DISTRICT COURT OF QUEENSLAND

CITATION:	*STO v Queensland Police Service & Anor* [2020] QDC 139
PARTIES:	**STO** (Appellant) v **QUEENSLAND POLICE SERVICE** (First Respondent) **DEF** (Second Respondent)
FILE NO/S:	D79/20
DIVISION:	Appellate
PROCEEDING:	Domestic Violence Order Appeal
ORIGINATING COURT:	Magistrates Court Southport
DELIVERED ON:	24 June 2020
DELIVERED AT:	Southport
HEARING DATE:	22 June 2020
JUDGE:	McGinness DCJ
ORDER:	**1. The appeal is allowed** **2. The protection order made by the Domestic Violence Court on 4 February 2020 is set aside;** **3. The proceeding is remitted to the Domestic Violence Court to be heard and determined according to law;** **4. The first respondent pay the costs of the Appeal.**
CATCHWORDS:	DOMESTIC VIOLENCE – APPEAL – where the appellant appeals a protection order – where the order was made in the absence of the appellant and the aggrieved – whether the Magistrate should have adjourned the application having regard to the matters known to the court – whether the Magistrate failed to comply with s 39 *Domestic and Family Violence Act 2012* – where the Magistrate failed to comply with s 37 *Domestic and Family Violence Act 2012* – where the Magistrate failed to give reasons.
LEGISLATION:	*Domestic and Family Violence Protection Act 2012* (Qld), Sections 37, 39, 142, 164, 169, 187, 237 *Uniform Civil Procedure Rules 1999* (Qld), Rule 681

CASES:	*Allensh v Maunz* [2000] HCA 140
	BAK v Gallagher and Anor [2018] QDC 32
	Beale v Government Insurance Office of NSW 48 NSWLR 430
	Drew v Makita (Australia) Pty Ltd [2009] 2 Qd R 29
	Kilvington v Grigg & Ors (No.2) [2011] QDC 37
	North Sydney Council v Ligon 302 Pty Ltd (1995) 87 LGERA 435
	Rajski v Bainton (Court of Appeal, 6 September 1991, unreported)
	Selvanayagam v University of the West Indies [1983] 1 WLR 585; [1983] 1 All ER 824
	Soulemezis v Dudley (Holdings) Pty Ltd 10 NSWLR 247
	Teelow v Commissioner of Police [2009] 2 Qd R 489
COUNSEL:	J. McNab for the appellant
	M. Vassilakos for the first respondent (sol.)
	No appearance for the second respondent
SOLICITORS:	Reardon Family Lawyers for the appellant
	Queensland Police Service for the first respondent

Introduction

[1] This is an appeal against the decision of the Magistrates Court at Southport on 4 February 2020 to make a protection order against the appellant under s 37 of the *Domestic and Family Violence Protection Act 2012* (Qld) ("the Act"). The second respondent (the aggrieved) did not wish to be part of the appeal proceedings.

Summary of facts

[2] The appellant and his partner, the aggrieved, had been in a relationship for approximately six years. They share two children and reside in New South Wales. They arrived in Coomera on 9 September 2019 to house sit for 11 days. At about 8.30pm, police were called. A witness stated that a female and male were arguing. After hearing a loud bang, the female called out for help. The witness then observed the male standing over the female saying words similar to "I will kill you."

[3] Police arrived a short time later and spoke to both parties. The aggrieved stated to police that she and the appellant had an argument and he would not leave her alone. The appellant followed the aggrieved around and she pushed him away a couple of times. The aggrieved stated that she was attempting to walk outside when the appellant grabbed her around the shoulders and pulled her back inside. The aggrieved stated that, although she wasn't fearful of the appellant, the relationship was over.

[4] The appellant initially stated to police that there had been a verbal argument only, but later conceded that he stood in the doorway and said words to the effect of "I will kill you". The appellant stated that he didn't mean it and would never hurt the aggrieved. He also stated that the aggrieved pushed him away which is why he stopped her leaving the house.

[5] Police arrived and issued a Police Protection Notice naming the appellant as the respondent. Police stated a protection order was necessary or desirable due to the fact that the appellant would not leave the aggrieved alone despite being pushed away, and because the appellant threatened to kill the aggrieved.

Court History

[6] The appellant was served with a Police Protection Notice on 9 September 2019. The notice informed him that he was required to appear at the hearing of the application before the Magistrates Court on 11 September 2019.[1]

[7] The application for protection order was listed for mention in the Southport Magistrates Court on 11 September 2019 at which time the appellant attended. On that occasion, the appellant consented to a temporary protection order "without admission". The appellant informed the court he lived in Wayo, New South Wales. His request to appear by telephone on the next occasion was granted. The Magistrate told the appellant to send written submissions to the Police as to why no order should be made. The matter was adjourned to 10 December 2019 for mention.

[8] On 10 December 2019, the police prosecutor informed the Magistrate that the file indicated there was to be phone appearances by both parties. As is the practice in the Magistrates Court, the prosecutor then attempted to contact the aggrieved from the courtroom telephone. The aggrieved's phone went to message bank. The prosecutor then rang the appellant. The appellant answered his phone. The aggrieved was at his address at the time. They had reconciled. The Magistrate first spoke to the appellant on his mobile phone. He informed her that he opposed the making of a protection order. The Magistrate reminded the appellant that he was supposed to have already sent a submission to the court. She informed the appellant that, if he was not going to consent to the order, to send a submission by email to the Police Prosecution Service.

[9] The Magistrate then asked to speak to the aggrieved, who also told the Magistrate she opposed the making of a protection order. The Magistrate told the aggrieved, when she was on the phone, that she would adjourn the application to 4 February 2020 for hearing. The Magistrate did not specifically inform the appellant of the next hearing, no doubt because she would have assumed the aggrieved would inform the appellant of the next date. The Magistrate told the parties they could appear by phone on 4 February 2020.[2]

[10] On 10 December 2019, the Southport Magistrates Court generated a Notice of Adjournment to the appellant; however, this notice was not sent to the appellant by post or email. The notice stated that the matter was next listed for hearing on 4 February 2020.[3] A copy of the notice and a corresponding email show that the notice was not sent to the Appellant. The email accompanying the notice states the

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1 Affidavit of the appellant filed 6 April 2020, Exhibit A.

2 Transcript of 10 December proceedings and noted clearly on the file endorsement cover sheet.

3 Affidavit of Maria Vassilakos filed 21 May 2020, exhibit 'Mav 7'.

Appellant's address was not supplied, but that he was present in court, therefore service was deemed to have occurred.[4]

[11] On 4 February 2020, the application came on for hearing. The prosecutor did not inform the Magistrate that an order had been made by the Magistrate on the previous occasion that the parties could appear by telephone. No effort was made to call either party. I have seen the endorsement on the court file made by the Magistrate on 10 December 2019. The Magistrate endorsed the file as follows:

> *"Submission to be made; email address provided; [aggrieved] opposes order; Leave to parties to appear by phone."*

[12] Despite the endorsement, the court had not telephoned the appellant. The Magistrate, without hearing submissions, made a Protection Order for five years.

[13] On 18 February 2020, the appellant emailed the Southport Magistrates Court with the following:

> *"I have a phone hearing date set for 24 February, I would be grateful if you would reconsider this DVO, I am also prepared to give an undertaking (not a formal order)."*

[14] The appellant received no response from the court.

[15] On 22 February 2020, the appellant received a phone call from SC Gold of Police Prosecutions informing him that the application had been heard in his absence on 4 February 2020, and the Magistrate had made a 5 year protection order.

[16] The appellant deposes that:

- He was under the misapprehension that the matter was adjourned to 24 February 2020, not 4 February 2020.[5]
- At no stage did he receive a copy of a written Notice of Adjournment that the next hearing date would be 4 February 2020.[6]
- The Magistrate's Court did not phone him on 4 February 2020.[7] The appellant's phone records exhibited to his affidavit show the court did not call the appellant on 4 February 2020. The first respondent concedes the court did not call the appellant.

Grounds of appeal

[17] The appellant submits the following grounds of appeal:

1. The Magistrate erred on 4 February 2020 in making a final protection order against the appellant pursuant to s 39(2)(a) of the Act;
2. The Magistrate erred by not adjourning the application pursuant to s 39(2)(b) of the Act;
3. On the evidence available, the Magistrate erred in finding that:
   (a) There was sufficient evidence to justify that domestic violence had been committed by the appellant to the aggrieved; or
   (b) That a domestic violence order was either necessary or desirable.

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4 Affidavit of Maria Vassilakos filed 21 May 2020, exhibits 'MAV 6' and 'MAV 7'.
5 Affidavit of Appellant filed 6 April 2020 at [28]-[29].
6 Affidavit of Appellant filed 6 April 2020 at [24].
7 Telephone records confirm this as does the transcript of hearing on 4 February 2020

[18] The first respondent concedes the appeal. The aggrieved did not appear.

Relevant legal principles on appeal

[19] Section 164 of the Act provides that a person aggrieved by a Magistrate's decision to make a protection order may appeal to the court.

[20] Section 169 of the Act provides the appellate court may:
(a) confirm the decision appealed against; or
(b) vary the decision appealed against; or
(c) set aside the decision and substitute another decision; or
(d) set aside the decision appealed against and remit the matter to the court that made the decision.

[21] The appeal is by way of a rehearing on the evidence given in the proceedings before the Magistrate. The court must have regard to all evidence before it and determine whether the order made by the Magistrate is the result of some legal, factual or discretionary error, see *Teelow v Commissioner of Police* [2009] 2 Qd R 489.

[22] The appeal court must conduct a real review of the trial and the Magistrate's reasons, and make its own determination of relevant facts and issues from the evidence, giving due deference and attaching a good deal of weight to the Magistrate's view.

Grounds 1 and 2: Failure to adjourn hearing

[23] The appellant and first respondent submit the Magistrate did not afford the appellant procedural fairness by refusing to exercise his discretion under s 39(2)(b) of the Act to adjourn the proceedings. They submit the appellant was not afforded procedural fairness because the Court did not send a Notice of Adjournment to the appellant and aggrieved stating the next hearing date was 4 February 2020; because the Court would have been aware the application was opposed; because the Court would have known the appellant and aggrieved were to appear by phone and made no attempt to contact them.

[24] Section 39 of the Act relevantly provides:

"**39 Hearing of application—non-appearance of respondent**

(1) This section applies if a respondent fails to appear before the court that is to hear and decide an application for a protection order and the court is satisfied that the respondent has been served with a copy of the application.

Note—

If a respondent has been served with a police protection notice, because of section 112, the respondent is taken to have been served with a copy of an application for a protection order.

(2) The court may—
(a) hear and decide the application in the absence of the respondent; or
(b) adjourn the application, whether or not it makes a temporary protection order under division 2; or
(c) subject to section 156(1), order the issue of a warrant for the respondent to be taken into custody by a police officer and brought before the court."

[25] In my view, s 39 of the Act requires proof of initial service of an Application for a Protection order before an application is determined in the absence of a respondent. The appellant was served. The section does not require the court to send out a Notice of Adjournment on each occasion a respondent is thereafter required to appear in court. Section 39 of the Act does not refer to a Notice of Adjournment, rather to a Notice of Application. Once a police notice or an application has been served on a respondent, and the respondent is present when the next court date is announced by the court, the onus is on the respondent to appear.

[26] There is a requirement in some instances that a Notice of Adjournment must be sent. Under the Act, a Notice of Adjournment need only be sent if the respondent is not present in court when court proceedings are adjourned.

[27] Section 187 relevantly provides:

> "**187 Court to give notice of adjournment to absent respondent**
>
> (1) This section applies if—
>
> (a) a court adjourns—
>
> (i) the hearing of an application for the making or variation of a domestic violence order; or
>
> (ii) a proceeding mentioned in section 42 or 43; and
>
> (b) **the respondent is not present in court when the adjournment is made**. (my highlighting)
>
> (2) If the respondent has been served with a copy of the application for the making or variation of the domestic violence order mentioned in subsection (1)(a)(i), or subsection (1)(a)(ii) applies, the clerk of the court must give a written notice to the respondent stating—
>
> (a) the date, time and place to which the hearing of the application is adjourned; and
>
> (b) that if the respondent does not appear in court on the later day to which the matter has been adjourned, a domestic violence order may be made in the respondent's absence, or the court may issue a warrant for the respondent to be taken into custody by a police officer.
>
> (3) If the respondent has not been served with a copy of the application for the making or variation of the domestic violence order mentioned in subsection (1)(a)(i), the clerk of the court must—
>
> (a) write on a copy of the application the date, time and place to which the hearing of the application is adjourned; and
>
> (b) give the copy of the application to the officer in charge of the police station nearest the place where the respondent lives or was last known to live.
>
> (4) A police officer must personally serve the copy of the application mentioned in subsection (3)(b) on the respondent.
>
> (5) The clerk of the court is not required to comply with subsection (2) if the clerk of the court cannot locate the respondent, or identify an address for the place of residence or business of the respondent, after making all reasonable enquiries.

(6) Failure to comply with this section does not invalidate or otherwise affect a domestic violence order.
(7) This section is subject to section 188."

[28] The court was not required to send the appellant and aggrieved a Notice of Adjournment because they had appeared by phone on 10 December 2019.

[29] However, in the present circumstances, having regard to: the court history of this matter; the clear notation on the front of the court file that the parties had been given leave to appear by phone; the failure of the court to call the appellant on 4 February 2020; the explanation provided by the appellant as to why he did not appear on 4 February 2020; and the evidence that both the aggrieved and the appellant opposed the making of a protection order, I am satisfied that there has been a miscarriage of justice where a five year protection order has been made against the appellant in circumstances where his failure to appear has been adequately explained.[8]

Ground 3: Failure to give reasons

[30] The appellant and first respondent submit that the transcript of proceedings for the hearing on 4 February 2020 does not provide any identifiable evidence that the learned Magistrate turned his mind to the three limb test required to be considered when exercising the discretion under s 37 of the Act to make a protection order against the appellant.

[31] The circumstances when a court may make a protection order are set out in s 37 of the Act which relevantly provides:

"**37 When court may make protection order**
(1) A court may make a protection order against a person (the respondent) for the benefit of another person (the aggrieved) if the court is satisfied that—
(a) a relevant relationship exists between the aggrieved and the respondent; and
(b) the respondent has committed domestic violence against the aggrieved; and Note— See the examples of the type of behaviour that constitutes domestic violence in sections 8, 11 and 12, which define the terms domestic violence, emotional or psychological abuse and economic abuse.
(c) the protection order is necessary or desirable to protect the aggrieved from domestic violence.
(2) In deciding whether a protection order is necessary or desirable to protect the aggrieved from domestic violence—
(a) the court must consider—
(i) the principles mentioned in section 4; and
(ii) if an intervention order has previously been made against the respondent and the respondent has failed to comply with the order—the respondent's failure to comply with the order; and

8 *Allensh v Maunz* [2000] HCA 140 at [28]

(b) if an intervention order has previously been made against the respondent and the respondent has complied with the order—the court may consider the respondent's compliance with the order.

(3) However, the court must not refuse to make a protection order merely because the respondent has complied with an intervention order previously made against the respondent.

(4) If an application for a protection order names more than 1 respondent, the court may make a domestic violence order or domestic violence orders naming 1, some or all of the respondents, as the court considers appropriate."

[32] The transcript of the hearing and decision on 4 February 2020 is set out in its entirety as follows:

"BENCH: Now, the matter of [DEF] and [STO]. There were submissions to be made to the police.

SGT CHETTY: It was down for submissions, your Honour. To my knowledge there have been no submissions received.

BENCH: The aggrieved and the respondent were both here on the last appearance on the 10th of December.

SGT CHETTY: Yes. I would seek a final order then.

BENCH: And term?

SGT CHETTY: Five years.

BENCH: Matter of the aggrieved [DEF] v respondent [STO]: I will order a protection in the same terms as the temporary protection order made by this court on the 11th of September 2019 for a period of five years."

[33] It is not clear what evidence, if any, the Magistrate considered to determine a protection order should be made. It is also not clear whether the Magistrate considered each limb of s 37 of the Act, in particular whether a protection order was *necessary or desirable* to protect the aggrieved from domestic violence in the future. When one reads the short statement of the domestic violence incident outlined in the police protection order, there is no prima facie evidence that suggests there would be ongoing domestic violence.

[34] What is undeniably clear is that the Magistrate has failed to give **any** reasons to support the exercise of his decision to impose a 5 year protection order based on the material before him.

[35] An error of law will have occurred when the court which hears and decides this type of application does not provide adequate reasons.[9]

[36] In *Drew v Makita (Australia) Pty Ltd*[10] *(Makita)*, Muir and Holmes JA, as her Honour then was, with Daubney J agreeing, stated:

"[57] A court from which an appeal lies must state adequate reasons for its decision. The failure to give sufficient reasons constitutes an error of law.

[58] The rationale for the requirement that courts give reasons for their decisions provides some guidance as to the extent of the

[9] *BAK v Gallagher and Anor* [2018] QDC 32 per Muir DCJ.
[10] [2009] 2 Qd R 29.

> reasons required. The requirement has been explained, variously, as necessary: to avoid leaving the losing party with 'a justifiable sense of grievance' through not knowing or understanding why that party lost; to facilitate or not frustrate a right of appeal; as an attribute or incident of the judicial process; to afford natural justice or procedural fairness; to provide 'the foundation for the acceptability of the decision by the parties and the public' and to further 'judicial accountability' (emphasis added).

[37] In *Makita*, their Honours considered *Soulemezis v Dudley (Holdings) Pty Ltd*[11]:

> "[59] The extent to which a trial judge must expose his or her reasoning for the conclusions reached will depend on the nature of the issues for determination and "the function to be served by the giving of reasons." For that reason, what is required has been expressed in a variety of ways. For example, in *Soulemezis v Dudley (Holdings) Pty Ltd*, Mahoney JA said:
>
> > '… And, in my opinion, it will ordinarily be sufficient if – to adapt the formula used in a different part of the law … by his reasons the judge apprises the parties of the broad outline and constituent facts of the reasoning on which he has acted.'
>
> [60] McHugh JA's view was that reasons sufficient to meet the above requirements do not need to be lengthy or elaborate but '… it is necessary that the essential ground or grounds upon which the decision rests should be articulated'."

[38] In *Makita*, their Honours also considered the propositions in *Beale v Government Insurance Office of NSW*, citing Meagher JA at [63]:[12]

> "…there are three fundamental elements of a statement of reasons. First, a judge should refer to relevant evidence. There is no need to refer to the relevant evidence in detail, especially in circumstances where it is clear that the evidence has been considered. However, where certain evidence is important or critical to the proper determination of the matter and it is not referred to by the trial judge, an appellate court may infer that the trial judge overlooked the evidence or failed to give consideration to it: *North Sydney Council v Ligon 302 Pty Ltd* (1995) 87 LGERA 435. Where conflicting evidence of a significant nature is given, the existence of both sets of evidence should be referred to.
>
> Secondly, a judge should set out any material findings of fact and any conclusions or ultimate findings of fact reached. The obvious extension of the principle in *North Sydney Council* is that, where findings of fact are not referred to, an appellate court may infer that the trial judge considered that finding to be immaterial. Where one set of evidence is accepted over a conflicting set of significant evidence, the trial judge should set out his findings as to how he comes to accept the one over the other. But that is not to say that a judge must make explicit

[11] 10 NSWLR 247.
[12] 48 NSWLR 430.

> findings on each disputed piece of evidence, especially if the inference as to what is found is appropriately clear: *Selvanayagam v University of the West Indies* [1983] 1 WLR 585; [1983] 1 All ER 824. Further, it may not be necessary to make findings on every argument or destroy every submission, particularly where the arguments advanced are numerous and of varying significance: *Rajski v Bainton* (Court of Appeal, 6 September 1991, unreported).
> Thirdly, a judge should provide reasons for making the relevant findings of fact (and conclusions) and reasons in applying the law to the facts found. Those reasons or the process of reasoning should be understandable and preferably logical as well."

Conclusion: Grounds 1 and 2

[39] I am satisfied that the appellant has provided an adequate explanation as to why he did not appear at the hearing on 4 February. His failure to appear was due to an honest mistake on his part as to the correct hearing date, but not due to a failure of the court to notify him of the hearing date. Each case depends on its own facts. In this case, the police prosecutor and the court failed to telephone the appellant on 4 February 2020 despite the previous court order. Ordinarily, busy courts cannot be expected to adjourn cases where parties have been served with the next court date, or are present when the date of adjournment is made and are aware of when they are next to appear. However, the present case is an example where the prosecutor should have been aware that the court needed to contact the appellant. Unfortunately, the Magistrate must not have read the file endorsement from the previous court date. Otherwise, he no doubt would have instructed the prosecutor to call the parties.

Conclusion: Ground 3

[40] I am satisfied the Magistrate erred by not providing any reasons for his decision to grant a protection order in the circumstances of the present case. I am not satisfied that the Magistrate considered, as he must, the three limbs in s 37 of the Act when he exercised his discretion to make the final protection order.

[41] The Domestic Violence Magistrates Court deals daily, Monday to Friday, with an overwhelming number of mentions, applications and hearings for protection orders, temporary orders, and variation orders. The constant challenge is to balance the need to administer justice expeditiously with the need to include reasons that support the Court's decision. The present case demonstrates why the making of or varying temporary and protection orders are not to be rubber stamped. All parties who appear before the Domestic Violence Court must be, and be seen to be, afforded natural justice, procedural fairness, and they are entitled to decisions based on the evidence and in accordance with the law.

[42] The appeal is allowed. The matter should be remitted back to the Magistrates Court for further hearing. In doing so, having regard to the paucity of the evidence against the appellant with regard to the third limb of s 37 of the Act, I suggest that careful consideration be given to whether it is in the interests of justice that the police proceed with this matter.

Costs

[43] Section 142(2) of the Act expressly provides that the *Uniform Civil Procedure Rules 1999* (Qld) ("UCPR") applies to an appeal under the Act. It follows that the relevant provisions of the UCPR govern the issue of an appeal under the Act. UCPR r 681 relevantly provides that costs of a proceeding, including an application in a proceeding, are at the discretion of the court but follow the event, unless the court orders otherwise.

[44] In the case of *BAK v Gallagher & Anor (No 2)*,[13] Muir DCJ considered the factors relevant to the court's discretion to grant costs in domestic violence appeals. She relevantly observed:

> "[30] … Rule 681 of the UCPR expressly states that costs follow the event unless the court orders otherwise. As McGill SC DCJ observed in *Kilvington v Grigg & Ors (No.2)* [2011] QDC 37, this distinction is relevant and must be kept in mind, as the provision under r 681 UCPR reflects the traditional approach. This means that the starting point is that costs follow the event and the question is whether there is a sufficient reason to depart from that position to any extent.
>
> [31] The court has an absolute and unfettered discretion as to costs which must be exercised judicially without caprice, bearing in mind relevant considerations. The discretion will generally be exercised on the basis that a successful party to litigation is entitled to an award of costs in its favour. The court will only depart from exercising the discretion in accordance with this principle if there are 'sufficient special circumstances to justify a departure from the ordinary rule as to costs'. In deciding whether a departure is justified in a particular case, fundamental principles of fairness favouring the prima facie approach stipulated by the rules apply, so a court will hesitate before departing from the general rule and will depart only in unusual cases. The occasions justifying a departure from the ordinary rule have been described as rare and exceptional." (Footnotes omitted).

[45] Having regard to the principles, it is appropriate to first consider the first respondent's submissions. The first respondent submits that each party should bear their own costs because the appellant failed to appear in person or by telephone on 4 February; the onus was on the appellant to appear on 4 February 2020; the aggrieved was told by the Magistrate of the next court date and she was with the appellant at the time, so the appellant should have been aware of the next court date; the appellant had displayed a history of complacency since the commencement of proceedings by failing to email written submissions to the court on earlier occasions; and the first respondent has conducted itself appropriately on appeal.

[46] The appellant submits costs should follow the event in the present case.

[47] I accept the first respondent has conducted itself appropriately on appeal. The first respondent provided a very thorough and helpful outline of appeal. The first respondent conceded the appeal should be allowed on all grounds.

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[13] [2018] QDC 132.

[48] However, I am satisfied the following factors militate in favour of costs following the event: the appellant provided adequate reasons as to why he did not appear on 4 February 2020; the police and or court failed to contact him by telephone on 4 February, contrary to a previous order that he could appear by telephone; the findings of the Magistrate were non-existent; and the evidence upon which the Magistrate granted the order, in my view, raised a real doubt as to whether the Protection Order was necessary of desirable under s 37(1) of the Act.

[49] I am not satisfied that the factors relied on by the first respondent are sufficient to warrant departure from the usual rule that costs follow the event.

Orders

1. The appeal be allowed.

2. The protection order made by the Domestic Violence Court on 4 February 2020 is set aside;

3. The proceeding is remitted to the Domestic Violence Court to be heard and determined according to law;

4. The first respondent pay the appellant's costs of the appeal.