IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION: MTHATHA]

CASE NO.: 74/2025

In the matter between:

O[…] D[…] M[…] **APPLICANT**

and

Z[…] G[…] **RESPONDENT**

REASONS/JUDGMNET

Mtshabe AJ

[1] On 21 January 2025 I handed down the following:

> "1. By consent the Applicant is granted leave to withdraw the application.
>
> 2. It is further ordered that the respondent should pay the costs of the application on Scale B".

[2] I informed the parties that I shall give reasons for the granting of the costs on Scale B in due course. These are my reasons for doing so.

A. INTRODUCTION

[3] The Applicant and the Respondent were married to each other and on the 7 June 2022 a decree of divorce was granted.

[4] Further to the granting of decree of divorce, there was Deed of Settlement which was made an order of Court. It is recorded in paragraph 7 of the Deed of Settlement that the parties had three minor children born of the marriage namely, S[…] B[…] G[…], a boy born 28 August 2009, N[…] A[…] G[…], a boy born on 4 May 2012 and N[…] O[…] G[…], a boy born on 20 November 2019. They are all minor children.

[5] I granted an order that the Respondent must pay costs on Scale B, in terms of rule 67A read with rule 69 of the Uniform Rules of Court.

[6] The Respondent is legally practitioner (attorney). His practice is in Johannesburg.

[7] The settlement agreement which was attached to the Court Order of 7 June 2022 was made an order of court. The settlement agreement was signed by the parties.

[8] Clause 22 of the settlement agreement provides as follows:

> *"22. The parties agree as follow:*
>
> 22.1 "*They are booth liable for financial report responsibility for bringing up the minor children and agree that they will take account of the proper needs of the children.*
>
> *22.2 Subject to clause 22.1 above, the Defendant shall be responsible for the minor children's reasonable education expenses including but not limited to crèche, primary and secondary school fees, aftercare and all costs associated with the minor children's tertiary educational expenses and such*

fees shall be paid directly to the said institution, save for the ones that cannot be paid directly to the institution. In that event such costs shall be paid to the Plaintiff's account or the children's personal account(s).

22.3 Notwithstanding clauses 22.1 and 22.2 above, the parties submit that they are aware that they both share equal responsibilities with regard to the maintenance of the minor children (subject to what is provided for this agreement) and the Maintenance Court will be utilised if one party is willingly refusing to maintain the minor children despite being gainfully and employed.

22.4 Subject to clause 22.1 above, the Defendant shall pay all the schoolbooks, textbooks, school bags, school stationery, school medical lessons, school educational day outings, school and sports tour, spending money and school photos.

22.5 Subject to clause 22.1 above, the Defendant shall pay for the minor children's winter and summer clothing.

22.6 In addition to the above financial responsibilities, the parties agreed that the Defendant shall deposit to the Plaintiff's bank account of choice an amount in sum total of R4050-00 for a conservative period of three months from the date of signature of this agreement by both parties.

22.7 The Plaintiff shall retain the minor children in her medical aid and shall utilize same for the minor children's medical expenses.

22.8 Maintenance contributions of the minor children shall continue until their self-supporting.

22.9 The Plaintiff shall use the rental income generated from the commercial flats to maintain the minor children and waives her rights to claim maintenance of any amount from Defendant."

[9] It is common cause that the defendant failed to pay school fees that have accumulated to a tune of over R71 000-00, and the Respondent made the last payment in May 2024.

B. URGENT APPLICATION

[10] The Applicant approached the Honourable Court on 21 January 2025 for an order that the Respondent has failed to comply with the orders of 7 June 2022 and that he must be found to be in contempt. She also sought an order that the respondent should pay arrears on school fees within 7 days of the granting of the order.

[11] The urgent application papers were served at the address of the respondent on 16 January 2025.

[12] On 4th January 2025, the Application sent an email to the respondent which reads as follows:

> "*Good day Z[…]. This morning, I received the communication below from the schools' attorneys. Could you contact these people and make arrangements. O[…] D[…] G[…] your outstanding Curro acc of R71 432.35 remains unpaid. We will now proceed to draft a summons to be served on you shortly. If you have paid forward the proof to c[…]. Regards VVM Attorneys."*

[13] The response to the above email by the Respondent reads as follows:

> "*You must be very rich now I want to see how explain to the kids why they are not going to school what lie are going to feed them….."* This was on 10 January 2025.[1]

[14] Before the email of the 4th January 2024 from Applicant to Respondent she wrote an email translated in Xhosa to read:

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[1] Annexure OD2 attached to founding papers

"*Hi Z[…]. Abantwana abazukwazi ubuyela esikolweni xa kuvulwa because you are not paying the school fees, the fees are in arears…*
Kindly attend to this and priorities the future yabantwana."

[15] On 11 January 2025 an email was sent to the Respondent by the attorneys of the Applicant dealing with non-payment of school fees. The email reads as follows:

"*Good day Mr G[…]*
We have received instructions from our client that she has been advised that the children's school account has been handed over to the attorneys for collection. This is occasioned by the fact that you continue to fail making acceptable arrangements with the school.
We may mention that we have been reluctant to intervene, on this issue as we have encouraged our client to communicate with you directly without our intervention. This was also as per your previous proposal on this issue of communication. However, our client is being frustrated and not happy about how you delay in responding to her regarding the children's needs. When ultimately revert to her you not giving any satisfactory responses. The email communication between the two of you has been provided to us and that is reason why we felt the need to intervene as this issue is about to get out of hand because it is likely to result in the kids not being allowed to go back to school when the schools re-open.
Firstly, we wish to address the issue of garnishing your personal accounts. With respect you seem to confuse the issue of freezing the account and garnishing the account. The instructions were given to the sheriff to attach the monies that were available in your personal accounts at the time for purposes of satisfying the debt you have been refusing to settle. This completely different to the freezing account. Your accounts have never been frozen at any stage and the banks have confirmed this. We therefore urge you to desist from creating this smokescreen as a way of avoiding your responsibilities imposed by the Court.
Secondly, in any event, even if what you are contending was true, that would not be the reason for not paying your responsibilities. You know that we are

aware that you are a practising attorney running a successful practice in Johannesburg, where there is nothing stopping you from transacting from your business accounts in paying for children's needs. We further do not believe that you expect anyone to believe that you have not been deriving any income from your practice because the alleged freezing of your accounts. Therefore, this opposed excuse does not hold any water.

Now that we have felt the need to intervene because of your apparent recalcitrance, our intrusions are to call upon you to attend to the settlement of this account or make acceptable arrangements that will allow the children to go back to school on opening. After having settled or made acceptable arrangements as stated above, kindly provide us with a proof of what you have done.

We are only giving you up to close of business on Monday 13th January 2024 (this should have been 2025) *to revert to us failing which an urgent application will launched for proper redress and costs order will be sought against you on punitive scale. We hope that this course will not be necessary as we are looking forward to your co-operation.*

Please note that we did contact your attorney, Mr Mgxaji who indicated that he does not have any instructions from you and further directed us to communicate with you directly.

Kind regards
Hymie Zilwa
Director."

[16] The Respondent did not respond to the email of the Applicant's attorneys. This was followed by an urgent application. The papers of which I have served upon the Respondent. The urgent application was not opposed by the Respondent as directed in the Notice of Motion. However, on 21 January 2025, in court did Mr Mgxaji stood up and informed me that he saw the application enrolled in the motion court roll and phoned Respondent, who informed him that he is going to settle the debt and request that the application be withdrawn. Mr Mgxaji did not seek postponement of the matter. He informed me that the Respondent has attended to the issue of school fees and the application should be withdrawn.

[17] Indeed Mr Zilwa, an Advocate, who appeared for the Applicant informed the court that the application should be withdrawn by consent as the Respondent has settled the debt. The only issue that remained was the issue of costs.

C. COSTS

[18] Mr Mgxaji who stood up on behalf of the Respondent, informed me that the costs should be reserved. Mr Zilwa informed that the Respondent should be ordered to pay costs on punitive scale attorney or own client scale as it is common cause that the Respondent has failed to comply with the court order granted on 7 June 2022.

[19] The Respondent, should comply with court orders particularly when it comes to the interest of children. In fact, it is trite that Court Order must be obeyed even if they are wrong until they are set aside by a competent Court.

[20] As I have indicated above it is my view that the Respondent by the time of bringing the urgent application was in contempt of the deed of settlement, which is a court order. It is also my finding that the Respondent has failed to pay school fees as he was directed by the court. The fact that the parties agreed that the application be withdrawn does not suggest to me that the Respondent was not in contempt of the court order granted on 7 June 2022. I can only add that the withdrawal of the application saved the skin or the integrity/character of the Respondent. The main reason I granted an order that the Respondent should pay the costs as he was in contempt of court. Further the Respondent has failed to meet the school requirements of his own children, when he ought to have known that such an act violates the rights of his own children.

[21] Furthermore, section 166(5) of the Constitution of the Republic of South Africa, 1996 provides as follows:

> "*An order or decision issued by the court binds all persons to whom and organ of state to which it applies".*

[22] Where it not for the urgent application, Respondent would have continued to be in contempt of court order which was taken by consent. His contact is not only contemptuous that if affects the rights of his own children and infringes them of their constitutional right to education. This is one of the reasons I found that the Respondent should pay the costs. Furthermore, the Applicant should not be confronted with costs this litigation when it is the Respondent's duty to comply with court orders and to take care of the needs of his own children.

[23] I must also add that costs in civil proceedings are made on two scale, that is, the party and party scale or the attorney and client scale. Costs awarded on the party and party scale allows the person in favour of whom it is made to recover the costs they had to care in bringing the civil suit but to the extent allowed by the set of tariffs designed to keep recoverable costs with the reasonable limits.

[24] Rule 67A of the Uniform Rules of Court came into operation on 12 April 2024[2] provides as follows:

> *"**67A Costs**.*
> *(1) Subject to any order of the court awarding costs, the fees and disbursements as between party and party, which may be included in a bill of costs submitted for taxation, shall be-*
>
> *(a) for attorneys, in accordance with the tariff in rule 70;*
>
> *(b) for attorneys, which have a right to appear in the Superior Courts and who appear in the matter, in accordance with rules 69 and 70, where applicable; and*
>
> *(c) for advocates, in accordance with the tariff in rule 69;*
> *Provided that for services rendered by an advocate referred to in Section 34(2)(a)(ii) of the Legal Practice Act, No. 28 of 2024, for work, which is*

[2] GNR4477of 8 March 2024 (GG 502720 of 8 March 2024)

ordinarily performed by an attorney, the fee for such work shall be in terms of rule 70."

(2) …

(3) …

(4) …

(5) The taxation of fees as between party and party shall be effected by the taxing master in accordance with rules 69 and 70 and the applicable tariffs therein",

[25] Rule 67A furthers provides that a cost order shall indicate the scale in terms of rule 69. In awarding an appropriate scale of costs, the Court is required to have regard to the complexity of the matter, and the value of the claim or the importance of the relief sought. I can mention that this matter is not a complex matter. The issues are uncomplicated. However, the relief sought is important.

[26] In the course of his judgment, in paragraphs 16 and 17, Wilson J in the matter of ***Mashavsha v Enaex (Pty) Ltd [2014] ZAGPJHC*** held:

"16. Likewise, the default position set under the rule is that, in the absence of contrary indication, counsel's costs will be recovered on scale A. Scale A, seems to me, is the appropriate scale on which to make an award unless the application of a higher scale has been justified by careful reference to clearly identified features of the case that mark it out as an unusual complex, important or valuable. Run-of-the mill cases, which must be the vast majority of cases in the High Court, should not attract an order on the B or C scales.

17. In the case presently before me, the issues were uncomplicated. The entire case was determined on the bases of jurisdiction and standing. The merits never became relevant. Ther hearing lasted well under an hour. The case was competently and ethically pursued by all concerned. The scale a is plainly applicable."

[26] The case of *Mashavsha (supra)* was followed by Cajee AJ in the matter of ***Buhle Waste*** *v* ***MEC of Health 2025 (2) SA 163 (GLD, Johannesburg),*** although in

the ***Buhle case*** the court awarded Scales C and B or senior and junior Counsel respectively.

[27] Rule 69 of the Uniform Rules of Court deals with tariffs of fees for legal practitioners who appear in the Superior Courts. The rule provides that the scale of fees contemplated in sub rule (3) of rule 67A shall be scale A R375.00 per quoter of an hour or part thereof, scale B R750 per quoter of an hour of part thereof and scale C R1125.00 per quoter of an hour or part thereof.

[28] In awarding scale B for costs in this matter, my decision was not influenced by the complexity of the matter but by the conduct of the Legal Practitioner (the Respondent). Furthermore, it was also influenced by the importance of the case particularly to the welfare of the children of the Respondent. What also informed me is the importance of relief sought which I viewed it as protecting rights and interests of the children.

[29] Despite the introduction of Rules 67A and 69, the position still remains that the award of costs is a matter wholly within the discretion of the Court, but this is a judicial discretion and must be exercised on the grounds upon which a reasonable person could have come to the conclusion arrived at[3].

[30] In *Ferreira v Levin NO and others*[4], **Ackermann J,** delivered an important judgment concerning costs, which was concurred by all the members of the Court. The Court stated: *"The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basics principles, the first being the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as general rule, have his or her costs. Even the second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs…. The principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation. They offer a*

[3] Jordon New Zealand Insurance Co. LTD 1968 (2) SA 238 (E) at 245 C-D
[4] 1996 (2) SA 621 (CC) at 624

useful point of the departure. If the need arises the rules may have to be substantially adapted; this should however be done in case by case. It is unnecessary, if not impossible at this stage to attempt to formulate comprehensive rules regarding costs in constitutional litigation.

[31] **D. <u>CONCLUSION</u>**

These are the reasons for my order dated 21 January 2025.

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N.R MTSHABE

ACTING JUDGE OF THE HIGH COURT

<u>APPEARANCES:</u>

COUNSEL FOR THE APPLICANT:	**ADV N ZILWA**
INSTRUTED BY:	**ZILWA ATTORNEYS**
	MTHATHA
COUNSEL FOR THE RESPONDENT:	**MR OLK MGXAJI**
INSTRUCTED BY:	**OLK MGXAJI ATTORNEYS**
	MTHATHA
DATE HEARD:	**21 JANUARY 2025**
DATE DELIVERED:	**15 JANUARY 2025**
	MTHATHA