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

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

**…….……..... **
F. MARCANDONATOS 24 January 2025

CASE NUMBER: 21620/2019

In the matter between:

S[...]: R[...] G[...] **Applicant**

and

S[...]: M[...] **Respondent**

In re:

S[...]: M[...] **Plaintiff**

and

S[...]: R[...] G[...] **Defendant**

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to Case Lines. The date and time for hand-down is deemed to be 10h00 on 24 January 2025

JUDGMENT

MARCANDONATOS AJ:

INTRODUCTION

[1] This Court was called upon to determine the following:

1.1. in terms of the Notice of Motion:-[1]

1.1.1. that the Warrant of Execution issued against the Applicant on ***15 June 2023*** under the above case number be rescinded;

1.1.2. that the goods attached by the Sheriff pursuant to the Warrant of Execution be released from such attachment;

1.1.3. that the Respondent pay the costs of this Application on the attorney and own client scale;

1.2. Applicant raised a point *in limine* that Respondent filed an irregular Supplementary Opposing Affidavit on ***06 September 2024***; [2] and

1.3. Respondent raised a point *in limine* relating to Applicant's failure to purge his contempt before this Applicant can be entertained.[3]

---

[1] NOM: S1 to S3
[2] Respondent's Supplementary Affidavit: CL Y1 to Y41
[3] Respondent's AA: par 2, CL V4

POINTS IN LIMINE

Applicant's point in limine

[2] Applicant argued that Respondent filed an irregular Supplementary Opposing Affidavit on ***06 September 2024,***[4] notwithstanding that Applicant's Replying Affidavit was already filed as far back as ***07 February 2024*** and Respondent's Opposing Affidavit on ***30 November 2023***. Heads of Argument were filed on behalf of both parties and the matter was enrolled for ***16 September 2024***.

[3] Applicant argued that the purpose of the Supplementary Affidavit is to put before the Honourable Court yet another version (*version 7 by the Respondent*) of ostensible arrears and does not advance the case of the Respondent at all and that the calculations contained in the Supplementary Affidavit attempt to set out a scenario of payments and claims up to ***03 July 2024***, which begs the question why the Respondent left the filing of the Supplementary Affidavit over until ***06 September 2024***, if not to ambush the Applicant and therefore argued that submitting the filing of a Supplementary Affidavit is highly irregular, is an utter abuse of the process and should be disregarded in its totality with a punitive costs order.

[4] Respondent's version is that the Supplementary Affidavit places updated figures before this Court reflected in the Warrant of Execution regarding the amount with which Applicant is in arrears with maintenance in terms of the Rule 43 Order and amounts which he has since made payment of and therefore prays same is admitted.

[5] In terms of the applicable law, three sets of Affidavit are normally filed in Motion proceedings, Founding Affidavit, Answering Affidavit and Replying Affidavit. This is well established by the authors Herbstein and Van Winsen in the Civil Practice of the Supreme Court of South Africa – 4th Edition at 359 wherein it is stated: "*the ordinary rule is that three sets of affidavits are allowed, supporting*

[4] Supra Footnote 2

affidavits, answering affidavits and replying affidavits. The Court may in its discretion permit the filing of further affidavits.".

[6] No litigant may take it upon herself to simply file further Affidavits without first having obtained the leave of the Court to do so. The Court will exercise its discretion to admit further Affidavits only if there are special circumstances, which warrant it or if the Court considers such a course advisable (***see Rieseberg v Rieseberg***[5]***, Joseph and Jeans v Spits & Others***[6]) and in **Bangtoo Bros & Others v National Transport Commission & Others**[7], it was held amongst other things, that a litigant who seeks to serve an additional Affidavit is under a duty to provide an explanation that negates *mala fides* or culpable remissness as the cause of the facts and/or information not being put before the Court at an earlier stage.

[7] There must furthermore be a proper and satisfactory explanation as to why the information contained in the Affidavit was not put up earlier and what is more important, the Court must be satisfied that no prejudice is caused to the opposition party that cannot be remedied by an appropriate order as to costs.[8]

[8] The Courts have found that the submitting of the filing of a Supplementary Affidavit is irregular and should be disregarded in its totality. Having regard to the parties' submissions, arguments and the cases stated above in respect of which I align myself, the Supplementary Affidavit was disregarded and I exercised my discretion finding that there are no special circumstances, which warrants the further Supplementary Affidavit.

[9] Accordingly, Applicant's *point in limine* was upheld.

Respondent's point in limine

[5] 1926 WLD 59
[6] 1931 WLD 48
[7] 1973(4) SA 667 (N)
[8] Standard Bank of SA Limited v Sewpersadh 2005 (4) SA 148 (C) at 154(c) to 154(f) (*See Transvaal Racing Club v Jockey Club of South Africa 1959(3) SA 599 (W); Cohen N.O. v Nel & Another 1975(3) SA 963 (W)*)

[10] Respondent referred to **SS v VV-S**,[9] wherein the Constitutional Court emphasised the significance of maintenance obligations and the duty of the Courts to ensure compliance therewith and wherein the question was asked: *"…. Whether it would undermine this Court's integrity to hear the dispute why the Applicant remained in default with his admitted maintenance obligations*".

[11] In paragraph 31 therein, it was held that:

> "*… it can only be described as unconscionable when a party seeks to invoke the authority and protection of this Court to assert and protect a right it has, but in the same breath is contemptuous of that very same authority in the manner in which it fails and refuses to honour and comply with the obligations issued in terms of a Court Order. The High Court, in Di Bona v Di Bona*[10]*, supports the view that a court may refuse to hear a party until they have purged themselves of the contempt by coming to the following conclusion*
>
> *The consequences of the Rule are that anyone who disobeys an Order of [c]ourt is contempt of [c]out and may be punished by arrest of his person and by committal to prison and, secondly, that no Application to the [c]ourt by a person in contempt will be entertained until he or she has purged the contempt."*

[12] Respondent argued that she had shown that Applicant had been in arrears throughout and that he remained in arrears with his maintenance obligations, even after the Writ of Execution was issued[11] and further argued that it is not disputed that Applicant did not make timeous payments and further that it is not disputed that the payments made by Applicant was not in accordance with the Ordered obligations to the letter and that it is furthermore not disputed that Applicant only registered the Respondent on his medical aid a year after he was supposed to have done so as per the Order recording that on Applicant's version, even though he alleges that it would

---

[9] [2018] ZACC5 (*judgment delivered on 01 March 2018*)
[10] 1993(2) SA 682 (C) at 688 F to G
[11] Annexure "A1", CL V23 to V27

be set-off,[12] he is in default of an amount of R42 118,19 (*forty two thousand one hundred and eighteen rand and nineteen cents*), at the end of ***November 2022***,[13] and with an amount of R18 797,75 (*eighteen thousand seven hundred and ninety seven rand and seventy five cents*), as at ***August 2023***.[14]

[13] Respondent therefore concludes that the Application should not be entertained until the Applicant has purged his contempt.

[14] In reply, Applicant argued that Respondent disputes that he admitted being in arrears and argued that the Warrant of Execution is based on incorrect amounts, which cannot be corrected and that the Rule 43 Order is ambiguous in respect of the reference to "*levies*" and that the Respondent's point *in limine* ought therefore not to be upheld.

[15] I do not agree with Respondent's contention that I cannot entertain this Application until Respondent purges his alleged contempt. The question is whether the Warrant of Execution has been validly or competently issued. I am therefore ultimately called upon to determine whether the Warrant of Execution had validly or competently been issued. In my view, the fact that amounts were paid and/or that amounts are to be set-off against Applicant's indebtedness, are irrelevant to the question of whether or not the Warrant of Execution had been validly or competently issued.

[16] Accordingly, the Respondent's point *in limine* was dismissed.

COMMON CAUSE ISSUES

[17] It is common cause that a Rule 43 Order was granted on ***10 December 2019***,[15] wherein:-

[12] FA, paras 32 and 33, CL S15
[13] FA, par 27.1, CL S 10
[14] FA, par 30, CL S12
[15] CL: S183 to S185

17.1. Applicant is ordered to pay maintenance to Respondent in an amount of R30 000.00 per month, payable on the first day of each month, monthly in advance, free from set-off, into the nominated bank of Applicant, the first payment to be made on ***01 January 2020***, *pendente lite*;

17.2. Applicant is directed to register and retain Respondent as a registered dependent on his medical aid scheme and be responsible for all levies and premiums pertaining thereto, *pendente lite*;

17.3. Applicant is directed to make available and pay for the motor vehicle of the Respondent, a Hyundai Creta, including insurance, maintenance and licensing of the motor vehicle, *pendente lite*;

17.4. Applicant is directed to pay rental of an alternate residence for Respondent in the sum of R9 200.00 per month, *pendente lite*;

17.5. Applicant is directed to make a contribution of Respondent's legal costs in the sum of R50 000.00, in monthly instalments of R5 000.00 per month on ***01 January 2020***.

[18] Respondent approached the Registrar on ***15 June 2023*** for a Warrant of Execution for arrears, flowing from the Rule 43 Order, being an amount of R111 496.01, supported by an Affidavit deposed on ***17 April 2023***, for arrears up to ***November 2022***.[16] The Warrant of Execution was issued by the Registrar after considering, the Rule 43 Order, supporting Affidavit, the breakdown and supporting documents.

ISSUES IN DISPUTE

[19] Applicant avers that he is not in arrears and in fact is in credit,[17] given that:-

[16] Annexure "GS6", CL S179 to S182
[17] FA: para 12, S6 and para 13, S7 and para 33, S15 and para 41, S17

19.1. he contends that the word "*levy*" as referred to in the Rule 43 Order (*paragraph 2*) does not include additional medical expenses not covered by the medical aid scheme being the interpretation by Respondent and hence included in terms of the Warrant of Execution and Applicant referred to Section 2(1)(a) of the Council for Medical Scheme Levies Act, 58 of 2000 defining levies as general administrative and other costs of the Council and functions performed by the Registrar of Medical Schemes;

19.2. Applicant paid an amount of R45 461.30 towards Respondent's retirement annuity, which ought to be set-off against his maintenance obligations;

19.3. Applicant paid an amount of R13 400.00 towards Respondent's traffic fines, which ought to be set-off against his maintenance obligations; and

19.4. Respondent cannot include outstanding legal costs in the sum of R50 000.00 as these expenses were settled by Applicant as confirmed in Respondent's spreadsheet (*annexure "A1"*) in support of the Warrant of Execution.

[20] Respondent says Applicant did not comply with the Rule 43 Order in that:-[18]

20.1. he did not register Respondent on his medical aid scheme from ***January 2020*** as a result Respondent had to obtain her own medical aid for the period he failed to do so and was liable to pay for the amounts so paid by Respondent, which were included in the Warrant of Execution and claimed by her as outstanding in support thereof;

20.2. he did not pay on the first of the month and the first cash maintenance payment was received on ***18 January 2022*** and only a portion of what was due;

[18] Respondent's HOA: paras 12.1 to 12.12, X19 to X21

20.3. he only paid R19 365.00 on ***25 March 2020*** and by the end of ***March 2020***, he was in arrears with the monthly payments, of R8 775.00, being the cash maintenance and medical aid premiums she had to get, in addition to the contribution to her legal costs to be paid in monthly instalments;

20.4. in ***April 2020***, Applicant only paid R30 650.00 (***02 April 2020*** *and* ***28 April 2020***) leaving arrears of R27 233.00;

20.5. he continued paying less than ordered and by the end of ***July 2020*** was in arrears in the sum of R92 182.00 comprising of rent, cash maintenance, medical aid premiums she paid for and the monthly contribution to costs;

20.6. during ***August 2020*** he reduced the arrears but was still in arrears in the sum of R57 950.00;

20.7. by the end of ***2020***, his arrears stood in the amount of R89 737.00;

20.8. he only registered Applicant on his medical aid scheme from ***January 2021***;

20.9. by end of ***August 2021***, the arrears was R149 012.00 and he reduced same by making slightly larger payments for the next few months leaving an outstanding amount at the end of ***2021*** in the sum of R100 787.00;

20.10. in the subsequent year, whilst making larger payments he was still in arrears and by ***November 2022*** he was in arrears in the amount of R83 768.19, which included the previous years' arrears and short payments in ***2022*** to the amount of R83 768.19 and Respondent calculated an amount of R27 727.82 outstanding in respect of medical "*levies*";

20.11. by the end of ***November 2022***, the outstanding amount totalled R83 780.19 plus R27 727.82 leaving a total outstanding amount of R111 496.01.

[21] Respondent therefore approached the Registrar during ***June 2023*** for a Warrant of Execution flowing from the Rule 43 Order for an amount of R111 496.01 supported by an Affidavit deposed to by Respondent on ***17 April 2023*** for arrears up to ***November 2022***.[19]

[22] Applicant launched this Application to set aside and rescind the Warrant of Execution for various reasons as referred to above. The Application was served on the Respondent.

[23] The breakdown provided by Respondent contains columns in accordance with payments compromising of date, rent, reference, medical aid, legal fees, allowance, Court Order, Grant monthly pay, total Grant monthly pay and arrears or in advance, med levies with a total computed as comprising of the outstanding amounts computed by Respondent.

APPLICABLE LEGAL PRINCIPLES

[24] In **AR v CR & Another**[20] and in the matter of **De Crespigney v De Crespigney**,[21] Modiba J, *inter alia,* held:-

> "*The Applicant seeks the Writ set aside on the following grounds:-*
>
> *1. it is not accompanied by an Affidavit quantifying the amounts specified in the Writ;*
>
> *2. it does not specify the provisions in the Settlement Agreement on which the Respondent relies;*
>
> *3. no supporting documents for the relevant expenses are attached*

[19] Supra Footnote 16
[20] Unreported matter of Gauteng Division, Johannesburg (1791/2009) [2020 ZAGPHC20] (30 January 2020) at paras 4 to 8
[21] 1959 (1) SA 149 M,

The Applicant disputes that he is indebted to her for some of the relevant amounts for serval reasons:-

1. the school fees claimed are not in respect of a Jewish school as required in terms of the Settlement Agreement;

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;

3. the Writ is liable to be set aside for two reasons:-

3.1 it is not apparent from the Writ that it was issued in conformity with the Settlement Agreement;

3.2 the basis the amount of to be executed under the Writ is unquantifiable and in dispute between the parties.

4. 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 be good solely on the first respondent's version."

[25] In **JA v RA**,[22] Matshaya AJ, *inter alia,* held:-

[22] (3348/2019) [2020] SAFSCH 31 (28 February 2022)

"*Uniform Rule 45(1) provides that judgment creditor may, at his or own risk sue out of the Court of the Registrar one or more Writs for execution thereof…"*

"A Writ may be set aside on, inter alia, the following grounds:-

(c) where the amount payable under the judgment can be ascertained only after deciding a further legal problem"

"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 has been issued is not definitive and certain, or if it is no longer supported by its causa."

[26] In **Strydom N.O. v Kruger & Another**,[23] the Court held:-

"*The general principle is that a Court will set aside a Writ of Execution if:-*

(i) the Writ does not conform with the judgment which warrants its issue;

(ii) the judgment if not definitive and certain;

(iii) the causa for the judgment has fallen away.

Essentially following Budchart (supra), the requirements to issue a Writ for these type of expenses are:-

(i) is the amount claimed by the judgment creditor an "expense contained in a maintenance order";

(ii) *is the amount easily ascertainable*;

[23] (872/2005) [2022] SANCHC 3 (21 January 2022)

(iii) is the amount ascertained in an affidavit filed to obtain the Writ.

… the principle enunciated there [Budchart] 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."

[27] In **Budchart v Budchart**,[24] Wepner AJ (*as he then was*) who delivered the judgment for the Full Bench, *inter alia,* with reference to **Block v Block**,[25] held the following:-

"*The Court (as in the case of the unreported judgment of Stegman J in **Block v Block** (supra) held that the amount owing under such orders which can be quantified without difficulty, may be proof before the Registrar by an affidavit of the judgment creditor. In Block v Block, Stegman 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 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 for issuing a valid Writ on the basis of a judgment for a money sum even though such money sum is subject to a valid variation on the fulfilment of a suspensive or resolutive 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 (the*

[24] 1997 (4) SA 108 W at 108
[25] Unreported judgment of Stegman J delivered in this division on 11 October 1994

reasonable medical expenses) is clear enough. The judgment creditor must file with the Registrar an affidavit providing 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."

[28] Wepner AJ after quoting Stegman 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 …*".

[29] A Writ of Execution will, on application, be set aside as incompetent, if the judgment was not definite and certain where the amount payable under the judgment can be ascertained only after deciding a further problem.[26] In **De Crespigney v De Crespigney** (*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**.[27] Even under the wide language of Rule 45(1), there can be a degree of uncertainty in a Judgment, which makes it incompetent for a Writ to be issued under it.

[30] It is clear from the Rule 43 Order, that no provision is made therein for Respondent to claim for medical aid premiums in respect of a medical aid scheme procured by Respondent, the obligation being that Applicant is to register Respondent on his current medical aid scheme, at his cost. Therefore the expenses

[26] 1959 (1) SA 149 M (supra) at 152 (a) to (b), Le Roux v Iscor Landgoed Eiendommes Beperk (supra) at 257 (f) to (g), Van Dyk v Du Toit (supra) at 783(d),
[27] 1977 (2) SA 400 (c) at 403

claimed by Respondent in respect thereof, is not competent and cannot be claimed for.

[31] It is furthermore apparent from the papers and argument, that there is a dispute on the meaning of the reference in the Judgment to "*medical levies*" and whether it refers to medical expenses not paid for and/or covered by the medical aid and/or refers to levies in the strict sense and linked to medical premiums and/or administrative costs as argued by Applicant. Therefore, is not clear from the Rule 43 Order and there is uncertainty, as to whether Respondent is entitled to these amounts claimed.

[32] In addition, given that Applicant has settled the outstanding legal costs in the sum of R50 000.00, it is incompetent for the Warrant to be issued in respect thereof.

CONCLUSION

[33] In summary, given the abovementioned exclusions from the Rule 43 Order pertaining to the medical aid expenses and legal costs and the uncertainty pertaining to the reference to "*levies*", having regard to the breakdown relied upon by Respondent in support of the Warrant of Execution, it is not clear precisely what is outstanding if anything and owed by Applicant to Respondent.

[34] Whilst Respondent provided a detailed schedule of the computation of amounts she alleges as outstanding in terms of the Rule 43 Order, the difficulty, however, is that she has gone beyond the parameters of the Rule 43 Order and has included amounts not competent and uncertain as being in terms of the Rule 43 Order.

[35] Even if I were able to extrapolate items extraneous to the Rule 43 Order, I am still not in a position to determine the actual arrears, if any.

[36] Respectfully, it is not for this Court to calculate the numbers, so to speak. The duty is on Respondent to do so and regretfully, in my view, she has not passed the muster.

[37] I therefore find that the Warrant of Execution, is materially defective and as a result, I find that the Warrant of Execution has been incompetently issued and that the Application must therefore succeed.

COSTS

[38] The norm is that costs follow the event.

[39] However, as costs are in my discretion, I am not persuaded that either party was frivolous and I am therefore not inclined to grant a cost order in Applicant's favour, which includes in respect of the points *in limine*.

ORDER

It is accordingly ordered that:-

[1] the Warrant of Execution issued and dated ***15 June 2023***, under case number 21620/2019 is hereby set aside;

[2] the goods attached by the Sheriff pursuant to the Warrant of Execution are released from such attachment; and

[3] no order as to costs.

F. MARCANDONATOS
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: ***18 September 2024***
Judgment: ***24 January 2025***

Appearances

For Applicant:Advocate JC Kotze
Cell: 082 789 4631
E-mail: corne@lawcircle.co.za

Instructed by:
DMO Inc
E-mail: mohamed@dmo.co.za
Ref: Mr Rasool/Mat11767
Tel: (011) 463-6693

For Respondent:Advocate. T Ellerbeck
Cell: 079 523 9142
E-mail: tanyae@lawcircle.co.za

Instructed by:
Arthur Channon Attorneys
Tel: (012) 940 6999
Email: arthur@channonattorneys.co.za
Email: anke@channonattorneys.co.za
Ref: LDX 6168/ MR/ Mnr Channon