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IN THE SUPREME COURT OF TONGA
CIVL JURISDICTION
NUKU'ALOFA REGISTRY

AM 20 of 2019

BETWEEN:

1. LITANIA TUPOU
2. 'ELIKONI TUPOU
3. SINITI TUPOU
4. LOPETI TUPOU

Appellants

-and-

ANA LAVULAVU

Respondent

JUDGMENT

BEFORE: LORD CHIEF JUSTICE WHITTEN QC

Counsel: Mr. W.C. Edwards SC for the Appellant
Mrs F. Fa'anunu for the respondents

Date of hearing: 1 May 2020
Date of judgment: 10 June 2020

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11 JUN 2020

INTRODUCTION

1. This is an appeal pursuant to s.34 of the *Family Protection Act* (the "Act") against the decisions of Magistrate Tuita on:

   (a) 20 September 2019, in which he granted the respondent's application for an emergency protection order against the appellants; and

   (b) 8 October 2019, when he refused the appellant's application to cancel the emergency protection order.

2. While the resolution of the appeal will be seen ultimately to turn on the existence or otherwise of a "domestic relationship" between the parties and "domestic violence" by the appellants towards the respondent, the proceeding raises issues of broad application in relation to the interpretation, ambit and operation of the Act.

3. At the conclusion of the hearing, I indicated that the appeal would be allowed and that I would deliver written reasons. These are those reasons.

BACKGROUND

4. On 20 September 2019, the Family Protection Legal Aid Centre filed an application on behalf of the respondent for a protection order against the appellants. The application referred to the respondent as being "in a domestic relationship with" the appellants and that they had been "living together recently". The grounds for the protection order were stated as:

   (a) the appellants breached s.4 of the Act "which is beyond what is accepted in living as a family and reasonable domestic life, thus causing pain in the state of mind of the complainant or another who is in a bad state."; and

   (b) the respondents were "making stories which put down the complainant and her daughter, thus puts down her morality not only once but this behaviour kept occurring".[1]

5. The application was supported by an affidavit of the respondent in which she deposed, relevantly:

   "2. I am constructing this affidavit in support of my application for protection

[1] Another translation describes the grounds as "by causing domestic violence beyond the reasonable expectation of the family and domestic life and causes mental agony and endangers that well-being of the victim and other persons; and "rumours spread by the respondents which are derogatory of the complainant and her daughter with the effect of lowering their dignity and these acts of victimisation are not only done once but are repeated".

order due to what my husband's family has done which caused me anxiety ever since we started living together.

3. I currently have a civil case (maintenance) with my husband, Kalafitoni Lavulavu.

3.1 Whilst my problems with my husband Kalafitoni Lavulavu, there were talks that occurred and coming from my in-laws, which is Kalafitoni's mother, Litania Tupou, his two sisters, 'Elikoni Tupou and Siniti Tupou and his brother Lopeti Tupou. I then seek advice from a lawyer, Tomasi Fakahua, whom have passed away and counsel sent them a letter of demand to the respondent, requiring them to come and apologise but they did not. A wife of Kalafitoni's brother told me that an older brother of Kalafitoni was about to come and assault me.

3.2 All the stories made by the respondent have made an effect on me and my life, I feel like I have no dignity in ruining not only myself and my daughter's reputation (daughter of 23 years of age) we all lived together where Kalafitoni took care of her as if she was his own for Kalafitoni is not her natural father.

3.3 The respondents have told stories saying that I am having an affair with Kalafitoni's uncle, that I stole a water pump and Tongan traditional mats and that our twins are not Kalafitoni's.

4. The statements which the respondents have put against me and my child are stressing and it is putting me and my child down. This is embarrassing when living in the family.[2]

5. I swear by oath that these stories are not [sic] true and that I also deny the stories told by the respondents, that is the purpose of my application for protection. That I be given protection from the respondent from all the distressing stories they have put up against me.[3]"

6. On 23 September 2019, Magistrate Tuita granted an emergency protection order for a period of 28 days to 20 October 2019 requiring the appellants not to engage in the following conduct:

   (a) "cause any discomfort, physical pain or awkwardness to the complainant or another person who is in a bad state;

   (b) encourage another to cause any such behaviour to the complainant or other person who is in a bad state, this regards any behaviour made by the respondent, which will be prohibited in this decision;

   (c) approach the complainant whether she is consumed of alcohol or any kind of drug whatsoever or any form of approach is prohibited;

   (d) be in possession of any firearm, and the respondent shall surrender any weapon to the nearest police station or dispose of any weapon that has been

[2] Another translation stated this as "the mental victimisation caused by the defendants to me and my daughter have degraded us and harm our well-being".
[3] Another translation stated this as "... to restrain them from causing mental agony".

used to commit domestic violence;

(e) watch, loiter near, or prevent or hinder access to or from, the complainant's place of residence, business, employment, education, institutions or any other place that the complainant visit often;

(f) follow the complainant about or accost the complainant in any place;

(g) enter or remain on any land or building where the complainant is known to be present without the complainant's express consent;

(h) make any other contact with the complainant (whether by telephone, electronic message, correspondence or otherwise) except such contact as is reasonably necessary in any emergency or as is permitted under any order or written agreement relating to the role of providing day-to-day care for, or contact with, or custody of or access to any children;

(i) speaking, writing or any behaviour which causes harm to the complainant and her daughter."

7. On 27 September 2019, the appellants filed affidavits in opposition to the order.

8. Litania Tupou deposed, relevantly, that:

(a) she is 76 years of age;

(b) she is the respondent's mother-in-law;

(c) the respondent and her son lived with her (from what would appear to be around mid 2017) until April 2019 when problems arose due to the respondent spreading false rumours;

(d) the relationship deteriorated and eventually Litania told the respondent to leave the house with her daughter and husband and to stop causing problems;

(e) after they left, the respondent kept coming around the family home but Litania ceased communication with the respondent because she is a "troublemaker";

(f) Siniti (the third appellant) is her daughter and she had been living and working as a police officer in Niua for the past five years;

(g) Lopeti (the fourth appellant), is her son and he did not know anything about the respondent as he lives in his own separate home with his own family;

(h) similarly, 'Elikoni (the second appellant), who is her daughter, had never talked with Litania about anything of which the respondent had complained;

(i) she denied any knowledge of alleged rumours against the respondent concerning her having an affair or being involved in theft;

(j) no details of the allegations had been provided by the respondent such as the

time, place or to whom any rumours were allegedly being spread by Litania;

(k) she did not know what water pump or Tongan goods the respondent was talking about and that the respondent had simply made up that story;

(l) the respondent's complaint was an attempt to hurt Litania and her family and to make them appear that they were after the respondent; and

(m) the complainant had been made with malice and was an abuse of the court process.

9. 'Elikoni deposed, relevantly, that:

(a) she lives with her mother, Litania, and helps look after her because of her age;

(b) she could not understand the allegations against her especially without any details to the time, and to whom she had allegedly spread rumours;

(c) in any event, she strongly denied the allegations;

(d) her sister, Siniti, had been living and working in Niua the past five years and therefore she could not understand how the respondent's complaints could include Siniti;

10. Lopeti deposed, relevantly, that:

(a) he is married with five children and resides at his own home in 'Utulau;

(b) he was surprised when he was served with the summons because he was unable to understand any reason why he would defame the respondent;

(c) he denied the allegations;

(d) the respondent's complaint did not include any details of any person to whom he allegedly spread rumours nor the time or place where he allegedly made defamatory statements; and

(e) the complaint should be dismissed because the respondent is trying to make him and his family look bad.

11. On 2 October 2019, the respondent filed an affidavit in reply. Relevantly, she deposed that:

(a) she received "reliable explanation" from Fatani Suli and his son, Tauvelu Suli, that in approximately June 2019, they were at the tax allotment of the Wesleyan Church at 'Utulau when Lopeti came to harvest talo from their group farming and he told them that the respondent stole a water pump, white mats and tapa cloths;

(b) her complaint against 'Elikoni was in respect of the allegation that she had an illicit relationship with her husband's uncle and not in relation to the allegation of stealing, which she maintained, because she "had Sulieti Suli, to whom

'Elikoni communicated the story, as her witness";

(c) she included Siniti in her complaint because Siniti conversed with 'Etuate Pangata'a in Niua and said that Litania chased the respondent and her daughter out because she had an affair with her husband's uncle;

(d) she did not cause any disruptions or problems in the home when living with Litania;

(e) in February 2019, Litania told her son, Kalafitoni, that she was waiting for his sermon on Sunday before informing him that whilst he is out drinking kava, the respondent would go out and "rub up and converse with the old man" (meaning the husband's uncle, Lutini, who lived next door). Kalafitoni became angry and told his mother that she was a bad and unappreciative mother. He, the respondent and her daughter then moved out of Litania's house that day;

(f) she returns to 'Utulau to obtain her income from the weaving group there to which she belongs;

(g) she believes that when her husband went to New Zealand in about June 2019, there was a "fraudulent arrangement and conspiracy by the family for him to leave her". She complained to the immigration authorities in Tonga and the husband returned to Tonga on the same plane. That is why she believes the family are angry and hate her.

12. The respondent also filed affidavits from Luseane Tupou and Tauveli Suli both sworn 2 October 2019.

13. Luseane is related, and lives next door, to Litania. She denied any suggestion that she was unhappy about the respondent's frequent visits to their home and talking to her father, Lutini. She corroborated the respondent's evidence about the argument which occurred in April 2019 (not February) which led to Litania chasing her son, the respondent and her daughter out of the house. She also confirmed that at times when the respondent went over and talked with Luseane's husband, Litania would tell Luseane to be careful because the respondent might "rub up" on her husband and Lutini.

14. Tauveli confirmed that, in June 2019, he went with his father to their group farm at 'Utulau on part of the tax allotment of the Wesleyan Church. Lopeti came to harvest some taro. He told Tauveli and his father that the respondent had stolen a tapa cloth, white mat and water pump from "their home" (presumably meaning Lopeti's home). He thought at the time that Lopeti was shameless because he knew when he was defaming her that the respondent was his father's cousin.

15. On 3 October 2019, Mr Edwards, on behalf of the appellants, filed an application for cancellation of the protection order. The grounds included:

(a) the object or purpose of the Act is to protect the respondent from violence

and abuse from the husband or someone who is in a domestic relationship with her;

(b) the purpose of the Act is to prevent the respondent from assault or economic punishment by the husband or by a person who has a domestic relationship with her;

(c) there was no domestic relationship between the respondent and the appellants;

(d) the respondent did not live in the same home with the appellants;

(e) this was not a case where any domestic violence has been committed;

(f) there was no threat or plan to assault the respondent;

(g) this was a case of alleged defamation;

(h) on the facts of the case, the Court lacked jurisdiction to make a protection order against the appellants.

16. In his submissions in support of the application, Mr Edwards developed the above grounds and added:

(a) the allegations of defamation, which were denied, do not provide the court with authority under the Act to issue protection orders;

(b) the purpose of the Act was to prevent and protect a wife or children from violence either having being committed or likely to be committed;

(c) for the court to issue a protection order against the appellants, there must exist acts of violence or potential violence against the respondent;

(d) the respondent and her husband had been separated, and out of Litania's house, since April 2019;

(e) the alleged rumours of defamation did not arise until June 2019;

(f) even if there had been any violence towards the respondent (which was denied), as the parties had been living apart for six months, they were not in a 'domestic relationship' as defined by s.5;

(g) there was no evidence anywhere in the respondent's application of 'domestic violence' as defined within the Act; and

(h) the application was a "clear case of abuse of procedure and the application for a protection order and should be dismissed with costs".

17. The application was supported by a number of further affidavits by the appellants in answer to the respondent's reply affidavit and those of Luseane and Tauveli.

18. Litania maintained her original evidence. She described the problems as being due to Luseane starting rumours. She denied any allegation that the respondent stole

any tapa cloth, white mats or any water pump from her home. I take it from that she meant that the substance of the allegation was untrue and that she denied ever making it. She did not know where those rumours originated from because she did not have any of those items missing from her home. She believed the problems were due to the respondent going around collecting rumours to upset her.

19. 'Elikoni also maintained her original evidence. She denied any allegation that the respondent was having an affair with Lutini or that she had made any such allegation. She denied the other rumours as well and also blamed the problems on the respondent "going around collecting untruthful rumours to obtain protection orders" against the appellants.

20. Lopeti too maintained his original evidence. He denied no knowledge of any allegation that the respondent stole anything from his home. There was in fact nothing missing from his home. He also understood that there was no allegation that the respondent had stolen those things from Litania's home. He considered it "incredible and unimaginable" how the respondent could lift a big water pump and steal it. He denied the evidence of Tauveli Suli. He said he has never told anyone that the respondent has stolen anything. He could not understand why he would go to Tauveli, an 18 year old boy, and tell him that the respondent had been stealing when it was not true.

21. Mrs Fa'anunu filed submissions in reply to the application for cancellation of the protection order. She submitted, relevantly, that:

    (a) section 3 of the Act was clear that it was to ensure the immediate safety and protection of all persons, including children, from experiencing or witnessing domestic violence, or who are at risk of domestic violence;

    (b) the Act was designed to provide immediate protection of persons in domestic relationships from harm or imminent harm of domestic violence which is not limited to physical violence but also includes mental, sexual and economic abuse and economic abuse;

    (c) the respondent met the qualifications to apply for a protection order because she had been subject to domestic violence in the form of "emotional abuse" due to the appellants' repeated insults and ridiculing the respondent to other people contrary to what is reasonably accepted in family life in Tonga (section 4). The alleged "defamatory remarks or statements" by the appellants were offensive, degrading, ridiculing and insulting and had caused the respondent to become emotionally distressed or abused;

    (d) the respondent had therefore sought the assistance of the Court under the Act for immediate protection against those "defamatory remarks". She noted that the respondent may also wish to bring proceedings against the appellants under the *Defamation Act*;

(e) defamatory statements fall within the definition of "mental abuse" because they "naturally cause humiliation, emotional pain and psychological harm especially if such defamation is untrue";

(f) the respondent had a domestic relationship with the appellants as they had recently shared the same residence until early 2019;

(g) the respondent's complaint in relation to the defamatory statements by Litania about the respondent's behaviour towards Lutini was supported by the independent evidence of Luseane;

(h) to cancel the protection order would only perpetuate the appellants' unreasonable behaviour; and

(i) therefore, the court had dealt with the application correctly and that it fell within the ambit of its jurisdiction to do so.

22. On 8 October 2019, Magistrate Tuita heard further argument from counsel for the parties. He refused the application to discharge the protection order. He confirmed that the order would continue until it expired on 20 October 2019 unless a further application was made on reasonable grounds for a grant of a further protection order. He concluded by recording that if either party was dissatisfied with his decision, they may appeal to the Supreme Court.

THIS APPEAL

23. On 14 October 2019, the appellants filed their notice in this appeal against both the learned Magistrate's decisions to grant the original protection order and his subsequent refusal to cancel it as being wrong in law and fact. The grounds of appeal include, relevantly, that:

(a) the power to make a protection order under s.12(1) of the Act is discretionary;

(b) the three essential requirements for making any such order are that:

(i) the parties are in a domestic relationship;

(ii) the respondent has committed or is a risk of committing domestic violence against the complainant or other persons at risk; and

(iii) the making of an order is necessary or desirable for the protection of the complainant or other persons at risk;

(c) there was no domestic relationship as defined within the Act between any of the appellants and the respondent;

(d) there was no complaint of domestic violence nor any evidence of any risk the appellants would commit or were likely to commit any domestic violence against the respondent;

(e) the respondent's allegations are only about rumours she said she received concerning derogatory remarks or statements about her character; and

(f) in those circumstances, the court has no jurisdiction to grant a Protection Order.

SUBMISSIONS

24. Both counsel filed written submissions and spoke to them during the hearing.

Appellants

25. Mr Edwards' submissions largely mirrored his submissions before the Magistrate on the application for the cancellation of the protection order. Otherwise, Mr Edwards submitted, in summary:

(a) paragraph 3.3 of the respondent's original affidavit did not state the time, place or to whom each appellant was alleged to have made the accusations against the respondent, which were vital and important facts to the question of whether a Protection Order should have been made;

(b) there was no evidence that any of the appellants spread rumours that the respondent was having an affair or illicit relationship with her husband's uncle or that her husband was not the father of her twins;

(c) the only evidence before the Magistrate was a disputed allegation that Lopeti (alone) had accused the respondent of theft;

(d) that evidence did not justify the issue of Protection Orders against all the appellants;

(e) further, the appellants were not in a domestic relationship with the respondent because:

(i) none of the appellants was married to the respondent or had lived with her as man and wife;

(ii) the first and second appellants were not living with the respondent nor had they *recently* shared the same house with her;

(iii) the respondent left the family home in April 2019, approximately five months before the application was filed; and

(iv) neither Siniti or Lopeti (the third and fourth appellants) had ever lived with the respondent at any address;

(f) the only possible type of 'domestic violence' which could arise on the facts of this case was 'mental abuse';

(g) the object of the Act is to prevent domestic violence and to protect victims.

In this case, the making of the protection order was based on a disputed allegation of defamation that the respondent had stolen a water pump and other goods. There were no allegations of violence or of threats or risk of violence to the respondent;

(h) the grounds relied upon by the respondent here were beyond the scope of the Act and the making of the order was wrong in law;

(i) even though the protection order expired on 20 October 2019, it was important to have it quashed, otherwise it could lead to further proceedings and similar applications on the same issues. In that regard, the respondent had commenced another proceeding for criminal defamation based on the same complaints; and

(j) the respondent's application based on grounds that she heard the theft accusation had been made in June 2019, belied the filing of the application for an emergency protection order in September 2019.

Respondent

26. Mrs Fa'anunu's submissions may be summarised, relevantly, as follows:

(a) the respondent's original application "did not disclose her sources until disputed by the appellants";

(b) the information she did disclose was "sufficient to the satisfaction of the Magistrate to consider the grant of the protection order";

(c) there is no specific requirement for a complainant to give precise details as to time, place or to whom the appellants made the allegations;

(d) the Magistrate has a discretion to consider or not a protection order application on a case by case basis consistent with the objects of protection orders (section 8) and ultimately, the Act (section 3);

(e) the evidence of Tauveli confirmed the allegations of theft;

(f) the evidence of Luseane confirmed that the respondent's complaint was merited and that the respondent was subjected to abuse from the first appellant whilst living in her home and it "lends assistance to infer that the appellants and particularly the first appellant defamed the respondent";

(g) the respondent had a "domestic relationship" with Litania as they "recently shared the same residence";

(h) the Magistrate was correct in including the names of other family members, if he was satisfied the appellants had committed or were likely to commit an act of domestic violence against other family members, pursuant to s.12(4), which does not make clear whether other family members should or must be in a domestic relationship with the respondent;

(i) the appellants' allegations caused the respondent to feel embarrassed, degraded and humiliated and therefore constituted "mental abuse";

(j) the affidavit of Luseane and the respondent's reply affidavit evidenced "a pattern of the first appellant's behaviour in making allegations that were belittling of and humiliating to the respondent";

(k) the Magistrate took into account "the seriousness of the allegations" and was satisfied there were reasonable grounds for making the order; and

(l) the Magistrate was correct in granting the emergency protection order as an "order" under s.11(i) [sic] pending a hearing.

DISCUSSION

27. Since it came into force on 1 July 2014, there have been few published decisions of this Court in relation to protection orders under the Act.[4] Notwithstanding the definition of Court extending to both the Magistrates and Supreme Court, as a matter of practice, almost all applications for protection orders appear to be made to the Magistrates Court. It has only been where an order of that Court has been appealed that this Court is called upon, in its supervisory appellate jurisdiction, to opine on the proper interpretation and application of the Act in respect of protection orders. This is one such case.

Nature and objects of the Act

28. Relevant provisions within the Act are to be interpreted having regard to their text, context and purpose within the Act as a whole.[5]

29. The preamble may be referred to for assistance in explaining the Act's scope and object.[6] It describes the Act thus:

> An act to provide for greater protection from domestic violence, to introduce protection orders, clarify the duties of the police and promote the health, safety and wellbeing of victims of domestic violence and related matters.

30. The objects of the Act are stated generally in s.3 as being to:

> (a) ensure the safety and protection of all persons, including children, who experience or witness domestic violence;
>
> (b) provide support and redress for all victims of domestic violence and economic abuse;
>
> (c) implement programmes for victims of domestic violence to assist their

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[4] *Masima v Masima* [2019] TOSC 2; *Fifita v Fifita* [2019] TOSC 24.
[5] *Bin Huang & ors v Police* [2020] TOSC 28 at [42] to [57].
[6] s. 8 of the *Interpretation Act*.

recovery to lead a safe and healthy life;

(d) facilitate the making and enforcement of court orders and Police Safety Orders issued to stop acts of domestic violence.

31. Part 2 provides for the making of protection orders. The objects of that Part are described in s.8 as:

(a) to prevent domestic violence and economic abuse between family members and others in a domestic relationship; and

(b) to facilitate and maximise the safety and protection of persons who experience or fear domestic violence.

Approach to this appeal

32. This appeal is brought pursuant to Part 8 of the Act. Section 34 provides:

34 Appeals

(1) An appeal may be made to the Supreme Court against a decision of a Magistrate's Court —

(a) to make a protection order;

(b) to revoke or vary a protection order (including a variation of the conditions imposed by the order); or

(c) to refuse to make, vary or revoke a protection order.

(2) An appeal —

(a) may be made by the complainant or the respondent; and

(b) shall be instituted within 28 days after the day on which the Court's decision is made.

33. Section 35(3) provides that:

(3) Unless a Judge of the Supreme Court orders otherwise, an appeal is to be by way of re-hearing, and shall be in accordance with the rules of the Supreme Court.

34. Section 36 provides:

36 Decision on appeal

(1) If the Supreme Court allows an appeal, it may —

(a) confirm, dismiss or vary any order to which the appeal relates, as it considers appropriate; or

(b) make such order or decision as it considers should have been made, and every such order or decision takes effect on and from the day on which it is made.

(2) A person aggrieved by an order or decision of the Supreme Court may appeal to the Court of Appeal against that order or decision.

> (3) Neither the Supreme Court nor the Court of Appeal is bound by the rules of evidence in determining an appeal.

35. Accordingly, I approach this appeal by way of rehearing as a determination of the rights of the parties by reference to the circumstances, including the law, as they exist at the time of the rehearing: *Harris v Caladine* (1991) 172 CLR 84.[7]

36. Those circumstances include the evidence called before the Magistrates Court below (subject to any power to receive further evidence). Whether the Court has the power to receive further evidence is not clear within the Act although the reference to the Court not being bound by the rules of evidence tends to suggest that it may receive further evidence. That issue did not arise on this appeal.

37. If, as here, there has been no further evidence admitted and if there has been no relevant change in the law, the court can exercise its appellate powers only if satisfied that there was some legal, factual or discretionary error on the part of the primary decision-maker: *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194.[8] In those circumstances, the court may give judgment as ought to have been given at first instance: *Quilter v Mapleson* (1882) 9 QBD 672 at 676 per Jessel MR.

Requirements for an order

38. Pursuant to s.12(1), a Court may, on an application made under s.10, make a protection order if it is satisfied that:

> (a) the respondent and the complainant are in a **domestic relationship**;
>
> (b) the respondent has committed or in the opinion of the Court is a risk to commit, **domestic violence** against the complainant, or other person at risk; and
>
> (c) the making of an order is **necessary or desirable** for the protection of the complainant, or other person at risk.
>
> [emphasis added]

39. In deciding whether to make an order, subsection (3) requires the Court to take into account:

> (a) the need to ensure that the complainant or other person at risk is protected from domestic violence or economic abuse;
>
> (b) the well-being and the accommodation needs of the complainant or other person at risk; and

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[7] Compared to an appeal stricto sensu and contrasted with a hearing de novo, as discussed therein. See also *Wilson v Neva Holdings Ltd* [1994] 1 NZLR 481.

[8] See also *Allesch v Maunz* (2000) 203 CLR 172; *Ezekiel-Hart v The Law Society of the Australian Capital Territory & ors* [2012] ACTSC 103 at [19].

> (c) any other matter that the Court considers relevant.

40. Such other matters referred to in (c) above are informed by subsection (6) which requires the Court to have regard to —

> (a) the opinion of the complainant, or other person at risk, of the nature and seriousness of the behaviour in respect of which the application is made; and
>
> (b) the effect of that behaviour on the complainant or other person at risk.

41. So far then, one sees that if an application fulfils the requirements in s.12(1) [or (2) in the case of economic abuse], the Court's jurisdiction is enlivened, at which point, its exercise of discretion is to be informed by the matters set out in subsections (3) and (6).

42. Section 20 permits any party to apply for a variation or cancellation of a protection order. The Court may grant such an application where it is satisfied that good cause has been shown and the application has been made freely and voluntarily.

How is a Court to be "satisfied"?

43. Section 12 is replete with references to the Court's discretion being enlivened upon it "being satisfied" of the various requirements therein. So too does s.13(2) require the court to be satisfied as to the existence of reasonable grounds for the beliefs specified therein. Section 14 asks whether the Court considers a temporary protection order to be in the best interest of the complainant or other person at risk. And, s.15 looks at whether the Court is satisfied on the evidence that the respondent has been given notice before making any order the court considers appropriate, including a final order.

44. But how is a Magistrate to determine whether he or she is satisfied as to the various requirements pertaining to each application for the various types of order?

45. The requirements must be satisfied by admissible evidence which, if accepted, proves the facts relevant to the requirements, to the requisite standard.

46. An application itself and the grounds stated in it, is not evidence. Unfortunately, while s.10 sets out the requirements as to the form of an application, it does not specify the evidential requirements for an application. Compare, for instance, O.13 r.2(2) of the Supreme Court Rules 2007 which requires any application to be accompanied by a supporting affidavit. To similar effect is rule 11 of the Magistrate's Court (Civil) Rules, which applies to any application for a court order.

47. Evidence on applications under the Act is not confined to affidavit. Section 10 provides for applications to be made orally, even by telephone. Section 25 enables applications for emergency protection orders to be made by police officers where

a respondent has failed to comply with a Police Safety Order. In those true emergency situations, a Magistrate may take evidence from the applicant orally on oath even it is no more extensive than swearing to the grounds stated in the application. Whatever the form, the evidence ought address the requirements for making the particular order.

48. Once a Magistrate has some evidence before him or her, the next question is whether applications under Part 2 of the Act are subject to the rules of evidence.

49. The Act is silent on whether the court of first instance, in dealing with an application for a protection order, is bound by the rules of evidence. Somewhat curiously, as noted above, s.36(3) provides that on appeals, the Supreme Court and Court of Appeal are not bound by the rules of evidence. If the fact that the Act does not specify whether the Magistrates Court is bound by the rules of evidence, suggests that, like any other proceeding, that court is so bound, a tension arises on appeal. For if the Magistrates Court is bound, and the Supreme Court is not, then when the latter is conducting an appeal by way of rehearing in which it is to consider the evidence that was before the Magistrates Court, if any of that evidence was inadmissible before the Magistrates Court, say because it offended the hearsay rules in s.88 of the *Evidence Act* (and did not fall within any of the exceptions provided by s.89), but admissible before the Supreme Court, different results might obtain.

50. Conversely, to approach the issue by saying that if a Magistrate excluded evidence because it was inadmissible, then the Supreme Court on rehearing should only consider the evidence that was received by the Magistrate, seems to me to be inconsistent with s.36(3). The position would be even less satisfactory if the Supreme Court were to act only on evidence the Magistrate considered to be admissible but not apply the same rules of evidence to any fresh evidence that might be adduced during the course of the appeal. Worse still, what if the Supreme Court were of the view that certain evidence acted on by the Magistrate was inadmissible below, and that the decision was vitiated by that error, whereas the Supreme Court could act on the same evidence?

51. One practical answer lies in the observation that the fact the Supreme Court is not bound by the rules of evidence does not mean it cannot, in appropriate cases, choose to apply them. So, if the Magistrate below acted on inadmissible evidence, not objected to by any opposite party (beyond an initial ex parte application), it would be open to the Supreme court to follow suit on the rehearing by not applying the rules to that evidence.

52. Another solution lies in the interrelationship between the rules of the two Courts. Order 27 rule 6(2) of the Supreme Court Rules provides that an affidavit filed in support of an application may contain statements of information or belief provided that the source and grounds thereof are stated. Rule 3(2) of the Magistrates Court

Rules provides that where a situation arises that is not covered by the Magistrates Court Act, its Rules or any direction of a Magistrate in the proceeding, the corresponding Supreme Court rule shall apply. As there is no corresponding rule or provision in the Magistrates Court Act or its Rules and there was no direction in the application before the Magistrate here to that effect, O.27 r.6(2) will apply to permit, say, hearsay provided the source and grounds are stated.

53. The next question is what is the standard of proof required before a Magistrate can be satisfied of the truth or accuracy of the facts given in evidence?

54. On the question of the standard of proof, again, the Act is silent. Part 6, which provides for offences and penalties, commences at s.28(1) by establishing the offence of committing domestic violence. The other offences and sanctions which follow, including fines and terms of imprisonment, clearly make that Part of the Act, at least, penal in nature. The very basis for many applications for a protection order may include a respondent having committed domestic violence, and therefore may amount to an offence under the Act punishable by imprisonment. The likelihood is that any proceedings for an offence of committing domestic violence will be taken by police pursuant to Part 6, and for which the criminal standard of proof will apply.

55. By comparison, similar legislation in the region, in respect of the equivalent of protection orders, specifies the civil standard.[9] Part 2 of the Act only provides for civil remedies in the form of protection orders. That Parliament has seen fit to separate Part 2, applications for protection orders, from Part 6, penalties and offences including for breaching protection orders, indicates a different standard of proof was intended. On that basis, I am of the view that applications for protection orders under Part 2 ought be assessed according to the balance of probabilities.

56. One qualification to that general statement may present depending on the urgency and the seriousness of the alleged actual or threatened domestic violence. For instance, on an application which is so urgent that an applicant can only manage to apply orally by telephone and the allegations involve very recent physical violence and threats of further imminent physical violence towards the applicant and her children, it may be open to a Magistrate, on that (necessarily uncontradicted) evidence, to apply a lower test or measure of proof to be satisfied that it is more likely than not that the requirements of s.12(1) and s.13(2) exist such that an emergency protection order should be made. That does not mean a Court should blithely accept whatever is placed before it by a complainant. On any ex parte application, it is incumbent on a Court to make all necessary enquiries of the applicant to be as fully informed on the application as can reasonably be expected

[9] For example, s.53(1) of the Victorian *Family Violence Protection Act* 2008 in relation to interim family violence intervention orders.

in the absence of a contradictor. The consequences of even an EPO on a respondent can be onerous not only in terms of any curtailment of his or her conduct and movement viz a vis the complainant, but also in terms of the potential consequences of any breach of the order.

57. At the opposite end of the spectrum, say on an application for final orders based on allegations which do not involve physical violence and events which took place a considerable time ago, without any evidence of any immediate threat of recurrence, a Magistrate may well expect a higher degree of proof in the evidence before being satisfied that it is appropriate to make the order sought. Ultimately, both are subject to satisfaction on the balance of probabilities, although the position of the figurative fulcrum by which that balance is to be measured may move according to the circumstances of each case.

58. Once, by admissible evidence satisfying a Court on the balance of probabilities, the statutory requirements are met, the Court will then consider the exercise of its discretion on whether to make an order.

59. Any discretion conferred on a court by statute must not be exercised arbitrarily or capriciously. It must be exercised judicially and in accordance with any relevant statutory prescriptions: *Secretary of Fisheries v Lanivia* [1999] TOCA 17; *AJ & E Ltd v FC Nichols (Wholesales) Ltd* [2006] TOCA 1. In *Tu'akalau v Tu'akalau* [1999] TOSC 6, a decision concerning a Magistrate's discretion on an maintenance application, the late Ward CJ said:

> "The magistrate has a wide discretion in such applications but, whenever there is such a power it must be exercised judicially. That means the manner in which it is exercised must be for good reason based on evidence and stated in the decision. It is an abuse of the magistrate's position to exercise his discretion capriciously or in a cavalier fashion by apparently simply plucking figures from the air. It has long been the rule that, where a judge has exercised his discretion on the basis of material before him, an appeal court will not interfere even if it disagrees with his conclusion (see, for example, Donald Campbell and Co v Pollak (1927) AC 732) but where, as here, there is no evidential basis for the decisions made, it will allow an appeal."

60. That last observation, concerning the existence of evidence upon which any exercise of discretion must be based, is, in the current context, important.

Was an emergency order warranted?

61. Before turning to consider whether the grounds and evidence in support of the respondent's original application fulfilled the requirements for an order, it is appropriate to consider whether the material before the learned Magistrate, even at a very cursory level of examination, warranted the making of an emergency protection order.

62. Section 13(2) provides that such orders may be made where the Court is satisfied

that there are reasonable grounds for believing that if an emergency protection order is not made —

> (a) the respondent may commit domestic violence against the complainant or other person at risk;
>
> (b) the respondent may cause economic abuse or damage to or removal of the property of the complainant or child or any other member of the family or person at risk living in the same household; or
>
> (c) the complainant will be prevented or deterred from pursuing the application if the order is not made immediately.

63. That subsection:

(a) (1) permits an application to be made ex parte and orally or in writing;

(b) (4) requires any order made to be sent immediately to the Police in the area where the complainant is residing who are then to try to effect service on the respondent as soon as possible;

(c) (5) limits the period of any order to not exceeding 28 days; and

(d) (6) requires the court to determine the application on the same day it is made unless there are exceptional circumstances,

indicates, as the title 'emergency' suggests, that such applications will be marked by an element of urgency in respect of actual or threatened domestic violence which is imminent and which requires urgent intervention to prevent any further occurrence, or the threat of it materialising.

64. That may be compared with temporary protection orders pursuant to s.14. Temporary orders may be made, also on an ex parte application,[10] if the Court considers it to be in the best interest of the complainant[11] or other person at risk by considering whether there is risk of domestic violence or economic abuse to the complainant or other person at risk if the order is not granted immediately.[12] Such orders are also to be served immediately on the respondent with notice of a date for hearing and that if the respondent does not take any steps in the proceeding, the order may become final. Otherwise, temporary orders are only effective for up to 90 days.[13]

65. In the instant case, the learned Magistrate made an emergency protection order effective for 28 days. In my view, there was no evidence before the Magistrate of any of the 'emergency' requirements of s.13(2) or of any urgency sufficient to justify the making of an emergency order.

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[10] Subsection (7).
[11] Subsection (1).
[12] Subsection (2).
[13] Subsection (6).

66. Firstly, paragraph 2 of the respondent's affidavit actually referred to her application being for a temporary order.

67. Secondly, neither the grounds for the application nor the respondent's original affidavit contained any evidence of when any of the 'degrading rumours' the subject of the respondent's complaints had been made relative to the date of filing the application.

68. Thirdly, there was no evidence of any actual or threatened continuation of the rumours if the order was not made. All the complaints were couched in the past tense, i.e. "have heard" or "have alleged".

69. Fourthly, there was no suggestion, let alone evidence, of actual or threatened repetition.

70. Fifthly, the evidence in paragraph 3.1 that the respondent had been told by her sister in law that her estranged husband's older brother was going to "beat her up" was not in any way connected to any of the appellants nor was there any indication as to when that threat was communicated such as to give rise to any emergency situation.

71. However, given the availability of temporary protection orders, and the degree of similarity between their requirements and those for emergency orders, the resolution of this appeal (and a better understanding of the ambit of the Act) requires more than a taxonomical analysis of the different types of protection orders available under the Act.

The application based on s.12(4) was misconceived

72. The respondent's evidence below and her submissions there and on appeal were largely directed at the first appellant, Litania. Her submission that pursuant to s.12(4), the Magistrate was correct in including the names of other family members, being the second to fourth appellants, was misconceived.

73. That subsection provides:

> (4) The Court may include in the protection order the names of other family members, if the Court is satisfied the respondent has committed or is likely to commit an act of domestic violence or economic abuse against other family members.

74. On a plain reading, the provision is intended for the addition of family members who are intended to be protected by the order. It is not intended as a means of adding to an order, persons who are members of the named respondent's family who are not named as respondents to an application which gives rise to an order. During the course of oral submissions, Mrs Fa'anunu accepted that the use of the subsection here was inverted.

Were any of the appellants in a "domestic relationship" with the respondent at the time the EPO was made?

75. The first requirement in s.12 is that the respondent and complainant are in a "domestic relationship". The term is defined in s.2 as having the meaning assigned by s.5 which in turn provides:

> A person has a domestic relationship with another person if any of the following apply —
>
> (a) they were or are married to each other;
>
> (b) they live or have lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other;
>
> (c) they are the parents of a child or are persons who have or had parental responsibility for that child;
>
> (d) they are family members living in the same household and including those related by legal or customary adoption;
>
> (e) they are or were in an engagement, courtship, including an actual or perceived intimate or sexual relationship;
>
> (f) they share or recently shared the same residence;
>
> (g) one person is wholly or partially dependent upon on-going care by the other person residing in the same household;
>
> (h) one person is a housekeeper in the same household.

76. The only species of domestic relationship relied on by the respondent here was subsection (f): that she and the appellants had recently shared the same residence.

77. During the course of oral submissions, Mrs Fa'anunu conceded, correctly in my view, that there was no evidence of any domestic relationship between the respondent and the third and fourth appellants, and that the EPO against them should not have been made. That concession is sufficient to dispose of the appeal insofar as it concerns Seniti and Lopeti Tupou.

78. In relation to the first and second appellants, Litania and 'Elikoni, it was common ground that for some period (not specified in the evidence) until April 2019,[14] the respondent had shared Litania's residence with others including 'Elikoni. As the respondent had left the residence some five months before the application was filed, the issue on this aspect of the appeal was squarely focussed on the meaning of the word "recently".

79. It is unfortunate that the word was chosen in the drafting of this part of the Act. Its dictionary definition - having lately come into existence; of or relating to a time not long past; new, fresh – gives rise to the potential for subjective and relative

[14] Although according to the respondent's affidavit in reply, it occurred in February 2019.

interpretations. For instance, where parties have resided together for say 20 years, a separation of two years may be regarded as recent. On the other hand, where they have resided together for two years, separation of two months may be regarded as recent.

80. Mrs Fa'anunu submitted that the five-month period since the respondent had lived at Litania's residence had not "severed the domestic relationship" having regard to the "way of living in Tonga, the culture, nature and importance of family and the intention of Parliament."

81. The submission was not supported by any evidence. The respondent's affidavits did not reveal how long the parties had lived together before the respondent (and her husband and daughter) left the house. Her initial affidavit did not even specify when she left relative to the date of the application. The Magistrate could not have known, by that affidavit alone, that some five months had elapsed before the application was made. There was no evidence that any aspect of the former domestic relationship was continuing or that it remained intact (i.e. had not been 'severed').

82. As it stood, there was no evidence before the Magistrate that the respondent and the first or second appellants had recently shared the same residence. Given the opaque nature of that part of the respondent's affidavit evidence, the question should have been asked. There is no indication in the material on appeal that it was.

83. Accordingly, there was no evidence before the Magistrate upon which he could have been satisfied on the balance of probabilities that the respondent was in a domestic relationship with Litania or 'Elikoni. On that basis alone, the application for an EPO should have been dismissed.

84. I should add that if the Magistrate had been informed that the parties had been separated for at least five months, then upon considering the nature of the complaints and lack of any evidence as to when they occurred or that there was any threat that they were continuing, he would also have been justified in concluding that the requisite relationship did not exist.

Did either of the first or second appellants commit "domestic violence" towards the respondent?

85. The meaning of the term "domestic violence" in the Act is found through a series of cascading elemental definitions.

86. Section 2 defines "domestic violence" as having the meaning set out in section 4, which in turn provides:

> **4 Meaning of domestic violence**
>
> For the purposes of this Act, a person (the "perpetrator") causes domestic violence to another person (the "victim") if —

> (a) the perpetrator and the victim are in a domestic relationship; and
>
> (b) beyond the reasonable expectations and acceptances of family and domestic life, an act or omission or threat thereof by the perpetrator —
>
> (i) causes physical abuse, sexual abuse, or mental abuse to the victim or other person at risk; or
>
> (ii) otherwise harms or endangers the health, safety or well-being of the victim or other person at risk.

87. For the reasons stated above, there was no evidence of the first element of a domestic relationship. However, if the respondent was considered to have been in a domestic relationship with the first and second appellants, the question then is whether either of them committed, or in the opinion of the Court was a risk to commit, domestic violence against the respondent.

88. The second element, being conduct "beyond the reasonable expectations and acceptances of family and domestic life", is presumably intended to present an objective test. For most cases, that may not prove difficult. However, for outlying cases on the fringes, the test is likely to draw on subjective value judgments of particular conduct which could see such conduct being assessed differently from one Magistrate to another. Thankfully, that issue did not arise on this appeal.

89. Moving then to the third element, here, the respondent contended that the 'degrading rumours' constituted "mental abuse".

90. Section 2 defines "mental abuse" as including:

> ... verbal **abuse**, emotional abuse and psychological abuse and means a **pattern** of degrading, humiliating, aggressive or intimidating conduct **towards** a victim, including —
>
> (a) **repeated** insults, ridicule or name calling;
>
> (b) repeated threats to cause physical and emotional pain; or
>
> (c) the repeated exhibition of obsessive possessiveness, domination or jealousy, which is such as to constitute a serious invasion of the victim's privacy, liberty, integrity or security.
>
> [emphasis added]

91. With the removal of Siniti and Lopeti and the theft rumour from further consideration for the reasons stated in the preceding section, the remaining rumours raised by the respondent in her original application were that she was having an affair and that her husband was not the father of her twins.

92. During submissions, Mrs Fa'anunu accepted that there was no evidence that any of the appellants had made any accusation to the effect that the respondent's husband was not the father of her twins.

93. That leaves the affair rumour. The only evidence of that on the EPO application was to be found in paragraph 3.3 of the respondent's first affidavit. The subsequent evidence, on the cancellation application, in the affidavits of Luseane and the respondent in reply went no higher than while the respondent was still living in Litania's home, Litania told Luseane on a number of occasions to watch out that the respondent did not 'rub up' on Luseane's husband and Lutini. As Mrs Fa'anunu accepted during submissions, that was not evidence of the respondent having an affair. Moreover, there was no evidence that at any time after the respondent left Litania's house, Litania said anything of that kind to any person.

94. The only evidence specifically against 'Elikoni was to be found in paragraphs 6 to 10 of the respondent's reply affidavit where she deposed to, effectively, being told by one Sulieti Suli that 'Elikoni had made the affair accusation as well as telling Sulieta and others that the respondent's daughter had fallen pregnant to the respondent's husband but had suffered a miscarriage. That latter allegation was never part of the application for the EPO. In my view, if the learned Magistrate took it into account in refusing the cancellation application, he erred in doing so.

95. As against 'Elikoni then the only arguable evidence was that she had made the affair accusation to others because Sulieti told the respondent so.

96. This aspect of the case is a good example of the caution to be applied by Magistrate's in assessing evidence firstly, for admissibility and secondly, for weight. The respondent did not file any affidavit by Sulieta Suli. The statements as to what she allegedly told the respondent were clearly hearsay and inadmissible. In fact, the statement in paragraph 3.3 of the respondent's first affidavit that "the Defendants have alleged…", without any attempt at even the most basic particularisation – who, when, where, how, etc – could well have amounted to impermissible hearsay on hearsay. There was no attempt to identify the source and grounds for any hearsay sought to be relied upon so as to gain the benefit of O.26 r.6(2). Even if this Court on rehearing did not apply the hearsay rule, the respondent's case would not be significantly improved, for without any of the usual particulars of what Sulieta allegedly told her, all her reply evidence amounts to is that Sulieta told her that 'Elikoni uttered the affair rumour.

97. Therefore, at the time of the original application, had the Magistrate enquired into or been appraised of what was to be revealed by the later evidence, he would or should have identified that:

    (a) there was no admissible evidence of anything said by 'Elikoni;

    (b) it had been five months since the respondent left Litania's home;

    (c) there was no evidence as to when the respondent had become aware of the 'affair' rumour;

    (d) there was no evidence of any threatened repeat of the rumour; and

(e) the making of an order against 'Elikoni was neither necessary nor desirable.

98. A similar analysis applies in respect of Litania.

99. However, even if the Magistrate could have been satisfied on the evidence before him on the original application that Litania had told Luseane that the respondent was having an affair with Lutini (as opposed to the actual evidence about the respondent 'rubbing up' against him), there was no evidence that any such statements were made other than when the respondent was still living with Litania, some five months prior to the application being filed.

100. But even if that were not the case, could a complaint such as the 'affair rumour' constitute mental abuse for the purposes of the Act?

101. The word 'abuse' is not defined in the Act. Its ordinary dictionary definition includes, relevantly, language that condemns or vilifies usually unjustly, intemperately, and angrily. Therefore, if one assumes that a rumour that the respondent was having an affair, coupled with the respondent's evidence at paragraphs 3.2 and 4 of her first affidavit, *could* be regarded as verbal, emotional or psychological abuse and even degrading or humiliating conduct, the next question is: did it meet the other elements of the definition of mental abuse in the Act?

102. The definition in s.2 calls for two other features, namely, that the abuse had to be:

(a) a pattern established by repeated conduct; and

(b) towards the victim.

103. As Mrs Fa'anunu accepted during oral submissions, there was no evidence in the respondent's first affidavit of any pattern or repetition of the affair rumour. Even in the subsequent affidavit material filed on the respondent's behalf, the only evidence which came close to establishing that requirement was Luseane's affidavit at paragraph 5.2 in which she deposed to "At times..." when the respondent was talking with her husband and Lutini, Lutinia would call out and ask where the respondent was and then say to Luseane to be careful because the respondent might 'rub up' on her husband and Lutini. Luseane did not depose to ever telling the respondent what Lutinia allegedly said about her and the respondent did not actually depose to hearing it from Luseane. The events only happened when the respondent was still living with Lutinia. No application was made at that time. There was no evidence that the accusations were made after the respondent left, nor at any time close to the filing of the application nor that Luntinia had threatened to repeat them. There was no evidence of any 'pattern' of conduct which could amount to mental abuse within the Act.

104. Further, while any derogatory comment allegedly made by Lutinia to Luseane was about the respondent, there was no evidence that any such statement was made by Lutinia *towards* the respondent. That begs an important question for the

operation of the Act: how direct, in terms of proximity of space and time, must abuse be levelled at or inflicted on, a victim, to constitute mental abuse as defined?

105. Section 4 refers to an act, omission or threat *causing*, relevantly, mental abuse to the victim. That would suggest the abuse does not have to be communicated directly by the perpetrator to the victim for the provision does not prescribe *how* an act, omission or threat is carried out, but rather the result, namely causing the victim to suffer the relevant abuse.

106. But what if, as here, A makes a derogatory comment to B about X, but A tells B not to tell anyone including the victim? What if B goes and tells C, D and E, and one of them eventually relays the comment to X? In that circumstance, and putting aside any requirement for repetition, can it be said that A caused X to suffer mental abuse? In that scenario, I think not, because A did not direct the comment to X, nor did he make it with any intention of X hearing about it. Although not specified in the relevant definition, intention must be implied. For example, if a husband accidentally bumps into his wife and she falls to the ground and sustains injury, the act caused injury, but it is not domestic violence for the purposes of the Act. But if he does it repeatedly, it is unlikely to be accidental and is likely to be intended, and therefore constitute domestic violence. In this regard, I respectfully agree with Niu J in ***Fifita v Fifita*** [2019] TOSC 24 at [9].

107. There, Niu J held that the act of adultery itself was not domestic violence for the purposes of the Act. In my view, adultery must be regarded as "beyond the reasonable expectations and acceptances of family and domestic life". Therefore, if a husband repeatedly tells his wife about his adultery, using language which degrades, humiliates or insults her, and thereby causes her to suffer mental abuse (which includes emotional and psychological abuse), such conduct may constitute domestic violence.

108. Returning to the issue of 'towards', contrast the example above with a situation where a recently estranged husband repeatedly tells his wife's friend to tell her that he is going to beat her the next time he sees her. Assume the friend tells the wife. In that circumstance, even though the husband has not made the threat directly to the wife, the manner in which he communicated it to the wife's friend with the explicit intention of the wife receiving the threat can clearly be said to be aggressive or intimidating conduct *towards* the victim. That was not the case here.

109. These questions of nuance call into focus the mainstay of Mr Edwards' submissions, namely, that if any of the appellants had made any of the accusations about the respondent of which the respondent complained, such comments may arguably be defamatory, but they are not domestic violence against which the Act was designed and intended to protect and prevent.

110. The partial overlap in subject matter is plain. Section 2 of the *Defamation Act* defines

defamation of character as statements damaging the reputation of another or exposing that other to hatred, contempt or ridicule or causing him to be shunned. The repetition of defamatory matter also constitutes defamation of character.

111. Subject to clause 12 of the Constitution (accused not to be tried twice), s.29 of the Act permits a respondent to be prosecuted under Part 6 as well as under other criminal laws if the facts disclose the commission of a separate criminal offence under those provisions. The examples given in the note to the section all involve serious offences against the person as found within Part IX of the *Criminal Offences Act*.

112. Arguably, criminal proceedings for defamation could be taken for conduct which also constitutes domestic violence in the form of mental abuse. One obvious point of distinction is that the Act is concerned with people in a domestic relationship who, in the ordinary course, are unlikely to prosecute or sue each other for defamation. A further distinction lies in the fact that defamation involves statements made to others about a person, whereas mental abuse as contemplated by Act will usually involve statements to the person rather than to others. That does not preclude the *possibility*, in an unusual case, of statements made to others about a person being capable of causing the person mental abuse once he or she becomes aware of them. Subject to the other requirements of the Act (such as a domestic relationship and repetition), it is at that point that domestic violence in the form of mental abuse and defamation of character may intersect. Yet a further distinction in the two statutory regimes is to be found in the relief provided. Protection orders under the Act are designed to prevent domestic violence. Criminal sanctions and/or damages under the *Defamation Act* are designed to punish and/or compensate.

Was it necessary or desirable to make the EPO?

113. For the reasons stated, I find that, on the proper interpretation of the Act, the respondent's original application and affidavit did not contain any or any sufficient evidence upon which the learned Magistrate could be satisfied of the requirements of s.12(1)(a) and (b) and/or s.13(2). In the absence of any "domestic relationship" or "domestic violence" in the form of mental abuse having been committed or threatened by any of the appellants, it was neither necessary nor desirable to make the EPO for the protection of the respondent.

114. As those requirements were not fulfilled, the discretion conferred by the Act to make an order was not enlivened.

115. Accordingly, the application for an EPO should have been dismissed.

Was there good cause for cancelling the EPO?

116. As may be seen from some of the above commentary on the evidence adduced

following the issuing of the EPO and during the appellants' application for cancellation of the order, none of the material filed for the respondent cured the defects in the decision to grant the EPO. That is because a number of the errors stemmed from an inaccurate interpretation and application of the critical statutory and evidentiary requirements for the order by which the application was to be considered.

117. From my reading of the material, including the notes of the hearing of the cancellation application and the Magistrate's decision refusing it, it appeared that the growing volume of conflicting affidavit evidence may have proved too difficult to consider and resolve, and determine there and then. Perhaps if the learned Magistrate had reserved his decision in order to consider the matter in more detail, he would have realised that the order ought to have been cancelled. The opposite conclusion was probably also more attractive because of the relatively short period before the EPO expired.

CONCLUSION

118. For the reasons stated above, I find that the Magistrate erred in granting the emergency protection order and in refusing the cancellation application. Further, by this rehearing, I find that:

    (a) on the evidence presented below, and on this appeal, the Court could not be satisfied that the requirements of ss 12(1) and 13(2) of the Act had been met, because:

        (i) there was no "domestic relationship" between the parties;

        (ii) the conduct complained of by the respondent did not constitute "domestic violence" in the form of "mental abuse" as defined by the Act; and

        (iii) it was neither necessary or desirable to make an order to protect the respondent; and

    (b) therefore, the statutory discretion to make the EPO was not enlivened;

    (c) further or alternatively, even if making the initial EPO was justified by the Act (which it was not), the subsequent affidavit evidence and submissions on the cancellation application provided good cause for cancelling the order pursuant to s.20.

119. Accordingly, pursuant to s.36(1) of the Act, I allow the appeal and order that the emergency protection order made by Magistrate Tuita against the appellants on 20 September 2019 be quashed (or, to use the language in s.36(1)(a): dismissed).

Costs

120. Mrs Fa'anunu submitted that the appeal be dismissed without costs, principally because of the respondent's financial circumstances.

121. Given this appeal concerned hitherto untested issues on the proper interpretation and application of the Act, I am minded to make no order as to costs.

122. However, as the appeal has been allowed, and Mr Edwards did not make any submissions on costs at the hearing, I will reserve liberty to apply within 14 days of the date hereof.

NUKU'ALOFA
10 June 2020

M.H. Whitten QC
LORD CHIEF JUSTICE