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

1. Reportable: No

2. Of interest to other judges: No

3. Revised: Yes

Date 24 January 2024

In the matter between:

**CASE NO:** 2017/11467

**DATE:** 24 January 2024

**T[...]** **P[...]** **R[...]**

(Identity No. [...])

and

Applicant

**S[...]** **R[...]**

(Identity No. [...])

Respondent

**Coram:** M Van Nieuwenhuizen, AJ

**Heard on:** 20 October 2023

**Delivered:** 24 January 2024

**JUDGMENT**

**M VAN NIEUWENHUIZEN, AJ:**

[1] In the main application the applicant seeks an order setting aside a writ of execution that had been issued by the Registrar of the High Court and executed upon by the respondent.

[2] The applicant seeks an order setting aside the writ of execution with costs on the attorney client scale and an order dismissing the respondent's counter-application with costs on the attorney client scale. The respondent seeks an order dismissing the main application with costs on the attorney client scale and granting the relief sought in the notice of counter-application<sup>1</sup> with costs on the attorney client scale.

### **ISSUES IN DISPUTE**

[3] As appears from the joint practice note<sup>2</sup> in the main application, the issues that I am called upon to determine are:

[3.1] whether the writ of execution should be set aside and rescinded or not; and

[3.2] if the writ is set aside whether the applicant should be credited with the R199 578,54 that was paid to SARS in reduction of his obligations to the respondent.

[4] In the counter-application the parties resolved that there were four issues which I am called upon to determine namely:

[4.1] whether the applicant's alleged oral agreement is valid, binding and enforceable, notwithstanding the non-variation clause in the divorce settlement agreement (hereinafter referred to as "*the DSA*");

[4.2] whether the payments made by the applicant directly to Brennan Richter constitutes a discharge of the applicant's maintenance obligations to the respondent;

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<sup>1</sup> In the counter-application the respondent seeks various declaratory orders in relation to amounts to be paid by the applicant in respect of arrear maintenance, school fees and tertiary education expenses

<sup>2</sup> Filed and uploaded by the parties on the 11<sup>th</sup> of October 2023, CaseLines 022.1

[4.3] whether the respondent is allowed to claim arrear school fees from the applicant in terms of the DSA;

[4.4] whether it is permissible for the respondent to claim other arrear school fees, which the applicant undertook to pay in the DSA and whether the Court can give effect to this and force the applicant to pay.

### **COMMON CAUSE FACTS OF THE MATTER**

[5] The parties were previously married to each other and divorced by an order of this Court on the 30<sup>th</sup> of October 2018.<sup>3</sup> The parties entered into a DSA, which was made an order of Court on the same day.<sup>4</sup> Three children were born of the marriage namely J[...] (born 25 March 1996), Tyler (born 22 July 1998) and B[...] (born 26 April 2005).

[6] The material terms of the DSA are as follows:

#### **“7. MAINTENANCE FOR THE CHILDREN**

7.1 *Subject to 7.2 below and notwithstanding that T[...] and Jayden are both majors:*

7.1.1 *the plaintiff shall make payment of maintenance to the defendant in respect of B[...] in the sum of R13 000,00 per month, such payments to commence on or before the first day of the month following signature of this agreement by both parties, and payable thereafter monthly on the first day of each and every succeeding month into the defendant’s bank account, or at such other address as the defendant may direct in writing;*

7.1.2 *the plaintiff shall make payment of maintenance to the defendant in respect*

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<sup>3</sup> Annexure “**TR1**”, FA, CaseLines 002-23

<sup>4</sup> Annexure “**TR2**”, FA, CaseLines 002-24

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*of T[...] in the sum of R6 000,00 per month, such payments to commence on or before the first day of the month following signature of this agreement by both parties, and payable thereafter monthly on the first day of each and every succeeding month into the defendant's bank account, or at such other address as the defendant may direct in writing;*

*7.1.3 the plaintiff shall make payment of maintenance to the defendant in respect of J[...] in the sum of R3 000,00 per month, such payment to commence on or before the first day of the month following signature of this agreement by both parties, and payable thereafter monthly on the first day of each and every succeeding month into the defendant's bank account, or at such other address as the defendant may direct in writing.*

*7.2 In addition to the maintenance set out above, the plaintiff undertakes that he shall pay in respect of the children:*

*7.2.1 50% of the costs incurred in respect of the minor children's education, inter alia private school fees, school uniforms, school bus, school books, prescribed stationery, compulsory school tours and excursions, levies, extra lessons where necessary and remedial lessons where required;*

*7.2.2 50% of the costs of the children's tertiary education, whether at a technical training college, university, technikon, computer, art school or any other like educational institution, subject to each of the children displaying an aptitude for the aforesaid tertiary education and his reasonable progress therein;*

*7.2.3 50% of the reasonable costs of the children's extramural, sporting, cultural and academic activities, including, inter alia, tuition fees, tournament charges, the reasonable costs of sporting apparel, other clothing and the equipment relating thereto.*

*7.3 The defendant shall be entitled, with effect from the first anniversary of the date of divorce, and at all reasonable times thereafter, to seek an increase in maintenance in respect of the children. The parties record in this regard that*

although J[...] and T[...;] are majors, they are dependent on the plaintiff and the<sup>5</sup> defendant for financial support. The parties specifically agree that the defendant may seek a maintenance increase on behalf of the major children.

7.4 The maintenance amounts referred to in clause 7.1 or 7.3 above shall be increased annually by a percentage equivalent to the increase in the Consumer Price Index, as issued by the Reserve Bank. The first increase is to take effect on the first anniversary of the grant of a decree of divorce and annually thereafter on the anniversary of the divorce date.

## 11. **PAYMENTS BY THE PLAINTIFF**

11.1 *It is recorded that the plaintiff is indebted:*

11.1.1 *To the defendant in the sum of R183 500,00 in respect of arrear maintenance ordered by the above Honourable Court in Rule 43 proceedings in March 2018 to date of signature of this agreement*

11.1.2 *to Yeshiva College of South Africa ("Yeshiva") in the sum of R153 172,00 as at 25 October 2018 in respect of arrear school fees.*

11.2 *The plaintiff undertakes:*

11.2.1 *to make payment to the defendant of the sum in 11.1.1 above as follows:*

11.2.2 *R9 000,00 within thirty days of date of divorce;*

11.2.3 *R87 000,00 on or before 1 November*

11.2.4 R87 000,00 on or before 1

November 2020;

12. to make arrangements with Yeshiva for payment of the arrear amounts due and owing. The plaintiff indemnifies the defendant against any action instituted by Yeshiva against her outstanding school fees prior to 1 April 2018;

12.1.1 to make payment of the monthly instalments due in respect of Jayden's motor vehicle and to transfer such vehicle into Jayden's name to be retained by him as his sole and exclusive property, once the vehicle is unincumbered;

12.2 Notwithstanding 11.2 above and in the event that the debit orders for November 2018 in the amount of R12 309,00 are debited from the plaintiff's account, the amount of R12 309,00 shall be deducted from the payment due by the plaintiff in 11.2.1.3 above."<sup>5</sup>

## **THE WRIT**

[7] It is common cause that the applicant fell in arrears with his maintenance obligations and pursuant to his arrears the respondent caused a warrant of execution ("writ") to be issued against the right, title and interests of the applicant in and to his Liberty Group Limited: Lifestyle Retirement Annuity Fund under contract number 007[...] in the amount of R1 673 637,30 in respect of arrear maintenance and/or any other pension interest as defined in the Divorce Act<sup>6</sup> including but not limited to a pension fund and/or provident fund and/or retirement annuity and/or any other investments in the name of the respondent in the amount of R1 673

<sup>5</sup> Paras 7 and 11 of DSA, CaseLines, 002-29 to 002-30 and CaseLines, 002-32

<sup>6</sup> Act 70 of 1979 (as amended)

[8] On the 28<sup>th</sup> of November 2022 the respondent deposed to a writ affidavit and subsequently the writ was issued wherein she claimed arrear maintenance as set out below.

**Overview of amounts owing**

Item	Category of expense	Annexure No	Amount owing
1.	Arrear maintenance inclusive of CPI increases inclusive of interest	“SR1”	R1 063 204,92
2.	Outstanding maintenance as per clause 11.1.1 of the DSA inclusive of interest	“SR2”	R139 335,62
3.	Outstanding maintenance as per clause 11.1.2 of the DSA	“SR3”	R153 172,00
4.	J[...] university fees	“SR4”	R43 824,89
5.	T[...] university fees	“SR5”	R22 513,87
6.	B[...] school fees	“SR6”	R251 586,00
<b>Total</b>			<b>R1 673 637,30<sup>7</sup></b>

[9] The applicant launched an application to set aside the writ for various reasons. The application was served on the 31<sup>st</sup> of March 2023 on the respondent’s legal representatives. The writ was served on the applicant on the 13<sup>th</sup> of January 2023. Liberty Life paid the Sheriff of the Court the amount of R550 000,00 and the

<sup>7</sup> Writ Affidavit – Annexure “TR6”, FA, CaseLines 002-44 to 002-50 at para 6, CaseLines 002-49

Sheriff paid the respondent's legal representatives Greenstein Attorneys, the amount<sup>8</sup> of R548 382,53 on the 31<sup>st</sup> of March 2023.



**POINT IN LIMINE**

[10] It is the respondent's contention that the relief which the applicant seeks, namely, to set aside the writ (Annexure "**TR6**"), is moot. The respondent states that on the applicant's version the writ was served on his attorneys (on his instruction as per the Sheriff's return of service) on the 12<sup>th</sup> of January 2023. Liberty Life to whom the writ was addressed made payment to the Sheriff on the 27<sup>th</sup> of March 2023.<sup>8</sup> The respondent states that the application was only e-mailed to his attorney on the 31<sup>st</sup> of March 2023. The respondent alleges that the proverbial horse has bolted.

[11] The respondent furthermore argued that it is not an insignificant feature that the applicant does not seek repayment of this amount and having regard to the contents of paragraph 13.3<sup>9</sup> of the applicant's founding affidavit, he concedes that there is maintenance owing, even taking into account the amount that Liberty has paid.

[12] The respondent argues that although the applicant brings the application to set aside the writ, he confirms that the amount received from the proceeds of the Liberty Life policy does not have to be repaid by the respondent but rather offset against the applicant's indebtedness.<sup>10</sup>

[13] The respondent contends that the determination that the writ be set aside is accordingly moot. The respondent in this regard contends that the applicant admits an indebtedness. It is common cause that Liberty Life paid prior to the launch of the application. The respondent further alleges that it is common cause that the applicant concedes that the funds received from Liberty Life be set off against his indebtedness.

[14] The respondent argues that the applicant in his replying affidavit at

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<sup>8</sup> Para 6.21, FA, CaseLines, 002-10

<sup>9</sup> CaseLines, 002-20

<sup>10</sup> Annexure "**TPR2**", RA, CaseLines 008-30

paragraph 16.2<sup>11</sup> contends that the arrear maintenance is R48 757,75 as per Table 1<sup>10</sup> of Annexure “TPR2”. The respondent argues that it is noteworthy that in Annexure “TPR2” the applicant deducts from the amount owing by him the amount received by the Sheriff of R548 382,43 in arriving at the figure of R48 757,75.<sup>12</sup>

[15] I do not agree with the respondent’s contention that the application for the writ to be set aside has become moot. Either the writ had been validly/competently issued or the writ had not been validly/competently issued. I am ultimately called upon to determine whether the writ had been validly/competently issued. The fact that Liberty Life had paid an amount to the respondent’s attorneys subsequent to the respondent having caused the attachment of the applicant’s Liberty Life policy and that the applicant has conceded that the funds received from Liberty Life be set off against his indebtedness. are irrelevant to the question whether or not the writ had been validly/competently issued.

[16] Accordingly, the respondent’s point *in limine* is dismissed.

### **THE MAIN APPLICATION**

[17] The applicant avers that prior to the attachment of the annuity funds his attorney addressed a letter<sup>13</sup> to the respondent’s attorney wherein which the applicant’s attorney *inter alia* indicated that:

[17.1] the amounts claimed by the respondent are in dispute;

[17.2] the amounts claimed on behalf of Yeshiva College (“Yeshiva”) were unsubstantiated and the only computation of the amount claimed was the respondent’s own computation and in the absence of supporting evidence the amount is unquantified;

[17.3] the amount claimed by the respondent, in respect of Yeshiva, is not due to

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<sup>11</sup> Para 16.2, RA, CaseLines 008-08

<sup>12</sup> Annexure “TPR2”, RA, CaseLines, 008-30

<sup>13</sup> Dated the 8<sup>th</sup> of March 2022, FA, CaseLines, 002-36

her.

[18] The applicant furthermore contends that the respondent had received payments that were not included in the computation of the writ amount. This the respondent concedes. The total amount by her not included in the arrear maintenance amounts to R279 246,00.<sup>14</sup> In paragraph 7.1 of her answering affidavit she states the following:

*“I made a bona fide error in not including R279 246,00 in payments which the applicant has made to me. This amount therefore falls to be deducted from the writ amount.”*

[19] There are other amounts that are also in dispute between the parties. The applicable CPI increase and the arrear interest rate applied and the calculation thereof are also in dispute between the parties.

### **Applicable legal principles**

[20] In **AR v CR and Another**<sup>15</sup> Modiba J *inter alia* held:

*“[4] The applicant seeks the writ set aside (sic) on the following grounds:*

*[4.1] it is not accompanied by an affidavit quantifying the amount specified in the writ;*

*[4.2] it does not specify the provisions in the settlement agreement on which the respondent relies;*

*[4.3] no supporting documents for the relevant expenses are attached.*

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<sup>14</sup> Respondent's AA, para 7.1, CaseLines 004-25

<sup>15</sup> Unreported matter of the Gauteng Local Division, Johannesburg (1791/2009) [2020] ZAGPHC 20 (30 January 2020) at paras 4-8; Also see the matter of **De Crespigny v De Crespigny** 1959 (1) SA 149 (N) referred to therein

[6] *The applicant disputes that he is indebted to her for some of the relevant amounts for several reasons:*

[6.1] *the school fees claimed are not in respect of a Jewish School as required in terms of the settlement agreements;*

[6.2] *their quantification is uncertain in relation to whether one of the minor children has become self- supporting and whether the respondent included the maintenance portion of this child in the quantification of the writ amount.*

[7] *The writ is liable to be set aside for two reasons:*

[7.1] *it is not apparent from the writ that it was issued in conformity with the settlement agreement;*

[7.2] *the basis for the amount to be executed under the writ is unquantifiable and in dispute between the parties.*

[8] *The basis on which the first respondent contends in these proceedings, that the writ was correctly issued does not assist her, as the writ has to comply with the above requirements when it is issued. It is an instruction to the sheriff to give effect to the orders upon which it is based. Given the grounds upon which the applicant relies in this application, the writ is materially defective. It is rather belated for the first respondent to explain the basis and the quantification of the judgment debt in the answering affidavit. Further, the quantification remains in dispute. Therefore the writ may not be good solely on the first respondent's version."*

[21] In **JA v RA**<sup>16</sup> Matshaya, AJ *inter alia* held:

"[11] **Uniform Rule 45(1)** provides that:

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<sup>16</sup> (3348/2019) [2022] ZAFSHC 31 (28 February 2022)

“A judgment creditor may, at his or her own risk, sue out of the office of the registrar<sup>13</sup> one or more writs for execution thereof ....”

[12]                    A writ may be set aside on, *inter alia*, the following grounds:

“(a)

(b)

(c)            Where the amount payable under the judgment can be ascertained only after deciding a further legal problem.”

[13]            It is trite that there must be certainty as to what the creditor is entitled to under the judgment, and a writ may be set aside if the judgment in respect of which it had been issued is not definite and certain, or if it is no longer supported by its *causa*.<sup>17</sup>

[22]            In **Strydom NO v Kruger and Another**<sup>18</sup> the Court held:

“[8]            The general principle is that a court will set aside a Writ of Execution if:

(i)            the writ does not conform with the judgement which warrants its issue;

(ii)           the judgement is not definite and certain;

(iii)           the *causa* for the judgement has fallen away.

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<sup>17</sup> Also see **De Crespigny v De Crespigny** (*supra*); **Ras v Sand River Citrus Estates (Pty) Ltd** 1972 (4) SA 504 (T) at 510E; **Le Roux v Yskor Landgoed (Edms) Bpk** 1984 (4) SA 252 (T) at 257G and **Van Dyk v Du Toit** 1993 (2) SA 781 (O) at 783D; **Ras v Sand River Citrus Estates (Pty) Ltd** (*supra*) at 510A-E and **Van Dyk v Du Toit** (*supra*) at 783C

<sup>18</sup> (872/2005) [2022] ZANCHC 3 (21 January 2022)

[20] Essentially following *Butchart* (supra), the requirements to issue a writ<sup>14</sup> for these types of expenses are:

- 20.1 is the amount claimed by the judgment creditor an 'expense contained in a maintenance order;
- 20.2 is the amount easily ascertainable;
- 20.3 is the amount ascertained in an affidavit filed to obtain the writ."<sup>19</sup>

"[24] ... the principle enunciated there [Butchart] is that the judgment creditor may issue a writ **to recover amounts expended by her or him from the judgment debtor in terms of an 'expenses clause' contained in a maintenance order provided the amount is easily ascertainable.**"<sup>20</sup> (Own emphasis)

[23] In *Butchart v Butchart*<sup>21</sup> Wepener AJ (as he then was) who delivered the judgment for the Full Bench *inter alia* with reference to *Block v Block*<sup>22</sup> held the following:

"The Court below (as in the case of the unreported judgment of Stegmann J in *Block v Block* (supra)) held that the amount owing under such orders which can be quantified without difficulty, may be proved before the Registrar by an affidavit of the judgment creditor. In *Block v Block* Stegmann J at 46--7 stated:

'The problem arises in regard to execution for any sum said to have been incurred as a reasonable medical expense. A writ of execution cannot validly be issued for an arbitrary sum. Some proper means must be established for determining the money sum for which a writ may validly be issued for the judgment creditor's reasonable medical expenses. How is the judgment to be supplemented in this respect? Must the

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<sup>19</sup> *Ibid* at para 20

<sup>20</sup> *Ibid* at para 24

<sup>21</sup> 1997 (4) SA 108 (W) at 108

<sup>22</sup> Unreported Judgment of Stegmann J delivered in this division on the 11<sup>th</sup> of October 1994

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*judgment creditor approach the Court from time to time for an order quantifying the medical expenses reasonably incurred before a valid writ can be issued? Having regard to the fact that the judgment debtor's liability for medical expenses reasonably incurred has already been established in principle by the judgment of the Court, that suggestion is impractical, not least on grounds of unnecessary expense. By analogy with the abovementioned cases (in which the proper method of issuing a valid writ on the basis of a judgment for a money sum even though such money sum is subject to a variation on the fulfilment of a suspensive or resolute condition, has been determined) it seems to me that the proper method of fixing the sum for which a valid writ may be issued on the basis of a judgment which obliges the judgment debtor to pay "reasonable medical expenses" is clear enough. The judgment creditor must file with the Registrar an affidavit proving the medical expenses reasonably incurred; the writ may then validly include the amount so proved by the judgment creditor; and the affidavit of the judgment creditor must be served on the judgment debtor together with the writ. This procedure will ensure (a) the required certainty of the amount due under the judgment for purposes of the writ; and (b) that the judgment debtor has a fair opportunity to consider whether the amount included in the writ in respect of medical expenses was indeed within the terms of the judgment, and, if he considers that it was not, to approach the Court for appropriate relief."*

[24] Wepener AJ after quoting Stegmann J in **Block v Block** with regards to the certainty of the amount claimed in the writ further held:

*"In the present matter the respondent attained substantially the same result by annexing all the medical invoices from which all the particulars can be gleaned. ..."*<sup>23</sup>

[25] A writ of execution will on application be set aside as incompetent if the judgment was not definite and certain, as where the amount payable under the judgment can be ascertained only after deciding a further legal problem.<sup>24</sup>

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<sup>23</sup> Page 115 of the **Butchart** judgment (*supra*)

<sup>24</sup> **De Crespigny v De Crespigny** (*supra*) at 152A-B; **Le Roux v Yskor Landgoed (Edms) Bpk** (*supra*) at 257F-G; **Van Dyk v Du Toit** (*supra*) at 783D. In **De Crespigny** (*supra*) it was held to be unnecessary to decide what degree of factual uncertainty in a judgment renders execution incompetent. Also see **Du Preez v Du Preez** 1977 (2) SA 400 (C) at 403: Even under the wide

## **THE APPLICANT'S SUBMISSIONS**

[26] The applicant's main submissions in seeking an order setting aside the writ are as follows:

[26.1] The respondent's affidavit in support of the writ lacked the necessary detail and supporting documents, therefore the amounts were not easily ascertainable;

[26.2] The respondent's conduct in using the writ to attach the applicant's retirement annuity funds whilst knowing the amount claimed was incorrect, was *mala fide*;

[26.3] The amounts claimed in the writ do not conform with the judgment (DSA) because they are due to third parties and the respondent has no claim for reimbursement, nor has she received any demand from the relevant third parties, nor has she herself complied with her obligations to the third parties as per the DSA.<sup>25</sup>

### **Amount not being easily ascertained**

[27] The amount in the respondent's affidavit in the application for a warrant of execution is not easily ascertained.

[28] Annexure "SR1" to the affidavit in support of the writ, which constitutes the respondent's calculation of what she claims due to her in terms of arrear maintenance has a large portioned greyed out / redacted, which makes the calculation unascertainable: The columns that are titled "*maintenance*", "*amount received*" and "*amount due*" are greyed out / redacted from October 2019 to November 2022.

[29] The remaining columns on the calculation for the abovementioned period

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language of Rule 45(1) there can be a degree of uncertainty in a judgment which makes it incompetent for a writ to issue under it

<sup>25</sup> Joint Practice Note, CaseLines 022-420 to 022-425



are still visible and the respondent also calculates the interest due for the period<sup>17</sup> that is greyed out / redacted.

[30] The respondent, however, manages to calculate what she claims to be the total maintenance, the total amount received and the total amount due inclusive of interest.<sup>26</sup>

[31] The respondent concedes that the amount claimed for in the writ is incorrect in her answering affidavit, however, she avers that the inclusion of these amounts in the writ were *bona fide* errors.<sup>27</sup>

[32] The affidavit in support of the writ does not have the substantiating documents attached to it that are required to quantify the amounts due to Yeshiva College in respect of school fees for B[...] R[...] and the university fees for T[...] R[...]. These two claims total the sum of R274 099,87.<sup>28</sup> The applicant however annexed the university statement for fees due in respect of J[...] R[...]. The applicant alleges that the respondent was well aware that supporting documents were required when making an application to issue the writ. No substantiation for the amount she claims for the university fees for T[...] R[...] or the school fees for Brennan Richter are attached to her writ affidavit.

[33] The respondent has without any explanation as to why the substantiating documents were omitted, proffered substantiating documents to these claims in her founding affidavit in her counter-application, which cannot have retrospective effect at the time of the writ.<sup>29</sup>

[34] The respondent furthermore concedes that the amount claimed for in the writ is incorrect by her admission in her answering affidavit, however, the respondent avers that the exclusion of those amounts were *bona fide* errors.<sup>30</sup> The respondent

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<sup>26</sup> Annexure “**SR1**” to Annexure “**TR6**”, CaseLines, 002-63

<sup>27</sup> Para 7.1, CaseLines, 004-25

<sup>28</sup> The applicant disputes that these amounts are due to the respondent. This was brought to the attention of the respondent prior to the annuity fund being attached in a letter dated the 8<sup>th</sup> of March 2022

<sup>29</sup> Annexure “**SRC8**”, para 2.2, CaseLines 005-16; **AR v CR and Another** (*supra*), para 8: “... It is rather belated for the first respondent to explain the basis and the quantification of the judgment debt in the answering affidavit. ...”

<sup>30</sup> Para 7, CaseLines, 004-20 to 004-25

omitted to exclude from her calculation payments she received for maintenance<sup>18</sup> from 2018 to 2020 which on her own account totals R279 246,00 which is made up of nineteen payments across the aforementioned period.<sup>31</sup> The applicant furthermore alleges that there are other amounts that should be taken into account which is disputed between the parties, which are dealt with in the applicant's submissions regarding the respondent's counter-application.

[35] The respondent tenders a very vague and implausible explanation on how these errors occurred.<sup>32</sup> In a schedule in her answering affidavit<sup>33</sup> the respondent seeks to calculate the amounts to be credited to the applicant. The applicant correctly avers that these are payments of a large amount that were made over a period of approximately two years, which the respondent actually received. The applicant disputes the *bona fides* of the respondent's errors. Be that as it may the quantification remains in dispute. Therefore the writ may not be good solely on the respondent's version.<sup>34</sup>

[36] In summary the fact that:

[36.1] the respondent having not attached supporting documentation to her affidavit in support of her application to obtain a writ as referred to hereinabove; and

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<sup>31</sup> It is the applicant's contention that there are other amounts that should also be taken into account however this is disputed between the parties

<sup>32</sup> <sup>32</sup> Para 6.9.2, CaseLines 004-23, AA

*"I requested from the Standard Bank of South Africa Limited bank statements in order to ascertain the payments which the applicant has made for the period. The statements which I received were voluminous in nature and as such I must have missed certain of the payments which I set out below. It was sincerely a bona fide error and I humbly request the Court to consider the below payments as payments which have been made by the applicant in reduction of the writ amount".*

Para 6.9.3

*"I set out below a list of the applicant's payments which have not been accounted for on "SR1" and the reasons therefor. Lest it not be forgotten the applicant in Annexure "DRA8" listed every payment made to me and sought a reduction from the writ amount of R422 243,83."*

<sup>33</sup> Respondent's AA, CaseLines,004-24 to 004-25

<sup>34</sup> **AR v CR and Another** (*supra*), para 8

[36.2] subsequently conceding that the total amount in respect of arrear<sup>19</sup> maintenance was incorrectly calculated, constitutes a clear indication that the total amount and/or amounts contained within the writ of execution is/are not easily ascertainable<sup>35</sup> and neither could the Registrar have objectively ascertained that the amounts claimed in the writ were indeed correct and true, due to the lack of supporting evidence proving the correct amounts.<sup>36</sup> The respondent has conceded that the arrear maintenance amount had not been correctly calculated and it is furthermore apparent that certain amounts in Annexure “SR1” attached to her application for a writ had been redacted.

[37] The amount payable under the judgment can be ascertained only after deciding further legal problems.<sup>37</sup> Certain of the amounts payable under the writ can be ascertained only after deciding various further legal issues as conceded by the parties in their joint practice note as set out above:

[37.1] Whether the oral agreement between the parties relating to the Investec bond payments have varied the DSA;

[37.2] Whether the applicant can be credited with the payments he made directly to Brennan Richter;

[37.3] Whether the respondent can claim for amounts due to third parties in terms of the DSA, when she herself has not discharged her obligations in terms thereof or expended monies on behalf of the applicant to third parties;

[37.4] Whether the respondent can seek relief from the Court on behalf of third parties for amounts prescribed but she is indemnified against.

## **Finding**

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<sup>35</sup> The amount is not ascertained in an affidavit filed to obtain the writ. **Strydom NO v Kruger and Another** (*supra*) at para 20

<sup>36</sup> **Block v Block** (*supra*); **Butchart v Butchart** (*supra*); **Strydom NO v Kruger and Another** (*supra*)

<sup>37</sup> **De Crespigney v De Crespigney** (*supra*) at 152A-B; **Le Roux v Yskor Landgoed (Edms) Bpk** (*supra*) at 257F-G; **Van Dyk v Du Toit** (*supra*) at 783D.

[38] I find that the writ is materially defective and that it is rather belated for the respondent to explain the basis and the quantification of the judgment debt in her answering affidavit as further amplified by the respondent in her founding affidavit in the counter-application. In the result I find that the writ of execution had been incompetently issued and the application must therefore succeed.

### **THE COUNTER-APPLICATION**

[39] In essence the respondent seeks in her counter-application to rectify her omissions and errors contained in her affidavit in support of her application for a writ after having considered the applicant's founding affidavit in the main application.

[40] What the respondent is in essence seeking from this Court is an order to amend a materially defective writ in material respects and to recalculate the amounts contained in the materially defective writ – which is further indicative thereof that the writ is incompetent. I find that it is incompetent for the respondent to have brought the counter-application. This Court is not inclined to amend and/or recalculate the amounts contained in the writ.

[41] In view of my finding that the counter-application is incompetent it is not necessary for me to deal with the merits of the counter-application.

[42] Accordingly, the counter-application is dismissed.

**COSTS**

[43] The norm is that costs follow the event. As costs are in my discretion I am, however, not inclined to grant a costs order in the applicant's favour either in the main application or in the counter-application. The applicant has admitted to being in arrears in a substantial amount in respect of his maintenance obligations. The applicant has in fact made a with prejudice tender in his papers, which the respondent has rejected as she was well entitled to have done.

**ORDER**

[44] Accordingly, I make the following order:

[44.1] The writ issued by the Registrar on the 13<sup>th</sup> of December 2022 under case number 11467/2017 is hereby rescinded and set aside.

[44.2] The respondent's counter-application is dismissed.

**M VAN NIEUWENHUIZEN**

*Acting Judge of the High Court of South Africa Gauteng Division, Johannesburg*

**Delivered:** This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand- down is deemed to be on 24 January 2024.

HEARD ON: 20 October 2023

DATE OF JUDGMENT: 24 January 2024

McCormick Londt Inc.

Ref: Mr D Londt

(Attorney duly authorised hereto in terms of section 4(2) of the Right of Appearance in Courts Act 62 of 1995)

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