from:

1) engaging in or attempting to engage in harassment of the respondent;
2) engaging in or attempting to engage in harassment of related persons, namely, the respondent's parents and girlfriend;
3) enlisting the help of other persons to engage in the harassment of the respondent.

And to prohibit the appellant from committing any of the following acts:

1) making any contact with his business associates, directly or indirectly;
2) making any allegations about him directly or indirectly, to third parties or via social media; and
3) naming him or alluding him by virtue of the former relationship social media to third parties and/or business associates.

[15] On 7 October 2019 the court a quo granted an interim protection order against the appellant ("the interim protection order"), prohibiting the appellant from:

1) engaging in or attempting to engage in the harassment of the respondent (or a related person) and/or the respondent's business,
2) enlisting the help of another person to engage in harassment of the respondent or a related person; and
3) committing any of the following acts:
    a) harassing or intimidating the respondent;
    b) defaming the respondent or spreading further rumours about him on social media or to others.

[16] On 26 November 2020 the court a quo granted a final protection order against the appellant, which order prohibited the appellant from:

1) engaging in or attempting to engage in the harassment of the respondent, and the respondent's current and future business colleagues and friends;
2) enlisting the help of another person to engage in the harassment of the respondent;
3) committing emotional abuse; and
4) disclosing to anyone in any manner that the respondent has allegedly raped her.

Grounds of appeal:

[17] The appellant is challenging the findings and order of the court a quo, on grounds which she has set out extensively in her heads of argument. In my view, some of these grounds overlap and there is no need to deal with each of them. I will firstly deal with the findings made by the magistrate based on the evidence. Secondly whether the appellant, given the circumstances of the case, was justified in speaking out against gender-based violence and whether she was justified in calling the respondent a rapist. This was also the principal submission made by the first amicus. Thirdly, in any event, whether the appellant's conduct, based on the facts, constitutes harassment in terms of the provisions of the PHA.

[18] The submissions of the amici to a large extent overlap with those of the appellant. The submissions they made in their respective heads of argument were very useful and I will make reference thereto, where necessary, in the judgment. We are indebted for the assistance they provided to this court in this very important case.

Respondents' opposition:

[19] The main thrust of the respondent's opposition to the appeal, is that while the reality of gender-based violence cannot be trivialised, the narrative that the appellant was raped by the respondent, that the appellant should be allowed to discuss with third parties the fact that she was raped by the respondent, some of which third parties are complete strangers to her, and that her actions were not unreasonable, cannot stand. The respondent submits that rape culture in South Africa is endemic, but that the appellant cannot make him the poster child for rape, while he has always maintained that he has never raped anyone.

[20] The respondent argues that the horrific state of gender-based violence in South Africa cannot be used to make the appellant's unreasonable actions of harassment, reasonable. He has never had the opportunity to clear his name and tell his version publicly. The appellant does not want to lay criminal charges, because she does not believe in the criminal justice system. The respondent further submits that the way the appellant disclosed to third persons that the respondent raped her, goes beyond her alleged goal to discuss the rape as part of her healing process and to warn people about how dangerous the respondent is.

[21] According to him, the appellant's conduct illustrates malice and was done to elicit harm. He submits that there is a causal link between the appellant's utterances or disclosures, and the abuse and harm he suffered. This was a finding made by the court, when the court held that, on the evidence, she told a number of people, including those in the safe space, that the respondent had raped her. The respondent submits that if she had not done so, then it is highly unlikely or improbable that there would be such an attack on him.

Evaluation:

[22] In this particular case, in order to understand the conduct of both parties, the court has to have regard to the totality of the evidence as presented, before coming to any conclusion. In *S v Trainor* [1] Navsa JA set out the obligation of a trial court:

'[9] A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the *onus* on any particular issue or in respect of the case in its entirety.'

A court on appeal will in general be slow to interfere with the findings of the trial court, but if such findings are plainly wrong, the court of appeal will indeed interfere therein. See *R v Dhlumayo & Another*[2]. A court of appeal should therefore have regard to the following considerations: it should be aware that in principle a trial court is in a better position than a court of appeal to make reliable findings of fact; that the court a quo indeed sees and hears

[1] 2003 (1) SACR 35 (SCA).
[2] 1948 (2) SA 677 (A) at p705 – 6.

the witnesses and is steeped in the atmosphere of the trial; and in addition the trial judge is better suited to take into account a witness's appearance, demeanour and personality. For these reasons, a court of appeal would not be inclined to reject a trial judge's findings of fact. See also *S v Robinson & Others*[3]. On the other hand, if such findings are plainly wrong, the court of appeal will indeed interfere.

[23] One of the findings of the magistrate, to impugn the plausibility of the appellant's version, was the following: 'The evidence of the respondent was that she was on therapy for many years. She did not deny the fact of childhood or teenage sexual abuse. It is also "strange" that she was "raped" by three of her former "lovers" and yet failed to lay one charge of rape against anyone of them. This court by no means wants to silence the respondent or deprive her of her constitutional right but in my humble view she cannot continue to tell others that the applicant had "raped" her[4].'

[24] In my view, the magistrate was wrong to draw a negative inference from the fact that the appellant did not lay a charge against the respondent, in order to conclude that the complaint or allegation that she made against the respondent was not justified, or was devoid of any substance or reliability. In my view, even though this is not a rape trial, or an action for defamation, there was no consideration given by the magistrate to the circumstances, dynamics and context under which the appellant made the accusation that she was raped by the respondent, in order to assess the veracity and probabilities thereof. This evidence, in my view, is highly relevant.

[25] It is common cause that the appellant took a conscious decision not to report the matter to the police, and rather sought to do deal with this matter in a different manner. This is not disputed. In her answering affidavit[5], which incorporated a letter written by her attorneys after having received a letter from the respondent's attorneys during these proceedings, she says that during her relationship with the respondent she was constantly subjected to emotional and psychological abuse, where the respondent distanced her from her family and friends, and tried to manipulate and control her life, which culminated in him raping her. She was

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[3] 1968 (1) SA 666 (A) at 675G-H.
[4] Record page 323 para 25.
[5] Record pages 172-176.

afraid to terminate the relationship because, during previous attempts, he had threatened to kill himself if she did so.

[26] She goes on to state that the relationship between them did not, as alleged by the respondent, end cordially. As she had previously, out of the fear, been unable to terminate the relationship, she believed that if she was unfaithful to the respondent he would terminate the relationship. On the night of 5 July 2015 she accordingly had relations with another man, and in the morning of 6 July 2015 she told the respondent about it. On hearing about her infidelity, the respondent verbally abused her for several hours before proceeding to rape her, which she believed was a form of retaliation and punishment.

[27] The respondent did not, as she had hoped, terminate the relationship. She therefore requested the respondent to jointly seek treatment from a therapist. Shortly thereafter, and out of fear for her safety and emotional well-being, she terminated the relationship by way of text message. She further states that due to the guilt, confusion and shame that she associated with the events of 6 July 2015, she confided in only a handful of close friends about the abuse she endured during the relationship, but she was unable to confide in them about the rape.

[28] After two months of no contact from the respondent, he approached her in a public space; she was at that stage emotionally fragile and in an attempt to forgive the respondent and start the healing process, she was agreeable to attempt to rekindle the friendship with him. Despite him being in another relationship he requested to see her late at night and made unsolicited visits to her home and place of employment.

[29] She further stated that for reasons unclear to her, the respondent's friends and associates subsequently commenced harassing her in person, as well as on social media. It was only at that stage that she informed her family that the respondent had raped her and she confronted him via text message. After this the respondent came to her apartment uninvited, told her that what he was doing was against the wishes of his attorney, and admitted that he had raped her on 6 July 2015. He also told her that he regretted doing so, and that he would do whatever he could to make up for it. She then requested him to acknowledge and apologise for raping her, to tell people that she was not lying about what had happened and to tell his friends and family to stop harassing her.

[30] Most of what the appellant stated in her answering affidavit, especially regarding the abuse she suffered at the hands of the respondent, was not denied by him, either in a replying affidavit or during his evidence. The respondent also did not to refute or deny that the appellant was afraid to terminate their relationship. He furthermore also did not refute or deny the appellant's version that she, out of desperation to get out of the relationship, took the unusual and uncommon step of having sexual relations with another man, for which she felt guilty and ashamed, in the hope that the respondent would terminate the relationship after becoming aware of her infidelity. The only thing he denied, for the very first time in court, was that he had raped her, or that he had admitted raping her, as stated in her affidavit. This only happened during these proceedings.

[31] He also agreed with the version as stated in the opposing affidavit, that they went to see a therapist, but that this was to mediate the end of their relationship and not for them to jointly seek treatment after the rape. He furthermore did not deny that he was at her apartment, that his friends and associates had harassed her on social media and in person, or that he ever visited or went uninvited to her flat.

[32] The evidence presented during the application rather confirmed her version, as set out in her answering affidavit[6], that after he and his friends had harassed her on social media and in person, she had confronted him via text messages. It seems that this was the sequence of events that led up to her applying for an interdict on 15 December 2016. There was a series of email exchanges between the appellant and the respondent, wherein she on more than one occasion accused him of having raped her. It is important, once again, to note the respondent's reaction to these accusations.

[33] From the record[7] it started on 27 September 2016, when she started to communicate with him via WhatsApp. She stated: 'And not put things on social media and be shady', to which he replied 'I am not in the space for that', whereupon she once again replied 'Cool, well neither am I ever but what must happen must I come to your work? Do I need to pass on your message three of friends or your girlfriend?'

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[6] Record page 174 paragraph 15.
[7] Record page 521 -530.

The message continued and the respondent replied: 'What are you on about? Why are we still doing this?' To this she replied: 'Why are you still being such a shady human who cannot be an adult and face me? I have never been rude to your face, why are you scared? And you must know by now I don't want to do this or have anything to do with you. You owe me this space to talk about things, you need to honour that'.

In a further WhatsApp the appellant continued and stated: 'You almost 29, no? Why are you scared?'

To which the respondent replied: 'I am not scared I just don't want to deal with this. Do you understand that?'

The appellant further continued the conversation by stating: 'Do you not understand how much damage you did to me as a human being and how I do not want to deal with this'.

In reply to this message the respondent stated: 'What must I do, what do you want from me?'

In a further SMS message, dated 9 October 2016, the appellant said to the respondent:

'You can block me off everything and try to pretend like I do not exist and that you can just walk away from me and what you did but you need to lawyer up because I am laying charges against you for rape. Yesterday I told you about (sic) Johnny you (sic) raped me. You are a [expletive] monster and an evil human being and you are not getting away with this. So take some time to figure out how you are going to explain to your parents that you abused and raped me before they find out through you being charged. You will pay for your sins. Trust me.'

The respondent testified that he did not reply to this message.

On 10 October 2016 the appellant sent the following message to the respondent, in an attempt to ascertain if his address was still the same as she knew it to be, by stating:

'40 Lovemore Road. . . Or is there another address the lawyers can send the interdict to?'

Once again the respondent did not reply.

She also sent him a further message on 10 October 2016:

'Your guilt is so loud by how silent you are now. I see you always. Never forget that. You have no leg to stand on so come. Bring it on. I know your side is that I am crazy and insane but you know

and I know the truth and you are guilty of this crime. I was not going to tell my people but now I have no choice but to. You came over to lie and manipulate me as you [expletive] always. You are too predictable. You are a joke. Jesus you won't unblock me. You won't answer my calls. You won't tell your parents the truth and you won't tell your friends to leave me alone. So [expletive] you. I will do whatever it takes to make this right. I still love you. You are a liar. And people who do not even like me are saying that truth will come out. I suggest you admit your guilt now before the City finds out. You're both a rapist and a liar.'

She further sent him another message saying:

'Unblock me on the WhatsApp or I am going to have to come see you at work, at home at friends. Where ever you are. Come do not be shy. You want to make this right remember. I'm still waiting on this. You cannot pretend that it's not happening and this is just going to go away. I am not backing down. So stick to your word for once. You agreed to do the things I asked you to do that you that night you came to my flat. You have not done none of it. I am waiting.'

[34] When the respondent was asked by his counsel in court during his evidence what the appellant meant by this, he stated that the appellant's brother sent him a message and told him that he heard what he had done to his sister. To this the respondent said he replied that he (the appellant's brother) knows him and that he would never do anything like that. The appellant's brother then told him not to tell him but he must tell it to her. According to the respondent, he then proceeded to call the appellant and he asked her what this was all about, he confronted the appellant and asked her why she was telling people that he raped her.

[35] In reaction to this, he says that she kept on screaming and said yes. He then asked her whether they should speak to their parents, or whether they need to speak to someone else. She said no, she just wanted him to send a message to her, her mom, to her friends and his friends stating that he had raped her and send the screenshots. He then asked her if that was all she wanted and she answered that it was. It was then that he realised what it was all about, which was to sabotage him and it was not really about the rape. According to him, she honestly thought that he was going to send her a screenshot messages that he raped her. He did not send any such message.

[36] This version of the respondent in reaction to the message the appellant had sent him on 15 October 2016, is implausible. It cannot be true, because it seems that long before he

had spoken to the appellant's brother, she had already accused him of having raped her. He knew what it was about long before that. It is therefore not a true statement by the respondent, as can be seen by the dates of the messages before he had spoken to the appellant's brother.

On 5 December 2016 he received another message from her, that stated:

'This week I am having an appointment at Nicro and will be advise of the charges which I will be laying this week. I told you how to make this right two months ago. I gave you two months and all I have received is public shaming for speaking out and being labelled crazy and a bully by your people. So if you really want to make this right which you cried about/during (sic) last time, then this is the time.

It kills me that this is where we are at with each other. All I ever did was to love you and treat you like gold. You abused me and raped me and now you are shaming me and allowing afraid to legit (sic) bully me.

Think carefully and do the right thing Anees'

On 10 February 2017, in a further message, she said:

'So you are just not going to show up in court I will send you a summons yet? I need to know.'

[37] It seems that during the period preceding 15 December 2016, before the appellant applied for an interdict against the respondent, she sent him these messages. This was private communication between the two of them, wherein she persisted with the allegation that he had raped her. After having received this messages from her, he never once in reply denied the allegations. The messages she sent him, and his failure to deny that he raped her, are consistent with the version she sets out in her answering affidavit, at paragraph 16, where she states that he said what he was doing was against the instructions of his attorney, that he admitted to having raped her on 6 July 2015, that he regretted having done so and that he would do whatever he could to make up for it.

[38] According to her, he agreed that he would, but ultimately failed to do so. Furthermore, this series of messages which the respondent presented in evidence clearly shows that they had an agreement that he would apologise to her, and tell people that she was not lying about what had happened. This is objective evidence which tends to prove the veracity of the rape allegation. It shows on a balance of probabilities, even though he denied it, that there was

more to the rape allegation than a merely made up story, as the respondent would want us to believe.

[39] This was also the reason why she went to court on 15 December 2016, apparently with the assistance of NICRO, to apply for a protection order. She alerted him about the possibility of laying a charge and that she would seek protection against him in a court of law. Not even this threat swayed the respondent to deny the allegations, as shown by his reaction to her messages. She persisted with the allegation which she made before she proceeded with her application for the protection order, based on the WhatsApp and SMS messages. In these messages it is evident that the respondent reneged on the undertaking he had with the appellant. The probabilities overwhelmingly point to this fact. It was for this reason, and because of him harassing her directly and indirectly through family and friends and on social media, that she went to apply for a protection order. That is the only logical conclusion the court can come to, based on the probabilities.

[40] It also further seems strange that, notwithstanding the appellant having accused the respondent of raping her in this series of WhatsApp messages and SMS's prior to applying for the protection order, there is no evidence that he tried to stop her or that he asked her to refrain from making the allegation. Although he says he also applied for an interdict in return, there is no evidence about this, as stated earlier. The title of the settlement agreement states the following: 'WHEREAS an application for a protection order was lodged in the Cape Town Magistrate's Court on 15 December 2016, under case number 2013/16, by Daniell Segerman, and which was subsequently withdrawn on 2 March 2017', which clearly indicates that only one application was launched, in the name of the appellant.

[41] Clearly, if he was concerned about the rape allegation and accusation made by the appellant, one would have expected him to insist that provision be made in the settlement agreement that the appellant refrain from making such an allegation. He was legally represented at that time and one would have expected him to have had it recorded in the settlement agreement. Once again, on the probabilities, it seems that at no time up to and even after the appellant's application for a protection order, did the respondent deny or refute the allegation that he had raped the appellant. Here it seems that in the light of the damning

evidence, he had the perfect opportunity to apply for an interdict, and once again it begs the question why he did not do so.

[42] What is furthermore implausible, based on the common cause facts and undisputed evidence of both the parties, was that, even after the settlement agreement was concluded, during 2017 and 2018 the appellant repeated the allegation to other people, which included the respondent's friends. One also would have expected the respondent, at that stage, when it became evident that the appellant had told other people that he had raped her, to have denied the allegation and to have taken steps against her to stop her spreading this serious allegation; but once again he persisted with his supine attitude.

[43] The appellant further persisted with the allegation that the respondent had raped her, during 2019 and before 3 September 2019. He also, at no time during this period, denied or refuted the allegation or confronted the appellant about it, and he continued to display a supine attitude in the face of this very serious and damning allegation. He also never denied the allegation on social media or on a public platform. He chose to remain silent, or chose not to institute any legal proceedings, when the appellant, firstly, in direct private communications with him, made the allegation and, secondly, when the appellant repeated the allegation to other people, especially to friends of his, during the period 2017, 2018 and 2019. The most obvious remedy was for him to institute an action for defamation against the appellant, where relief could have been granted on less onerous grounds than the institution of harassment proceedings.

[44] In *Booysen v Major (Women's Legal Centre Trust as Amicus Curiae)*[8], in a similar application, albeit in the context of interdictory relief in terms of the Uniform Rules of Court, regarding the delay in proceeding with an interdict where the first respondent accused the applicant of having raped her on social media by distributing such an allegation on various social media posts, Baartman J said:

> "I accept that the applicant has a right to have his dignity and good name protected. However, it is apparent that the applicant has known for years that his reputation and good name were being tarnished through online posting. He is concerned that in the future, the posts will continue to cause

[8] Case number 5043/2021, delivered on 30 August 2021, para 24.

harm. It is a legitimate concern. However, in the circumstances of this matter, the posts have moved from the initial identifying of the applicant as a rapist to reporting on the progress of an 18-year process, among others. The irreparable harm that the applicant fears, in the circumstances of this matter, is non-existent as his congregation has been discussing the issue for many years with apparently no effect on his reputation.'

[45] It was strangely only when the news broke on social media on 3 September 2019, when the appellant's accusation was widely published and the respondent was publicly shamed, all this during the period of the rise of #METOO movement and the outcry against gender-based violence, following the violent murder of Uyinene Mrwetyana, that the shoe began to pinch and he started to the deny the allegation.

[46] Further evidence which balances the probabilities in favour of the appellant's version, was that her evidence about the incident was not vague, and did not lack any detail or substance. She was very specific as to when it happened, because she clearly remembered the specific date on which she was raped. She gave a frank and honest explanation of the unusual circumstances that gave rise to it, which was that she had to have sexual relations with another man to try to have the relationship between herself and the respondent terminated, which led to the respondent raping her in retaliation and as punishment for what she had done. Although the respondent denies that he raped her, he did not dispute the circumstances set out by the appellant in her affidavit, as having been the causal factor to her rape. The appellant must have been very desperate to have taken such a drastic and extraordinary step, that must have caused her much shame and embarrassment.

[47] In my view, it would have been much easier for her to conjure up a less elaborate or tortuous story than the one she told us, as having given rise to her being raped by the respondent. There is, in my view, no reason to doubt the appellant's version. Against this, there is the respondent's version, which amounts to a bald denial and an allegation that she had reason to falsely implicate him, which begs the question why would she go through this trouble in persistently making the allegation. Also his consistent failure to deny or refute the allegation. Given the strong probability that favours the appellant's version, the respondent's evidence based on his bald denial is not convincing where it is in direct contradiction with hers.

[48] The probabilities therefore overwhelmingly favour the appellant's version, which is that the respondent had admitted that he had the raped her on 6 July 2015, and that it indeed happened, for which he had apologised. She was therefore justified to call him a rapist, because he had admitted that he raped her, and never denied the allegation when she confronted him with it and when she repeated the allegation to other people. There was no need for her to lay a charge against him and to have him prosecuted and convicted to be labelled as a rapist, based on the evidence of this case.

[49] In *The Citizen 1978 (Pty) Ltd and Others v McBride (Johnstone and Others, Amici Curiae)*[9] Cameron J (writing for the majority) said the following regarding an allegation that a person was a murderer, where such a person had been granted amnesty and where such a person's conviction and record had been expunged, albeit in a different context::

'[69] . . . On a literal approach, those never convicted of murder, not being covered by s 20(10), could still be called "murderers", while those convicted cannot. This, as counsel for the *Citizen* justly contended, would be an intolerable anomaly. There is no reason for the statute to be interpreted to confer a lopsided advantage on those convicted over those never convicted.

[70] Mr. McBride's argument sought to circumvent this anomaly by asserting that the term "murderer" applies only to those convicted of murder in a court of law. But this is to redefine language. In ordinary language "murder" incontestably means the wrongful, intentional killing of another. "Murderer" has a corresponding sense. More technically, "murder" is the unlawful premeditated killing of another human being, and "murderer" means one who kills another unlawfully and premeditatedly. Neither in ordinary nor technical language does the term mean only a killing found by a court of law to be murder, nor is the use of the terms limited to where a court of law convicts.' (Internal Footnote omitted, own emphasis supplied.)

[50] In *Modiri v The Minister of Safety and Security and Others*[10], also dealing with a defamation matter, the court upheld the defence of truth and public benefit relied on by the media, where they reported that the appellant was allegedly involved in drug dealing, cash-in-transit heists and car theft, before the appellant in that case was arrested and charged in court, as the suspicions or allegations of his involvement were not based on flimsy evidence.

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[9] 2011 (4) SA 191 (CC).
[10] 2011 (6) SA 370 (SCA) paras 24-27.

There are many examples in our law where a person is not charged or convicted of a crime where such a person can, for example, be called a thief or a murderer. For instance where a person either extra-curially, in a civil matter, settled a claim by admitting liability for stealing, or where a person, in terms of the provisions of section 204 of the Criminal Procedure Act 51 of 1977[11], admitted to committing a crime and agreed to be witness for the prosecution in exchange for being indemnified from prosecution.

[51] The absence of a conviction does not mean that a person who committed an offence like theft, cannot be called a thief or, as in this case, a rapist, where facts outside a criminal trial show the existence of such a fact. The lack of a conviction does not render such a fact, if it indeed happened, untrue or non-existent. Especially in cases like rape where it is a notorious fact, which has been judicially recognised, that most victims do not report rape to the police. It does not render the true facts, that a victim was raped, untrue or non-existent. The reasons why rape victims do not lay charges are well-known and our courts have taken cognisance of it. In *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others*[12] it was held to be of pivotal importance to the case before the court:

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[11]'(1) Whenever the prosecutor at criminal proceedings informs the court that any person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such witness with regard to an offence specified by the prosecutor—

(a) the court, if satisfied that such witness is otherwise a competent witness for the prosecution, shall inform such witness-

(i) . . .

(iii) that he will be obliged to answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the answer may incriminate him with regard to the offence so specified or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified;

(iv) that if he answers frankly and honestly all questions put to him, he shall be discharged from prosecution with regard to the offence so specified and with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and

(b) such witness shall thereupon give evidence and answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the reply thereto may incriminate him with regard to the offence so specified by the prosecutor or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified.

(2) If a witness referred to in subsection (1), in the opinion of the court, answers frankly and honestly all questions put to him —

(a) such witness shall, subject to the provisions of subsection (3), be discharged from prosecution for the offence so specified by the prosecutor and for any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and

(b) . . .'

[12] [2018] ZACC 16 paras 56-57.

'[56] . . .that the systemic sexual exploitation of woman and children depends on secrecy, fear and shame. Too often, survivors are stifled by fear of their abusers and the possible responses from their communities if they disclose that they had been sexually assaulted. This is exacerbated by the fact that the sexual perpetrator, as the applicants allege Mr Frankel to have been, is in a position of authority and power over them. They are threatened and shamed into silence. These characteristics of sexual violence often make it feel and seem impossible for victims to report what happened to friends and loved ones – let alone state officials. Combined with this is the frequent impact of deeply-located self-blame, which, as the Supreme Court of Appeal recognised in *Van Zijl*, disables the victim from appreciating that a crime has been committed against her for which the perpetrator, and not she, is responsible.

[57] All these features of survival of sexual trauma make it rational to be reluctant to report and to avoid reporting. And this is before even considering the effect of rape trauma syndrome, the now recognised patterns of emotional, physical, cognitive and behavioural disturbances that approximately one in three survivors of sexual assault develop. Even if a survivor is fully aware that she was abused, she naturally weighs up the possibility of reprisals from the perpetrator together with the possible lack of support from the police and statistically small eventuality that reporting will actually, eventually, result in a conviction in a criminal court.' (Internal footnotes omitted.)

And in any event, even if he did not admit to raping her, the fact that she did not lay a charge cannot be used to draw a negative inference that would influence the assessment of the veracity of her claim.

[52] The magistrate clearly misdirected himself by not taking into account the totality of the evidence, and by improperly evaluating the evidence, which included the drawing of a negative inference from the appellant's failure to lay a charge against the respondent, which, ultimately, materially influenced his decision to grant a protection order in favour of the respondent. I am also in agreement with the submissions made by the appellant, as well as the first and second amicus, that the appellant is a survivor of gender-based violence and she was not trying to spread "salacious gossip" about the respondent. I agree that she was trying to be heard, to find healing and to protect others from suffering the same fate. The appellant had the right to speak out and to express herself about the experiences she had endured. In my view, the appellant had the right, just like all of us, to freely express herself about this issue. This is exactly what she did and was entitled to do.

[53] A court will have to balance that with the rights of the perpetrator, which include his right to dignity, privacy and reputation, and in its performance of the balancing act in the particular circumstance of the case, will have to find whether the victim's right to express herself freely, outweighs the rights of the perpetrator to dignity and privacy. In *Islamic Unity Convention v Independent Broadcasting Authority and Others*[13] the following was thus said:

'[30] There is thus recognition of the potential that expression has to impair the exercise and enjoyment of other important rights, such as the right to dignity, as well as other State interests, such as the pursuit of national unity and reconciliation. The right is accordingly not absolute; it is, like other rights, subject to limitation under s 36(1) of the Constitution. Determining its parameters in any given case is therefore important, particularly where its exercise might intersect with other interests. Thus in *Mamabolo* the following was said in the context of the hierarchical relationship between the rights to dignity and freedom of expression:

> "With us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression. How these two rights are to be balanced, in principle and in any particular set of circumstances, is not a question that can or should be addressed here. What is clear though and must be stated, is that freedom of expression does not enjoy superior status in our law."' (Internal footnotes omitted.)

[54] I am reluctant to state, as a general proposition, that in all matters concerning gender-based violence, the victim's right to express themselves freely outweighs the perpetrator's right to dignity and privacy, especially in a matter like this where we are not dealing with a defamation action. The facts and circumstances of a given case will influence such a decision, or will have a material impact on such a decision. But given the facts and circumstances of this case, as I found earlier on, the appellant was justified in doing so.

[55] In my view, even if I am wrong in my conclusion that the appellant was justified in calling the respondent a rapist, the question is whether this amounts to harassment, given the facts and circumstances of this case. It is especially pertinent in a case like this, to ask whether the respondent can, after a period of almost four years of the appellant calling him a rapist on a continuous basis, claim that he had been a victim of harassment. This brings me

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[13] 2002 (4) SA 294 (CC).

to the whether the court a quo was justified in granting the interdict against the appellant in terms of the PHA. At this stage, it would be appropriate once again to have look at the relevant provisions of the PHA.

[56] In term of section 1, harassment means:

'directly or indirectly engaging in conduct that the respondent knows or ought to know-

(a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably-

(i) . . .

(ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or

(iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to, or brought to the attention of, the complainant or a related person; or

(b) . . .'

Harm in terms of section 1 means 'any mental, psychological, physical or economic harm'.

Another important provision is section 9 (4), which states that, subject to subsection (5), the court must, after a hearing, issue a protection order in the prescribed form if it finds, on the balance of probabilities, that the respondent has engaged or is engaging in harassment.

Section 9 (5) states four grounds a court has to consider for the purpose of deciding whether the conduct of the respondent was unreasonable, as referred to in paragraph (a) of the definition of harassment. The court must, in addition to any other factor, take into account whether the conduct, in the circumstances in question, was engaged in-

(a) for the purpose of detecting or preventing an offence;
(b) to reveal a threat to public safety or the environment.

The other two grounds set out in paragraphs (c) and (d) of section 9 (5) are not relevant for the purposes of this matter. The court a quo at no stage during its judgment or findings, given

the circumstances of this case, considered whether the appellant's conduct was reasonable, as contemplated in this section.

[57] In my view, the crisp question to consider is, firstly, whether the appellant's conduct, having discussions in a private support group about her experience and mentioning that the respondent raped her, and, secondly, the respondent being identified as a rapist on social media after third parties published the information, without her knowledge or consent, can be regarded as harassment for the purposes of the act.

[58] In *Mnyandu v Padayachi*[14] Moodley J, in trying to interpret the provisions of harassment by having regard to a comprehensive study and analysis of international legislation, cases in other jurisdictions, as well as the research conducted by the South African Law Reform Commission, came to the following conclusion, with which I agree, regarding the definition of harassment in terms of the PHA:

'Based on its examination of international legislation, the SALRC recommended that the recurrent element of the offence should be incorporated in the definition of "harassment". The definition in the Act states that "harassment" is constituted by "directly or indirectly engaging in conduct". However, although the definition does not refer to "a course of conduct", in my view the conduct engaged in must necessarily either have a repetitive element which makes it oppressive and unreasonable, thereby tormenting or inculcating serious fear or distress in the victim; alternatively, the conduct must be of such an overwhelmingly oppressive nature that a single act has the same consequences, as in the case of a single protracted incident when the victim is physically stalked.'

The definition of harassment in the Domestic Violence Act 116 of 1998 is the following:

'**"harassment"** means engaging in a pattern of conduct that induces the fear of harm to a complainant including—

(a) repeatedly watching, or loitering outside of or near the building or place where the complainant resides, works, carries on business, studies or happens to be;

(b) repeatedly making telephone calls or inducing another person to make telephone calls to the complainant, whether or not conversation ensues;

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[14] 2017 (1) SA 151 (KZP) para 68.

(c) repeatedly sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant; . . .'

Both this definition, as well as the definition of the court in Mnyandu, accords with the ordinary dictionary meaning, which also defines harassment to be in the form of 'persistent' and 'repeated' conduct.

www.dictionary.com defines harassment as 'conduct aimed to disturb or bother persistently; torment, as with troubles or cares; pester; to intimidate or coerce, as with persistent demands or threats; to subject to unwelcome sexual advances; to trouble by repeated attacks, incursions, etc., as in war or hostilities; harry; raid'.

[59] In my view, the harassment must be in respect of (a) (ii) and (a) (iii) of the definition, which it seems is applicable in this case, in the form of positive, goal directed, conscious conduct. The words of the definition include by directly or indirectly 'engaging' in conduct by means of 'engaging in verbal, electronic or any other communication aimed at the complainant . . . by any means, whether or not a conversation ensues'. The conduct in terms of (a) (iii) is to be undertaken by means of 'sending, delivering, or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant . . . or leaving them where they will be found by, given to, or brought to the attention of the complainant'.

[60] In my view, the conduct constituting the act of harassment requires some form of positive or willful element. It cannot be as a result of inadvertent conduct, which the purported perpetrator did not desire or was not aware of. One cannot inadvertently harass someone else. Such a conclusion would be illogical, not consistent with common sense, and does not fit in with the ordinary meaning of harassment.

[61] In coming back to this case, it is common cause that the appellant began to tell other people about the rape she endured at the hands of the respondent. She did this by telling other victims about the rape, which I agree was her right. It is not disputed that at no time did she publish or publicly name the respondent as her rapist. Her social media engagements about this issue, were public posts regarding the extent of rape in Cape Town and South Africa. For example, she posted '@rapist I see you'.

[62] Whilst the respondent, as well as a court quo, was of the view that the statements were directed at himself, these were general statements against unnamed perpetrators. She never named or identified the respondent. She also made public posts regarding allegations of rape against men in the so-called "streetwear" industry. Yet again she did not name or identify the respondent in these posts.

[63] She furthermore sent private WhatsApp messages to a group of survivors, and posted in the private Instagram group CYO, in which she identified the respondent as her rapist. This is a private space for women to speak about their experience, not a public space. The posts on "Instagram stories" would disappear within 24 hours after being posted. The appellant submits that at that stage her following was insignificant.

[64] On 3 September 2019 the appellant was alerted to the fact that the private messages about the rape, including the identity of the respondent, had been made public. It is undisputed that she never consented to this publication, and did not know about the publication thereof, until she was contacted by a third party. Furthermore, she contends that it was in violation of the privacy rules of the CYO group. According to the appellant, the publication of the details without her permission was devastating to her and she felt the posting thereof without her consent was similar to the experienced of rape; she said she felt powerless and exposed.

[65] It is not in dispute that these messages were posted on public Twitter accounts by third parties, who were raising awareness about gender-based violence and informing other women about alleged perpetrators. It is common cause this was done during a national outcry against the murder of a young woman, Uyinene Mrwetyana. It was as a result of these public posts by third parties that the respondent approached the magistrate's court in Cape Town for a protection order.

[66] In his evidence, and in his founding affidavit in support of the application, the respondent only complained of the appellant's conduct during the period he described as four weeks before the application for the interim protection order, which was on 3 October 2019. And it seems that the application in support of the order was based on the events that happened during September 2019. As shown earlier, there was no desire by the respondent to lodge a complaint of harassment regarding the private communications in the form of

WhatsApp messages and SMS's which the appellant sent to him during 2016, before she applied for a protection order on 15 December 2016, which was subsequently settled between the two of them.

[67] Regarding the private posts in the CYO Instagram group, in which the appellant identified the respondent as her rapist, it seems that only those people in the group would have known about him. There was a clear undertaking that discussions between the participants were private and confidential, and would not go beyond the group. It seems that the appellant was confident in her belief that the allegations that she made against the respondent in the safe space of the group would not be made public. The magistrate remarked in this regard, in foreshadowing his ultimate finding that the appellant was responsible for the publication of these posts, that: 'This case also emphasized and highlighted that "no one can be trusted with your 'secrets'". Whistleblowing is a rife phenomenon.'[15] This opinion expressed by the magistrate, in my view, is extremely unfortunate and lacks insight into the plight of the appellant.

[68] From the evidence as a whole it was clear that the appellant, up to 15 December 2016, shared her experience with no one else, except by venting her frustration with the respondent. At that stage, not even her parents were aware of what happened to her. It was only when she applied for the interdict that other parties, except herself and the respondent, came to know that she accused him of rape. Then on 3 March 2017, in the settlement agreement between the two of them, it was agreed that she could not make contact with him. It was only thereafter, during the period 2017, 2018 and 2019, that she could speak about the fact that she was raped to other people in the safe group, where she mentioned and identified the respondent as her rapist. She also made some public posts about her experience without mentioning or identifying the respondent. By making this comment, the magistrate, in my view, and with due respect, perpetuated the notion that victims of gender-based violence should not speak out, should remain silent about their experiences, and should be careful who they speak to.

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[15] Record page 323 at paragraph 25.

[69] The magistrate's criticism of the appellant speaking out to the participants in this group, was clearly unwarranted and indifferent to her plight. He unjustifiably held the appellant responsible for the conduct of other people, who had publicly posted her private conversations with them in the safe space. In this regard, the magistrate stated in his judgment··· "that on the (respondent's) appellant's own version of the number of people, including those in the safe space group that the respondent (applicant) had raped her. If she had not done so, it is highly unlikely or improbable that there would have been such an attack on the person of the respondent when it occurred." He came to the conclusion that there was thus, on a balance of probabilities, a causal link between the appellant's (respondent's) utterances or disclosures and the abuse and harm suffered by the respondent (applicant).

[70] I am in respectful disagreement with this finding of the magistrate, because it was not the appellant who caused the discussions she had with the other participants to be published, which caused him harm. The magistrate was clearly wrong in coming to such a conclusion. There is no evidence that she caused or utilised the participants in this group to make these allegations against the respondent public. This the magistrate found by means of circumstantial evidence, to conclude by means of inferential reasoning that the appellant was guilty of harassment. By doing so, he completely ignored the undisputed and direct evidence of the appellant, that it was other people that publicly distributed utterances that the respondent raped her, and not she herself. He gave no reason why he rejected this crucial evidence of the appellant, and why he found it implausible. This finding, in my view, amounts to a serious misdirection on the part of the magistrate and cannot by any stretch of the imagination support a finding of harassment.

[71] The fact that she mentioned this in a private group, in my view, cannot constitute harassment, because she did not intend harm to be caused to the respondent when she mentioned to the participants that the respondent raped her. She was not even aware of the fact that these allegations she made against the respondent in the private group had been published on a public platform. If she was instrumental in or orchestrated the publication of these allegations through the other participants, it would have been a different case. Then she would have been directly or indirectly engaged in conduct which would have caused harm to the respondent.

[72] The appellant's conduct therefore, by having made the allegation to a number of persons that the respondent raped her, in a private discussion, which inadvertently and not of her own doing, and without her knowledge, was made public and in breach of her confidence, can clearly in my view not constitute harassment. Whilst it may have caused harm to the respondent, such harm was not caused by the conduct of the appellant.

[73] Regarding the public posts in which she never named or identified the respondent, which the court found by means of inferential reasoning that this directly related to the respondent, I am was not convinced that when she made these posts it constituted harassment and that she directly caused harm to the respondent.

Conclusion:

[74] I am therefore, for all of the reasons as stated above, of the view that the protection order granted by the court a quo falls to be set aside.

Order:

[75] In the result, I make the following order:

75.1 That the appeal against the whole of the order and judgment of the magistrate handed down on 26 November 2020 is upheld, with costs, including the costs of counsel for the appellant.

75.2 That the order is set aside and replaced with the following:

"That the application for a protection order in terms of the provisions of section 9 (4) of the Protection from Harassment Act 17 of 2011 is dismissed, with costs."

R.C.A. Henney
Judge of the High Court

I agree.

D. Thulare
Judge of the High Court

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