

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 2020/44450

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) *REVISED.*

11/09/2023
DATE

In the matter between:

H

Applicant

and

THE SHERIFF JOHANNESBURG NORTH

First Respondent

SH

Second Respondent

Coram: Ingrid Opperman J

Heard: 11 August 2023 & 17 August 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 11 September 2023

Summary: Application to suspend the monetary portions of the maintenance obligations of a rule 43 order pending the finalisation of an appeal (leave for which is yet to be decided) against the dismissal of the applicant's application to set aside or declare invalid the rule 43 order (*the invalidity application*) – Rule 45A discussed and question considered whether in the present suspension application regard should be had to the prospects of success in the pending application for leave to appeal of the dismissed invalidity application – Court finding that applicant had entered into an agreement not to pursue the suspension application – in the alternative, and assuming that the applicant could pursue the suspension application, the Court considered the suspension application in the context of its inherent power to control its own processes, having regard to the interests of justice, which inherent discretion operates independently of the provisions of Uniform Rule 45A.

ORDER

The Rule 45A application comprising of notices of motion dated 26 October 2022, 19 June 2023 and 22 June 2023 is dismissed with costs as between attorney and client

JUDGMENT

INGRID OPPERMAN J

Introduction

[1] In this application the applicant, Mr H, seeks to suspend the money orders¹ granted by Judge Victor on 12 September 2022 in favour of Mrs SH in terms of rule 43 (*the Victor J order*).

¹ Paragraph [14] – the monetary portion of the maintenance obligations of Mr H in respect of both Mrs SH and the 3 minor children and Paragraph [16] – the order in respect of the contribution towards costs.

[2] Before me Mr H applies for the suspension of the Victor J order in terms of Rule 45A (alternatively the common law) which reads:

'45A. Suspension of orders by the court

The court may, on application, suspend the operation and execution of any order for such period as it may deem fit: Provided that in the case of an appeal, such suspension is in compliance with section 18 of the Act'

[3] Mr H had previously applied to set aside the Victor J order on the basis that it was invalid (the invalidity application), but the invalidity application was dismissed by Judge Mudau (the Mudau J order). Mr H has delivered an application for leave to appeal against the dismissal of his invalidity application by Mudau J. That application for leave to appeal is still pending.

[4] Having failed to set aside the Victor J order before Mudau J, Mr H now seeks to suspend Victor J's order before me pending the finalisation of the appeal against the Mudau J order, in other words, Mr H contends that Mudau J's judgment is wrong and that pending an appeal court coming to that conclusion, Mr H should not have to comply with Victor J's order, which, it bears repeating, was made in terms of rule 43 which is a rule which deals with, amongst other subjects, interim maintenance between spouses pending divorce.

[5] Ancillary to Mr H's present application, is his prayer for an order setting aside or suspending 2 writs of execution, one issued on 22 November 2022 and the other on 23 May 2023 which were issued on the strength of the Victor J order. Mr H's entire suspension focussed application I shall refer to as the Rule 45A application.

[6] Much has happened since the granting of the Victor J order and it is thus useful to set out a chronology of the relevant events from 12 September 2022 (when the Victor J order was granted), to date.

Relevant Events

[7] On 12 September 2022, the Victor J order was granted. Paras [14] and [16], being the orders relevant to the present Rule 45A application, provide:

‘Interim Maintenance

[14] [Mr H] shall pay interim maintenance at the rate of R104 000 per month payable on the last day of each month with effect from 1 September 2022 meaning payment of the said amount commences on 30 September 2022 and the last day of the month thereafter into an account nominated by [Mrs SH].

.....

Contribution to Costs

[16] [Mr H] shall make a contribution to [Mrs SH’s] legal costs in the amount of R830 000 within 10 court days of this order into an account nominated by [Mrs SH].’

[8] On 30 September 2022, Mr H launched the Rule 45A application (as Part A) and the invalidity application (as Part B) and set it down in the urgent court for hearing on 4 October 2022. By agreement between Mr H and Mrs SH, Makume J granted an order, the relevant parts of which read:

‘1. The respondent (Mrs SH) undertakes not to execute the warrant/s of execution obtained by her pursuant to the order made by Victor J on 12 September 2022 under the above case number, until 25 October 2022. It is recorded that the respondent (Mrs SH) does not waive or abandon any of her rights to contend that the applicant (Mr H) did not make out a case for the relief sought in parts A and/or B of the application or that the application is not urgent.

2. The applicant (Mr H) shall not persist with seeking any relief as set out in Part A of the application.

3.

7. The applicant (Mr H) shall ensure that the application is enrolled for hearing in the Urgent Family Court for 25 October 2022.” (emphasis provided)

[9] Part A of Mr H’s application was the application in terms of rule 45A to suspend the operation of the Victor J order. Mr H bound himself to not persist with any relief as set out in Part A of his application. Part B, being the invalidity application, was set

down for hearing on 25 October 2022 when, despite neither party contending that the matter was not urgent, it was struck off the roll for want of urgency by Wright J. It was argued at the hearing before Wright J that the undertaking given by Mrs SH lapsed on 25 October 2022 as per the order of Makume J and the court was urged to enrol the matter as one of urgency by virtue of, amongst other reasons, this feature. The point though is this: everyone present in Wright J's court on 25 October 2022 knew that Mrs SH's undertaking lapsed on that day.

[10] On the very next day, 26 October 2023, Mr H launched his second Rule 45A application in which he sought the suspension of paragraphs [14] and [16] of the Victor J order only, i.e. not the entire order. This followed an instruction by Mr Dollie, Mrs SH's attorney of record, to the sheriff to make an inventory and attach, but not to remove certain assets.

[11] On the 22 November 2022 a writ of execution was issued in respect of the maintenance obligations of Mr H towards Mrs SH and the children for the months of September and October 2022 in the amount of R218 000 payable in terms of paragraph [14] of Victor J's order (*the First Writ*). This writ resulted in the attachment of a BMW motor vehicle (*the BMW vehicle*) on 24 November 2022.

[12] During November 2022, another writ was issued by the Registrar of this court, this time for the contribution towards costs ordered in terms of paragraph [16] of Victor J's order. On 8 November 2022, the Sheriff received payment of the sum of R830 000 in response to this writ which is of significance only insofar as Mr H's compliance with it has a bearing upon an argument subsequently raised on his behalf, to which I return below.

[13] On 4 April 2023, at a case management meeting,² the issue of Mr H's failure to deliver the BMW vehicle and the Sheriff's alleged obstructive behaviour in respect of the execution of writs, was raised. Mr Dollie was requested to provide the name of the Sheriff and the particulars of the non-co-operation complained of, which he did.

[14] On 25 April 2023, the BMW vehicle was delivered by Mr H personally to the office of the Sheriff.

[15] On 23 May 2023, Mr Dollie caused a further writ to be issued by the Registrar in relation to the further arrear maintenance amounts for the period December 2022 to April 2023 (*the Second Writ*) which was executed by the Sheriff on 30 May 2023 when the Sheriff attached Mr H's bank account at ABSA. The Sheriff informed Mr Dollie that Mr H's account reflected a credit of R530 000.

[16] On 6 June 2023 the notice of sale in execution of the BMW vehicle was served on Mr H and on 20 June 2023 it was sold by public auction (I was advised from the Bar that the proceeds of the sale were insufficient and no monies were received).

[17] On 19 June 2023 Mr H served a supplementary affidavit to the rule 45A application which application, as at the date of this hearing bears three notices of motion dated 26 October 2022, 19 June 2023 and 22 June 2023. No formal amendments have been moved or allowed in respect of any of these notices of motion by Mr H.

[18] In the notice of motion dated 26 October 2022, Mr H sought an order that the money orders set out in paras [14] and [16] of the Victor J order be suspended pending the finalisation of the relief sought in Part B being the invalidity application which was heard by Mudau J on 22 November 2022 and dismissed on 14 December 2022. The third notice of motion which amended the dates for the filing of papers and the

² I was appointed Case Manager towards the end of 2022.

enrolment of the application on the urgent court roll for 4 July 2023, was transmitted to Mr Dollie via email on the evening of 22 June 2023 affording him less than one court day to deliver an answering affidavit although he had received the application with a notice of motion with no dates for filing and no set down date on 19 June 2023.

Events pursuant to the Second Writ

[19] On 22 June 2023 a case management meeting was held where I directed that Mr H, if so advised, could endeavour to enrol the Rule 45A application in the urgent court. The matter was then enrolled at Mr H's instance for hearing on 4 July 2023.

[20] Having placed Mr Dollie and Mrs SH under enormous pressure with unreasonably truncated times for the filing of opposing papers, Mr H unilaterally removed the matter from the roll of 4 July 2023 and approached the Deputy Judge President for a special allocation due to the voluminous papers. I should mention that this, the extent of the papers, must have been foreseen.

[21] During July 2023, special motions were being enrolled in this division for the 4th term and having received the request from Mr H for a special allocation, the Deputy Judge President released me from my duties to hear the matter on Friday the 11th of August 2023 (as it turned out, there was not sufficient time on the day to complete the argument which argument was then finalised on 17 August 2023 at 19h30³).

The urgency

[22] The replying affidavit delivered by Mr H, was delivered 5 months late. The notices of motion were never formally amended, supplementary affidavits were filed

³ This was due to, amongst other reasons, an application to permit a further supplementary affidavit, a postponement application and an intervention application having to be considered.

without leave and the relief sought in the original notice of motion has been overtaken by events.

[23] It has not escaped this court's attention that one of the criticisms that was levelled against Mrs SH and the Victor J order is the alleged undisciplined way Victor J had approached the rule 43 proceedings which, so the criticism continued, led to all the supplementary affidavits going in and Mr H being subjected to an unfair process. I do not express a view on that and do not know how the receipt of the multiple affidavits came about. However, what is readily apparent from the application before me is that Mr H, himself, appears to pay scant regard to the rules of procedure including the number of sets of affidavits that are allowed. The delay in prosecuting the relief in Part A, coupled with the unstructured manner in which this application was brought, with little regard for the rules of this court or the rights of Mrs SH, will be addressed later in this judgment in making an appropriate costs order.

[24] To recap: Part A serves before me. Part B served before Mudau J which was heard on 22 November 2022 and in which he delivered a judgment on 14 December 2022. Part A was not prosecuted despite the first writ having been issued on 26 October 2022. This timeline demonstrates why I directed in the case management meeting on 22 June 2023 that Mr H should approach the urgent court *only if he were so advised*. I had not made a ruling on urgency either way as I did not have all the facts before me but there appeared, prima facie, to be difficulties persuading a court that the matter was sufficiently urgent to justify why Mr H should not wait for his turn at a hearing in due course.

What then is the stated urgency?

[25] Mr H says that all his personal banking accounts were frozen on 23 May 2023 and that he has been prevented from accessing the funds held therein. He contends

that he only became aware of the writ on 10 June 2023. He explains that the frozen funds include his income that he requires to pay his monthly expenses, the funds that he uses to pay for the monthly expenses of the minor children and rental of the property that he resides in, debit orders and loans. He also says he needs to pay for the curator ad litem appointed on behalf of the minor children and the experts appointed. He emphasises that while his banking accounts are frozen, he is unable to comply with court orders that have placed financial obligations on him which relate primarily to the minor children. Mr H states further that should Mrs SH's conduct continue unabated, he will be placed in a state of insolvency.

[26] Mrs SH challenged these allegations. In her answering affidavit to the supplementary affidavit served on 19 June 2023 (*the Second Answering Affidavit*) she invited Mr H to produce all his bank statements, including all the ABSA Bank statements reflecting the credit of R530 000. One searches the papers in this application in vain for a response to this invitation. It begs the question: What would have been easier than to attach the bank statements to evidence the transactions which have been done on this account? How easy would it have been to analyse the monthly transactions in support of Mr H's averments? The most plausible inference to draw from this failure, which inference I draw, is that the content of the bank statements will not support Mr H's version that, without this R530 000, he will not be able to pay for the minor children's expenses.

[27] Mr H was also directly challenged by Mrs SH to explain how he was able to accumulate R530 000 in his ABSA bank account when he is in such financial difficulties. Mr H, very glibly stated that '*it has been no secret that I earn commission from time to time as well as bonuses. It is this, my monthly salary, and the bonuses which permits the entities I am associated with to provide me with financial assistance...*'

[28] This response raises more questions than answers: when was the commission paid? When was/were the bonus/es paid? How is this credit possible if he allegedly has a monthly shortfall of about R77 000 as averred in the rule 43 application? Again, the bank statement/s would cast light on these allegations, but Mr H chose to not take this court into his confidence leading to the probable inference being drawn that the transactions reflected in the bank statement will not corroborate his version.

[29] Mrs SH alleges that Mr H is able to fund a lavish lifestyle. To demonstrate this she explains that Mr H travelled to Cape Town during the period 10 to 12 June 2023, staying at the Twelve Apostles Hotel, where the average rate per room per night is R11 000. Prior to this he travelled to uMhlanga and stayed at the Oyster Box Hotel. He was accompanied by his girlfriend, the children and one of his employee's children. Mr H attached a letter (not an affidavit) of a company to support his version that the expenditure was the company's and not his. The letter does not state expressly that the company paid for these expenses. That being the primary purpose for which the letter was tendered, it is strange that such fact was omitted or that it was not squarely addressed. The opening paragraph reads that: *'The Directors of.....hereby confirm that we are aware of [Mr H's] business trips to Natal and the Western Cape'*. It is not their knowledge of the trips which is in issue but rather whether they funded his accommodation at the Twelve Apostles Hotel and at the Oyster Box Hotel. Also, if the company had made payment, it would have been a simple matter to attach the paper trail in support of such proposition. It was not. Again, I infer that it was not done because the paper trail will not support the version of impecuniosity.

[30] So, why does this court have to delve into this? It has a bearing on a number of features of this case including the urgency with which the matter was brought to court, the interests of justice consideration for the request for the stay and, of course, costs.

Pactum de non petendo

[31] A *pactum de non petendo in anticipando* forms part of our law⁴ and is a contractual undertaking not to institute an action.

[32] Mr Dollie argued that the relief currently sought is exactly the relief set out in Part A of the application which served before Makume J and in terms of which, Mr H had agreed (and it was so ordered) that *'[Mr H] shall not persist with seeking any relief as set out in Part A of the application.'* There is no dispute about the fact that the relief forms part of that which was sought in Part A⁵. The only dispute relates to the duration of the undertaking.

[33] The order of Makume J provided in its terms that:

‘The respondent (Mrs SH) undertakes not to execute the warrant/s of execution obtained by her pursuant to the order made by Victor J on 12 September 2022 under the above case number, until 25 October 2022....’⁶

[34] The undertaking provided by Mrs SH, had limited duration which is stated as such in the order. In fact, the expiration of the undertaking, on the 25th of October 2022, was used by both parties in an attempt to have the matter heard and to bolster the urgency argument before Wright J on 25 October 2022.

[35] The First Writ has come and gone. The parties conducted themselves in accordance with the agreement i.e. Mr H subsequent to 25 October 2022 and on 25 April 2023, delivered the vehicle to the sheriff voluntarily and it has been sold.

[36] However, the Second writ is still subject to the undertaking by Mr H, incorporated in prayer 2 of Makume J's order, *to not seek relief under Part A*. That undertaking is not of limited duration.

⁴ *Coral Lagoon Investments 194 (Pty) Ltd and Another v Capitec Bank Holdings Limited* (Case no.887/2021) [2022] ZASCA 144 (24 October 2022) at [29] and the authorities cited there.

⁵ Before Makume J Mr H sought the stay of the entire Victor J order and now it is only paragraphs [14] and [16]

⁶ Supra at para [8]

[37] The order of Makume J precludes Mr H from instituting any new application in terms of Rule 45A. It however, does not preclude Mrs SH from executing *after* 25 October 2022. Mrs SH agreed to a suspension until a fixed date, 25 October 2022 and not pending the outcome of part B of the relief i.e. not pending the invalidity application.

[38] Mr H contends that it is clear from a reading of the order, as a whole, that for so long as Mr H is prevented from pursuing a Rule 45A application, Mrs SH is precluded from seeking enforcement of the money orders of the Victor J order. I disagree for a number of reasons including that such a construction contradicts the express provisions of the Makume J order, contradicts the parties' understanding of the Makume J order as used to support the urgency argument before Wright J and contradicts the subsequent conduct of Mr H in handing over the BMW vehicle voluntarily to the Sheriff for purposes of the sale in execution.

[39] In determining the enforceability of a *pactum*, the Supreme Court of Appeal in *Coral Lagoon*⁷ identified the following factors for consideration: whether the undertaking not to execute was for a limited period⁸ (although the linking of any *pactum* to a time limitation *per se* is not relevant); whether the election to enter into a pactum by the party (Mr H) is a waiver or a decision to not exercise his rights to pursue the suspension application;⁹ whether the party (Mr H) was represented by an attorney and senior counsel at all times material to the conclusion of the pactum; whether the party (Mr H) had equal bargaining power (with Mrs SH); whether the party (Mr H) understood what he was agreeing to;¹⁰ whether Mr H would be afforded an adequate opportunity to seek judicial redress in due course. In my view and having applied the

⁷ *Coral Lagoon Investments 194 (Pty) Ltd and Another v Capitec Bank Holdings Limited* [2022] ZASCA 144 (24 October 2022).

⁸ *Coral Lagoon supra* at [30].

⁹ *Coral Lagoon supra* at [36].

¹⁰ *Coral Lagoon supra* at [38].

aforegoing considerations to the facts of this case I conclude that Mr H's undertaking to not pursue a Rule 45A application is enforceable.

[40] Mitchell AJ¹¹, dealing with a contempt application brought by Mrs SH against Mr H, construed the facts differently. In my view, I need not analyse Mitchell AJ's reasoning as he was considering contempt proceedings, which are subject to a far more onerous test and one in which he was simply required to decide whether the version advanced was reasonably possibly true. I am certainly not bound by his factual finding in the current proceedings before me.

[41] Of some significance in these proceedings, was an alleged second undertaking, given on the 27th of October 2023, in terms of which Mr Dollie for Mrs SH agreed to attach, but not remove, Mr H's assets until the determination of the invalidity application. There was some dispute as to whether such an undertaking was given, which I will assume it was (without finding) in Mr H's favour. However, on his version, this undertaking lapsed on 14 December 2022 when Mudau J dismissed Part B ie the invalidity application. That the lapsing of the undertaking was accepted by all is clear from the fact that thereafter, the Sheriff released payment of the sum of R830 000 to Mr Dollie in satisfaction of para [16] of the Victor J order relating to a contribution towards Mrs SH's legal costs. There was no attempt made by Mr H to stop this and all accepted that Para [16] of the Victor J order was fulfilled.

[42] If, for some reason, Mr H is entitled, despite my finding of the existence of the *pactum*, to bring an application to suspend Victor J's order in terms of either Rule 45A or because this court is empowered to do so due to its inherent discretion derived from

¹¹ *S v H and Others* [2023] ZAGPJHC 283 (30 March 2023)

he common law to set aside or stay a writ of execution¹², I would nonetheless refuse to do so. My reasons follow.

Should execution be stayed?

[43] Victor J's order, being an order granted in terms of rule 43, is sought to be set aside on a number of grounds. The grounds are conveniently categorised into 4 issues, namely: residence, therapy, maintenance and costs. In respect of the residence issue it is contended that such issue did not serve before Judge Victor and that it had been dealt with by Judge Siwendu in a previous rule 43 application (the Siwendu J order). Accordingly, it could only have been dealt with in terms of rule 43(6) but it was not and was not even referred to in Victor J's judgment. The Victor J order, accordingly and so the argument goes, falls to be set aside or declared invalid in respect of the residence issue.

[44] The therapy issue (ordering the parties to attend counselling) is challenged on the basis that the relief the court granted was neither sought by Mrs SH, nor is such relief contemplated by rule 43. The contribution to legal costs issue, allegedly included an amount which had previously expressly been waived and such waiver had specifically been recorded in the Siwendu J order. The consequence of the foregoing transgressions is, so it is argued, that Victor J's order falls to be set aside.

[45] The only issue, however, relevant to the current application, is the maintenance issue. It is common cause that the maintenance issue was dealt with for the first time before Victor J and that there was no need to approach the rule 43 application before Victor J in terms of rule 43(6) i.e. to investigate whether changed circumstances existed. Judge Victor ordered that Mr H pay the sum of R104 000 per month in respect

¹² *MEC, Department of Public Works and Others v Ikamva Architects and Others*, 2022 (6) SA 275 (ECB) at para [81]

of the monetary portion of his maintenance obligations. The point taken in the invalidity application was that a court is not empowered to oblige someone to perform an impossibility. The impossibility allegedly lies therein that Mr H placed before the court facts which revealed a monthly income of R100 000 and the amount ordered exceeds this amount.

[46] The legal principles applicable to this Rule 45A application were concisely summarised in the full court judgment of *Ikamva*¹³ and no purpose will be served in repeating them here save to state that courts have an inherent power to control their own processes having regard to the interests of justice which inherent discretion operates independently of the provisions of Rule 45A.

[47] Fundamental to this is that execution should generally be allowed¹⁴ unless an applicant demonstrates that real and substantial justice requires a stay or where an injustice will result if execution proceeds.

[48] A court will be guided by considering factors usually applicable to interim interdicts, except where the applicant is not asserting a right, but attempting to avert injustice.

[49] Crucially in this case, Mr H is not asserting a right of appeal against the rule 43 Victor J order. No right of appeal lies against such order. The invalidity application was modelled on the door left open in the Constitutional Court judgment of *S v S*.¹⁵

[50] I interpose to draw attention to the considerable factual differences between that which served before Victor J and the facts which served before the Constitutional Court in *S v S*. In *S v S*, Mr S had applied (in terms of rule 43) for confirmation of the minor children's *de facto* care and residence with himself. In addition to agreeing to

¹³ Supra at paras [81] to [91]

¹⁴ *Strime v Strime*, 1983 (4) SA 850 (C)

¹⁵ 2019 (6) SA 1 (CC) at para [58]

pay for all the costs associated with the minor children, he tendered an amount of R12 000 per month for Ms S's personal maintenance. Ms S filed an opposing affidavit several weeks out of time in which she sought R60 353 per month maintenance. The court *a quo* ruled that because the opposing affidavit was out of time it would not be received as evidence. With only Mr S's affidavit before it, the court *a quo* ordered Mr S to pay an amount of R40 000 per month maintenance in addition to the amounts he had already tendered. Having excluded Ms S's opposing affidavit for being out of time, the Constitutional Court found that no weight should have been placed on its contents. It held further that although the maintenance order did not infringe on Mr S's constitutional rights, it was unjust and there was no basis for the amount ordered.

[51] Judge Victor, in contrast, had evidence before her upon which the orders made, were taken. In fact, she was criticised in the invalidity application by Mr H for allowing too many supplementary affidavits. Paragraphs [60] to [69] of the judgement of Victor J deal extensively with Mr H's ability to pay maintenance and it is evident that Judge Victor did not accept Mr H's version that his income was limited to R100 000 per month. She referred to his ability to employ four au pairs and multiple security guards, to spend R 250 000 on 4 suits to name but some of the factors considered by her in concluding that his income was understated. There was thus a basis for the amount ordered and this case is accordingly distinguishable from the facts in *S v S*.

[52] There was much debate in this court whether this court is to concern itself with the merits of the underlying dispute or whether I should simply accept that the sole enquiry is whether the *causa* is in dispute¹⁶. Similarly, much time was spent on whether there is a distinction to be drawn between the approach prior to the hearing of the

¹⁶ *Gois t/a Shakespeare's Pub v Van Zyl*, 2011 (1) SA 148 (LC);

application for leave to appeal before Mudau J and the approach, thereafter, should it be refused, pending a petition to the Supreme Court of Appeal.

[53] Mr Dollie argued that since the amendment of Rule 45A on 30 October 2020 to include a reference to section 18 of the Superior Courts Act 10 of 2013, this debate has been put to bed. He argued that the Supreme Court of Appeal has now expressed a preference for the approach that, in a section 18(1) application, regard is to be had to the prospects of success in the pending appeal.¹⁷

[54] As quoted above, and as bears repeating here, rule 45A currently provides:

‘The court may, on application, suspend the operation and execution of any order for such period as it may deem fit: **Provided that in the case of appeal, such suspension is in compliance with section 18 of the Act.**’

[55] The highlighted proviso supra was inserted in the Rule on the 30th of October 2020.

[56] Although, in my view, the wording of Rule 45A is clear, i.e. that in the case of appeal (which is where we find ourselves in relation to the Mudau J order), regard is to be had to the prospects of success, I do not think it necessary to decide this feature definitively because I will be deciding this matter on the basis that courts have an inherent power to control their own processes having regard to the interests of justice which inherent discretion operates independently of the provisions of Rule 45A.

Discretion

[57] Mr H approached this court on the basis that if the R530 000 is not released, he will face insolvency. I explained¹⁸ why I do not accept this. In all the affidavits that serve before this court, I was unable to find a single shred of evidence to support this

¹⁷ *University of the Free State v Afriforum and Another*, [2016] ZASCA 165 at para [44]

¹⁸ Paras [25] to [29]

proposition. Because the record and Caselines file comprises thousands of pages and being unable to find such evidence I, after the hearing on 10 August 2023, caused a request to be sent to the parties which read as follows:

‘The Judge has requested that both parties provide a 1 page (or very short) Caselines reference note of where one is to locate (a) Mr H’s bank statements and (b) his other banking facility details such as credit cards and the like:

1. In the application which is currently being heard ie in the documents listed in paras 8.3 to 8.10 of the practice note at Caselines 29-869 to Caselines 29-870; and
2. Anywhere else on Caselines.’

[58] The response received from Mr Dylan Jagga representing Mr H, was initially:

‘Kindly note the below request forms part of our proposed reply for Thursday [17 August 2023, the resumed hearing].

We are hesitant to respond at present given that it will inevitably result in an argument ensuing between the parties. The matter is presently before Her Ladyship and we respectfully request that we be permitted the opportunity to respond fully under reply and direct Her Ladyship to the necessary sections in court and on record.’

[59] All that was requested was references. The response is perplexing, to say the least. Be that as it may, and after a further communication with Mr Jagga he responded that the information could be found at 009 – 149 to 009 – 278 (this is the Rule 43 application which served before Victor J). The reason for the initial dilatory response became obvious: the bank statements to which he referred were unhelpful and were not presented in the application under consideration but in a historical application. The

references ultimately provided did not shed light on any of the material allegations before this court.

[60] Mr Dollie's response addressed the substance of the request correctly as follows:

'The current suspension application does not contain any of the Applicant's bank statements since January 2022, except the one bank statement which was furnished to us by Standard Bank pursuant to the subpoena we delivered.....'

[61] Since the granting of the Victor J order, Mr H has not paid a single cent of the monetary amount ordered by Victor J in paragraph [14]. This amount includes monetary maintenance contributions for the children. The R104 000 monthly contribution includes Mrs SH and their three children. It is not insignificant that Mr H has not transferred a lesser amount into the account of Mrs SH, one which he contends is reasonable. He has paid nothing on this front.

[62] It is under these circumstances and with these facts that Mr H approached this court. I have drawn attention to the lack of evidence presented to this court to support an application based on the interests of justice.

[63] The focus of this application is based exclusively on paragraph [14] of the Victor J order being the R104 000 monthly maintenance amount, as paragraph [16] of the Victor J order, which was the contribution towards costs order, has fallen away, the execution procedure having been completed.

[64] The interests of justice require that rule 43 orders be complied with. Justice Nicholls in *S v S*¹⁹ highlighted the fact that Rule 43 was not designed to resolve issues between parties for an extended period. Guidance was given that resort should be had to rule 43(6) or where no changed circumstances exist but there is a need to remedy

¹⁹ Supra at paragraph [54]

'a patently unjust and erroneous order and no changed circumstances exist, however expansively interpreted', a court can be approached to exercise its inherent power to regulate its own process in the interests of justice.

[65] In my view and for the reasons advances herein, there is nothing patently unjust or erroneous in paragraph [14] of the Victor J order. The court meticulously considered the evidence contained in the vast amount of affidavits placed before it and concluded that Mr H could access the funds to comply with the interim rule 43 order. As it turns out the court was correct. Mr H was able to access R 830 000 in compliance with para [16] of Victor J's order.

[66] Mr H has not paid a single cent in maintenance in respect of Mrs SH and the children. He makes payment of the school fees and medical aid accounts. He makes no contribution towards household groceries, clothing for the children, water, electricity, fuel costs, domestic helpers salaries and maintenance costs for the home.

[67] Mrs SH contends that Mr H has access to three holiday homes in South Africa, travels overseas regularly, drives super and hyper cars, lives in a home which was purchased for R 10 million in cash and after their separation, he lived in the Da Vinci Apartment Hotels for more than one year.

[68] Mrs SH, although a medical professional was until recently employed by a company associated with Mr H and thus, as put by her, *'at his mercy'*. She said that *'I am made to feel as though I am a beggar at my place of employment. I am treated in the most humiliating manner.'* Her employment at such company has in the interim

been terminated. It seems that she has some private patients but the income from this is unclear.

[69] Mrs SH says that if the relief sought is granted, she won't be able to maintain herself and the children. She says her financial position is extremely precarious.

[70] The true issue in this matter is the payment of the monetary component of maintenance in respect of Mrs SH and the minor children. One can hardly imagine a better case deserving of execution continuing than this one. Mr H has not paid a single cent in the monetary portion of his maintenance obligation since the commencement of the divorce proceedings.

[71] There are applications pending before me in which the production of personal bank statements of Mr H is sought. This is being opposed. The matters were set down for hearing the day before this matter was argued but were postponed to afford 35 Affinity companies (allegedly linked to Mr H) an opportunity to object to the production of certain documents which relate to them and to afford them an opportunity to set aside some of the subpoenas. The Affinity companies aside, one would have thought that Mr H would make available all his personal bank statements in an attempt to move the matter forward.

[72] The application for leave to appeal before Mudau J has yet to be heard. The papers are replete with accusations as to who is to blame for this. The invalidity application was dismissed on 14 December 2022. 8 Months later the application for leave to appeal has not been heard. It is the joint responsibility of the parties to ensure the matter is heard.

[73] The filing of the application for leave to appeal in the invalidity application did not suspend the Victor J order. Mr H emphasises that he accepts that the Victor J order is valid until set aside. He appears to be dragging his feet on the 'final' determination of the invalidity application. The motives for doing so are known to him

and this court has its suspicions which need not be dealt with herein. I do not accept that it is Mrs SH's legal team who scuppered the hearing of the application for leave to appeal. It makes no sense for her team to do so.

[74] The granting of leave to appeal on the maintenance issue has, in my view, poor prospects of success. Judge Mudau found: '*Clearly, the Court [referring to the Victor order] did not believe that the applicant had made a full and frank disclosure regarding his income*'.

[75] For all these reasons, I conclude that the interests of justice dictate overwhelmingly that paragraph [14] of Victor J's order are not to be suspended.

Costs

[76] Mr Dollie very strenuously argued that this case was one in which *de bonis propriis* costs against Mr H's attorney of record, Mr Dylan Jagga, would be appropriate.

[77] I have spoken publicly on collegiality and ethics in family law²⁰ and drew attention to, amongst other publications, the comments of the court in *Clemson v Clemson*²¹ where the husband approached the urgent court for return of a list of goods taken by the wife when she, together with the two teenage children, left the matrimonial home. Some of the items on the list which the husband needed back included the daughters' bedding, their lamps, their clothes and their CD's. The court held:

'The only rational explanation for this application being brought in the manner it was brought is that it was to harass the respondent in order to intimidate her in the ongoing litigation.

It was not an error of judgment on the part of the attorney, but was part of a willful, deliberate strategy. These tactics cannot be attributed to the applicant who is clearly a layman and not versed in law.....

²⁰ "Common Purpose: Collegiality and Ethics in Family Law", The Judiciary, December 2020 Q3 Issue p 22

²¹ 1999 JDR 156 (W)

The marriage has irrevocably broken down and the parties themselves cannot function rationally with each other as emotional issues intrude.

The court expects attorneys acting on behalf of such people, as professional people and officers of the court, to display objectivity and sound common sense in assisting their clients. Fortunately most attorneys perform this task admirably. However there is a minority of attorneys who approach each divorce as a war between the two litigants. The rules of court and legal principles are utilised as weapons in a fight to destroy the opposition. As happens in most wars of attrition by the time the war has come to an end both sides have lost. There is now permanent hatred between the parties and their joint assets have been consumed to pay legal fees.'

[78] In my view, legal practitioners have a responsibility to buffer their client's vindictiveness through collegiality and advice, which this court considers to be very much part of ethical practice because collegial practice, like ethical practice is focused on doing the right thing. This also protects limited judicial resources from being overstretched to the detriment of other litigants.

[79] Although there was some force in the criticisms of the conduct of Mr Dylan Jagga²² in the prosecution of the Rule 45A application, this court will, for present purposes only, accept that the conduct complained of can and should be attributed to Mr H and that he is to blame for the manner in which this matter has come before this court.

[80] In my view, a punitive costs order against Mr H is warranted.

[81] Ultimately a court has a discretion in awarding costs. A court should be cautious in awarding punitive costs against one of the parties in an ancillary application in a matrimonial dispute, as rather than curb the animosity, it can add fuel to an already blazing fire. In exercising my discretion in favour of such punitive costs I considered

²² The instructing attorney and not counsel, Adv Nick Jagga. The de bonis propriis order was not sought against Adv Nick Jagga.

all (but not only) that which is mentioned in this judgment. I list the most egregious transgressions and most compelling facts and considerations to so order in what follows:


- 81.1. The unreasonably truncated time periods allowed and then the unilateral removal of the matter from the urgent roll on the basis that the matter was voluminous as though this was not foreseeable.
- 81.2. Mr H has not paid a single cent in respect of the monetary maintenance portion of the Victor J order.
- 81.3. The haphazard way in which the matter came before the court. There were ultimately 3 notices of motion. It was not clear at all what was being sought and considerable time was spent at the commencement of the proceedings to unpack the exact relief sought. The replying affidavit was filed 5 months out of time and instead of leave being sought to supplement the founding papers, new matter was raised which then gave rise to numerous supplementary affidavits. The unstructured manner in which this matter was brought to court, is to be deprecated.
- 81.4. The delay in which the Rule 45A application was launched. Mr H knew that Mrs SH had instructed the Sheriff to pursue assets. His obvious knowledge of this fact is evident from the fact that the Sheriff's alleged reluctance to act had been drawn to my attention, whereafter he personally and voluntarily handed the BMW vehicle over to the Sheriff to be sold. He thus knew that Mrs SH would cause monies to be attached where she found them. This application seems to have been launched only because Mr H was caught out.

- 81.5. Mr H stated that all his bank accounts had been frozen. He was challenged to identify these bank accounts which he failed to do. One bank account was frozen and none of the statements which could support Mr H's factual averments and financial woes, were disclosed.
- 81.6. Mr H did not explain adequately how he was able to accumulate R 530 000 when he ostensibly has a deficit of approximately R77 000 per month.
- 81.7. Mr H failed to explain adequately how his lavish lifestyle and in particular his holidays at the Twelve Apostles hotel in Cape Town and the stay at the Oyster Box Hotel in Natal was funded.
- 81.8. Mr H brought the application in breach of his agreement, recorded in the order of Makume J, that he would not do so.

Order

[82] I accordingly grant the following order:

The Rule 45A application comprising of notices of motion dated 26 October 2022, 19 June 2023 and 22 June 2023 is dismissed with costs as between attorney and client.



T OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

Counsel for the applicant (Mr H): Adv Nick Jagga and Adv M Peacock

Instructed by: Jagga & Associates

Attorney for the Respondent (Mrs SH): Mr Dollie from Shaheed Dollie Incorporated

Date of hearing: 11 and 17 August 2023

Date of Judgment: 11 September 2023