IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO. AR485/19

In the matter between:

P[….] A[….] F[….] **APPELLANT**

and

S[….] C[….] F[….] **RESPONDENT**

JUDGMENT

(Delivered on 25 August 2020)

KRUGER J

[1] The Appellant appeals against various orders granted against him in the court *a quo*. These will be considered later in this judgment.

[2] The Appellant has also sought leave of this court, in terms of s 19 of the Superior Court's Act 10 of 2013, to admit further evidence on appeal. Finally, the

Appellant has sought condonation for the non-compliance with the provisions of rules 49(6) and rule 49(7). I propose to deal with the application to lead further evidence on appeal first.

Application to lead further evidence

[3] In terms of s 19(b) of the Superior Court's Act 10 of 2013, a court of appeal may 'receive further evidence'. In *Rail Commuters Action Group and Others v Transnet Ltd t/a Metro Rail and Others* 2005 (2) SA 359 (CC), the court confirmed the judgment of *Colman v Dunbar* 1933 AD 141 that the relevant criteria to determine whether evidence on appeal should be admitted were 'the need for finality, the undesirability of permitting a litigant who has been remiss in bringing forth evidence to produce it late in the day, and the need to avoid prejudice'. (At paragraph [41]). At paragraph [43] the court held: 'The Court should exercise the powers conferred by s 22 'sparingly' and further evidence on appeal . . . should only be admitted in exceptional circumstances. Such evidence must be weighty, material and to be believed. In addition, whether there is a reasonable explanation for its late filing is an important factor.'[1]

[4] The evidence which the Appellant seeks to place before the court on appeal is the fact that he had obtained an opinion from Senior Counsel regarding the lawfulness of establishing a trust and making a donation to it. The Appellant had obtained a written opinion from *Stokes* SC, which he now seeks to introduce into evidence. He has further averred that he enquired from his Counsel, during the trial, whether he was going to lead such evidence and was advised that it was unnecessary. It is common cause that *Stokes* SC represented the Appellant during

[1] The reference to s 22 is that of the Supreme Court Act 59 of 1959. The provisions thereof are similar to s 19 of the Superior Court's Act 10 of 2013.

the trial. Finally the Appellant has averred that the opinion is relevant and would have affected the outcome of the trial in that the court *a quo* would not have concluded that the donation be included in the accrual calculation.

[5] The Respondent opposed the application. Mr *Stokes* SC has also submitted an affidavit in which he set out the context in which the Appellant sought the opinion. Of importance, in my view, is the averment that the Appellant 'was very concerned about the amount he was likely to have to pay Mrs F[….] in terms of her accrual claim'. The Respondent was also very concerned that the Appellant had been seeking ways to reduce her accrual claim. This concern was repeatedly echoed throughout the trial.

[6] At the conclusion of the trial the court *a quo* agreed with the Respondent and directed that the donation to the trust be included in the accrual calculation. This will also be further discussed and expanded upon later in this judgment.

[7] The Appellant's averments warrant closer scrutiny, especially, in my view, the practicalities of it. How was Mr *Stokes* SC going to introduce his own legal opinion into evidence without testifying and thereby confirming that he indeed was the author of same? This would have required him to recuse himself and for another legal representative to be appointed to lead this evidence. Failing this, the opinion would be inadmissible as it constitutes hearsay evidence. I agree with the submission of Mr *Humphrey*, on behalf of the Respondent, that even if this opinion was placed before the court *a quo*, this does not mean that the court *a quo* is bound to accept it. The general principles regarding the admissibility and evaluation of expert opinion have been described, by the authors D T Zeffertt and A P Paizes – The South African Law of Evidence – Third Edition, as follows:

> 'Expert evidence . . . will be admissible if the court can receive appreciable help on the particular issue when, by reason of his special knowledge and skill, he is better qualified than the trier of fact. There are some subjects on which an expert's opinion will never be admissible. His opinion will be supererogatory and irrelevant, for instance, on the legal or general merits of the case – the judicial officer is the person most qualified.' (At page 334).

See *P v P* 2007 (5) SA 94 (SCA) at paragraph [16]; *Commissioner, South African Revenue Service v Stepney Investments (Pty) Ltd* 2016 (2) SA 608 (SCA) at paragraph [16] and *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC) at paragraph [43].

[8] The opinion of Mr *Stokes* SC related to the disposition to the trust and the legality thereof. In light of the aforementioned authorities, I agree that such opinion is irrelevant. This issue was clearly before the court *a quo* which ably ruled on the matter.

[9] In the result I am of the view that the Appellant has failed to show that there are exceptional circumstances which would warrant the admission of the legal opinion of *Stokes* SC into evidence. The application is accordingly to be dismissed with costs.

Condonation

[10] Rule 49(6) provides that the Appellant is to apply for a date for the hearing of the appeal within 60 days after delivery of a notice of appeal, failing which the appeal shall be deemed to have lapsed. In terms of the provisions of rule 49(7) the

Appellant was required to file the record on appeal at the same time that the application for a date of the hearing of the appeal was made. Both rules also make provision for the application of condonation should the time limits not be observed.

[11] It is common cause that the appeal has lapsed. The notice of appeal was served and filed on 7 November 2018. Although no specific date has been indicated, it appears that the Appellant applied for a date of hearing of the appeal and furnished a record on appeal on or about 9 or 10 October 2019. An application for condonation for the failure to comply with the provisions of rules 49(6) and 49(7) was filed and served on 10 October 2019.

[12] The court's power to grant condonation is a discretionary one upon consideration of all the circumstances of each case. Factors which need to be considered when granting condonation have been adeptly set out in *Aurecon South Africa (Pty) Ltd v Cape Town City* 2016 (2) SA 199 (SCA) at paragraph [17]:

> 'The relevant factors in that enquiry generally include the nature of the relief sought; the extent and cause of delay; its effect on the administration of justice and other litigants; the reasonableness of the explanation for the delay, which must cover the whole period of delay; the importance of the issue to be raised; and the prospects of success'.

The onus is on the Appellant to satisfy the court that condonation should be granted – *Glazer v Glazer N O* 1963 (4) SA 694 (AD) at 702 H

[13] Against this backdrop, I turn to consider the grounds or reasons proferred by the Appellant. In a lengthy affidavit, the Appellant's attorney has outlined the

difficulties encountered in compiling and preparing the appeal record. It appears from the affidavit that the Appellant's attorney was in possession of the record of proceedings as early as 26 November 2018. Annexure 'N' was however missing and Volumes 3 and 4 had been incorrectly paginated. On 27 November 2018, the record was forwarded to a company, Appeal Document Services ('ADS'), who were tasked with the preparation of the record. Most of the blame for the late delivery of the appeal record has been placed at the door of ADS who, it is alleged, repeatedly requested more time to complete the task. What is lacking in the affidavit are averments by the Appellant's attorney relating to steps taken to compel ADS to complete the appeal record timeously. In this regard I am mindful of the judgment of Halgryn AJ in *Unitrans Fuel and Chemical (Pty) Ltd v Dove-Co Carriers CC* 2010 (5) SA 340 (GSJ) at paragraph [27] to paragraph [31] he held:

> 'This judgment must not be seen as authority for the future condonation of such long delays. On the contrary, it must serve to ensure that this never happens again. . .
>
> > if the reason for the delay is the non-cooperation by the contracted transcribers, then substantial delays . . . will not constitute a sufficient reason/explanation for the delay without proof of attempts to compel the transcribers to provide the transcripts.
>
> . . . .
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> In future applicants for condonation in matters such as the present will have to show their attempts at compelling the transcribers to provide the record, including, but not limited to the bringing of an application to court to compel compliance, as part of their explanation for the delay and to show that they are not at fault.'

I see no reason why the same should not apply in respect of those responsible for the preparation of the appeal records.

[14] 'Final instructions' were allegedly given to ADS on 6 June 2019. Notwithstanding this, the record was only delivered to the Appellant's attorney on 18 September 2019. No explanation has been provided for the delay from 18 September 2019 until 9 October 2019 when the appeal record was eventually filed with the registrar. There is also no explanation from ADS, in either the form of a substantive affidavit or a confirmatory affidavit, regarding the delay and the causes thereof.

[15] In dealing with the non-compliance with rule 49(6), the Appellant's attorney has merely stated as follows:

> '
> 85.
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> Due to an error on my part I did not apply for a date for the hearing of the appeal in accordance with the provisions of rule 49(6)(a). I mistakenly thought that the application for the date for the hearing could only be made once the appeal record was filed with the registrar. The error arose as a result of misconstruing the provisions of rules 49(6) and (7).'

Such a terse explanation assumes that a condonation request is simply for the asking and a simple averment by an attorney that he/she misconstrued the provisions of the rules will suffice. There is no suggestion that this was, for example, the first appeal ever noted by the Appellant's attorney. I would indeed be surprised if it were as the attorney is a long standing member of the profession. I am not

suggesting that this would be a plausible explanation, but it would at least lay the basis for 'misconstruing' the provisions of the rules. It is the duty of every legal practitioner to be acquainted with the rules of court. In *Moaki v Reckitt and Colman (Africa) Ltd and Another* 1968 (3) SA 98 (AD), the court held, at 101 G – 'An attorney who is instructed to prosecute an appeal is in duty bound to acquaint himself with the procedure prescribed by the Rules of the Court to which a matter is taken on appeal.'

See also *Kgobane and Another v The Minister of Justice and Another* 1969 (3) SA 365 (AD) at 369 B – 370 A; *Mbutuma v Xhosa Development Corporation Limited* 1978 (1) SA 681 (AD).

[16] In *Shaik and Others v Pillay and Others* 2008 (3) SA 59 (NPD), Nicholson J at paragraph [7] held:

> 'As has often been stated the court is hesitant to debar a litigant from relief, particularly where it is his attorney who has been at fault . . . There are limits, however, even where the attorney is largely to blame for the delay, beyond which the courts are not prepared to assist an appellant. The remarks made in *Saloojee and Another v Minister of Community Development* at 141 C – E by Steyn CJ bear repeating again:
>
> > 'I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact this court has

> lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this court was due to neglect on the part of the attorney. The attorney, after all, is a representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstance of the failure are.''

[17] The Appellant's attorneys of record were advised, by letter, as early as 21 June 2019 that the appeal had lapsed and that a condonation application would be necessary. The Appellant's attorneys failed to respond to this correspondence. The Appellant's attorney has also failed to address this aspect in her founding affidavit. This reinforces my view that it appears that the Appellant's attorneys are of the view that condonation is simply there for the asking.

[18] Counsel for the Appellant has submitted that the Appellant's attorney's error should not be decisive of the condonation application. Ms *Law*, on behalf of the Appellant, has submitted that the Appellant has 'reasonably good prospects of success in the appeal'. As stated earlier in this judgment, this aspect is also to be considered by the courts when considering whether or not to grant condonation. I accordingly turn now to consider the Appellant's prospects of success in the appeal.

Merits

[19] Leave to appeal has been granted in certain limited respects of the rulings and order made by the court *a quo*. They are the following:

(a) against the ruling in paragraph [289] which provides;

'In the circumstances I propose to deem the values of the dispositions in relation to the donation to the trust and the money repaid to the Plaintiff's father as assets in the estate of the Plaintiff.'

(b) the ruling in paragraph [343] – in respect of the date to calculate the exchange rate. The court *a quo* ruling that the exchange rate be that as at the date of disposition.

(c) the order in paragraph 7 directing the Appellant to pay to the Respondent the sum of R3 521 895.00;

(d) the order in paragraph 7.2 insofar as it pertains to the payment of interest on the outstanding balance;

(e) the order in paragraph 5 which relates to the payment of maintenance, medical expenses and educational expenses on behalf of the minor child born of the marriage;

(f) the order in paragraph 6 which relates to the payment of maintenance for the Respondent; and

(g) the order in paragraph 26 which directs the Appellant to pay the costs of suit, including the reserved costs of the rule 43 applications dated 12 August 2013 under case number 3819/2013 and dated 24 November 2014 under case number 12861/2014.'

[20] Subsequent thereto, and as it appears from the heads of argument filed on behalf of the Appellant, certain aspects of the appeal are not being proceeded with and have been abandoned. Ms *Law* has confirmed this during the hearing of the appeal. These are important and are the following:

(a) in respect of the ruling in paragraph [289], - the finding by the court *a quo* that the value of the loan repayment made by the Appellant to his father should be taken into account in determining the accrual in the Appellant's estate;

(b) in respect of the order in paragraph 5, the appeal is now limited to the order that the payment of maintenance is to increase at the rate of 10% per annum.

(a) <u>The ruling in paragraph [289]</u>

[21] Before considering the submissions made in respect of this aspect of the appeal, I am of the view that it is necessary to set out, briefly, the background. These facts are all common cause.

[22] The parties were married to each other, out of Community of Property, subject to the accrual system, on 7 December 2001. The Appellant, as Plaintiff, instituted divorce proceedings against the Respondent on 24 June 2013. One of the main issues before the court *a quo* was the value of the accrual claim of the Respondent against the Appellant. It was common cause in the court *a quo* that the value of the Appellant's estate far exceeded that of the Respondent's. Both parties had, in the Antenuptial Contract, declared a commencement value of nil.

[23] The trial commenced on 18 February 2015 and continued for two days thereafter. It was then adjourned for further evidence. On 13 February 2017 a Decree of Divorce was granted. Notwithstanding this, the Appellant offered and was ordered to continue paying his obligations in terms of a rule 43 order, granted on 12 August 2013, until the court delivered its judgment. The remaining issues were separated out in terms of the provisions of rule 33(4). Judgment was ultimately handed down on 13 November 2017.

[24] On 29 January 2015, the Appellant established a trust under the laws of the British Virgin Islands. The beneficiary of the trust is the parties' minor daughter. The sole trustee is the Appellant's brother, M[….] J[….] F[…..], a Barrister (Senior Counsel) practicing in the British Virgin Islands. On 30 January 2015 (18 days before the trial commenced), the Appellant entered into a Deed of Donation with the trustee in terms of which he agreed to donate the sum of £115 000 to the trust. The establishment of the trust and the subsequent donation to it were all done with the knowledge of the Appellant that it would reduce the Respondent's accrual claim. The Appellant indeed confirmed this when testifying. The Appellant sought advice on how to reduce the value of his estate and thereby the Respondent's accrual claim. What is startling, in my view, is that his attorneys of record, who were aware of the Respondent's accrual claim, assisted the Appellant in drawing up the Deed of Donation to the trust. The Appellant then sold his immovable property situate in London and the donation was subsequently paid to the trust deed during July 2015.

[25] At about the same time, the Appellant remembered that his father had lent him the sum of £40 000. This 'loan' had been made approximately 23 years prior. The details of this 'loan' were only revealed to the Respondent on the day before the

trial commenced. The Appellant then paid the sum of approximately £125 000 to his father which was made up of the original amount of the loan plus interest.

[26] In her amended claim-in-reconvention, the Respondent pleaded that the aforesaid payments:

(a) had the effect of considerably reducing the value of her accrual claim;

(b) was done for no reason other than to reduce the accrual claim payable to her upon their divorce;

(c) in respect of the donation to the trust, was a simulated transaction designed purely to create a considerable liability in the Appellant's estate;

(d) that there was no loan to the Appellant's father; and

(e) the payments were done with the intention of reducing her accrual claim and were therefore done with the intention to defraud her of her accrual claim.

In the circumstance the Respondent pleaded that she was entitled to an order that the funds paid to the trust and to the Appellant's father be part of the Appellant's estate in the calculation of the Respondent's accrual claim.

[27] As regards the donation to the trust, the court *a quo*, after considering the aforementioned and in particular the timing of the establishment of the trust and the donation to it, found that 'The Plaintiff designedly created the trust and made the donation to it with the fraudulent intention of depriving the Defendant of her rightful claim to the accrual in the Plaintiff's estate'.

[28] The court *a quo* was more critical of the 'loan repayment' made by the Appellant to his father. In the end the court *a quo* concluded as follows:

> 'I am of the view that on the probabilities, the Plaintiff created this loan and the interest thereon and the repayment of the total sum was made designedly and with the fraudulent intention of reducing the Defendant's accrual claim'. (At paragraph [259])

[29] The court *a quo* consequently concluded that the value of these dispositions be assets in the estate of the Plaintiff. It is as against this backdrop that it is noteworthy that the Appellant has accepted the court *a quo*'s finding in relation to the 'loan' and has abandoned the appeal lodged in respect thereof.

[30] In arriving at the aforesaid conclusion, the court *a quo* considered the various authorities and decisions handed down by our courts. In seeking to address the very real problem of the malicious dissipation of assets by a spouse, particularly during the period between the breakup of a marriage and its dissolution, the court *a quo* held, (at paragraph [266]):

> 'To my mind, the true enquiry in situations like this is whether the Plaintiff, when making the disposition, did so with the intention of depriving the Defendant of her rightful accrual claim. When one reduces the enquiry to this level, the distinction drawn between an innocent benefactor and a guilty benefactor of the disposition made by an alienator spouse, does not really matter. What really matters, in my view and should be determinative of the issue, is whether or not the alienator spouse maliciously intended to deprive the beneficiary spouse of her or his accrual claim.'

[31] I am respectfully in full agreement with the above dictum. As stated earlier in this judgment, the court *a quo* found that the Appellant made the dispositions – both the donation to the trust as well as the 'loan repayment' – 'fraudulently or at least maliciously to reduce the Defendant's (Respondent's) accrual claim.'

[32] Counsel for the Appellant, as also the court *a quo*, has relied heavily on the judgment of Ploos van Amstel J in *MM & Others v JM* – 2014 (4) SA 384 (KZP) – in support of the submission that there is no legal basis to 'deem' assets to be part of the accrual in a parties' estate. Ploos van Amstel J's judgment was considered by the court *a quo*. The issue before the court in *MM & Others v JM* was 'whether assets owned by the trust can be taken into account in determining the accrual of the husband's estate in the absence of averments that the husband, and not the trust, is in fact the owner of such assets.' (At paragraph [18]). At paragraph [19] he held:

> 'The amount of an accrual is determined on a factual and mathematical basis and is not a matter of discretion. What a spouse's estate consists of is a factual enquiry. There is no warrant in the MPA to have regard to assets which do not form part of his estate on the basis that it would be just to do so. Nor is there a legal basis for an order that assets that in fact do not form part of his estate should be deemed to form part of it for purposes of determining the accrual of his estate. I should add that if a trustee behaves improperly with regard to trust assets and deals with them without the authority of the other trustees, the law provides a remedy. It is not a case that a husband can with impunity treat trust assets as if they belong to him.'

[33] As pointed out by the court *a quo*, the facts in *MM & Others v JM* are different to the facts in casu. 'The main difference is that in that case, the wife's main contention

was that the husband had the ability to use the assets of the trust for his sole benefit whereas in the case before me, the Plaintiff made the donation to the trust and made the payment to his father, with the intention to defraud the Defendant of her accrual claim.' The court *a quo*, whilst agreeing that the calculation of the amount of accrual is determined on a factual and mathematical calculation, disagreed that a court has no discretion to determine which or what assets should be taken into account for purposes of that mathematical calculation. The determination of assets belonging to a spouse's estate must not be conflated with the mathematical calculation of the accrual. See also *REM v VM* 2017 (3) SA 371 (SCA) at paragraph [20].

[34] Referring with approval to the judgment of Alkema J in *RP v DP and Others* 2014 (6) SA 243 (ECP) the court *a quo* concluded that the court had the common law power to make such a remedy and that such invocation did not infringe on the provisions of the Matrimonial Property Act.

[35] I once again respectfully agree with the aforesaid conclusions of the court *a quo*. The courts would be failing in their duty to ensure fairness and equity were it not to come to an aggrieved spouse's assistance particularly in cases such as this. The *mala fides* of the Respondent is borne out by the facts outlined earlier in this judgment. I am accordingly respectfully of the view that the decision of Ploos van Amstel J in *MM and Others v JM* is incorrect.

[36] It follows that the Appellant has, in my view, no prospects of success in respect of this ground of appeal.

(b) and (c) <u>The ruling in paragraph [343] and the amount of accrual payable</u>

[37] The ruling appealed against relates to the exchange rate applicable in calculating the value of the dispositions deemed to be part of the Appellant's estate. This in turn would impact on the final amount payable by the Appellant to the Respondent. The court *a quo* ruled that the value of the dispositions (both the donation and loan) should be calculated as at the date of the dispositions.

[38] In arriving at this ruling, the court *a quo* accepted the submissions of the Appellant that the appropriate date to determine the value of the dispositions is the date of the disposition. The parties thereafter agreed that the amount due to the Respondent is the sum of R3 521 895.00.

[39] During the trial and particularly when the Respondent's witness, Taryn Wright, testified, the Appellant objected to her calculation of the value of the dispositions. Ms Wright calculated the value of the dispositions as at the date of her report being 1 September 2016. It was submitted that the correct dates to calculate the value was the date of disposition, namely, 13 May 2015 and 8 July 2015 respectively. The reason for this submission becomes evident when considering the fact that as at September 2016 the South African Rand had depreciated against the British Pound. This in turn meant that the value of the dispositions increased the value of the Appellant's estate. As a consequence, he was prejudiced by the depreciation of the South African Rand and accordingly the court was urged to accept the exchange rate of the dispositions as at the actual date of the disposition.

[40] The Appellant now contends that the court *a quo* erred in that the correct dates to determine the value of the disposition is the date of dissolution of the marriage – viz – 13 February 2017. This, despite successfully arguing that the correct dates for the calculation is the date of disposition. Once again, when regard

is had to the exchange rates applicable, the reason for this submission becomes clear. As at 13 February 2017, it is noted that the South African Rand had appreciated as against the British Pound. The result of which is that the Appellant's estate, according to the calculations presented by Ms *Law*, is to be reduced by approximately R278 349.00 and accordingly the amount of accrual payable to the Respondent is to be reduced by approximately R139 000.00.

[41] The Appellant has elected not to appeal against any of the findings or rulings of the court *a quo* in respect of the alleged 'loan repayment'. This, in my view, indicates an acceptance of the value placed on this disposition – viz – the actual date of the disposition itself. To allow an appeal on the calculation of the donation to the trust would render the judgment somewhat confusing. However, given the Appellant's insistence on the date of disposition as being the effective date, coupled with the Appellant's belated attempt to reduce the Respondent's accrual claim, I am reluctant to interfere with the ruling of the court *a quo*.

(d) Payment of interest on the accrual

[42] The court *a quo* ordered that the amount payable by the Appellant to the Respondent shall attract interest 'at the prescribed legal rate from date of judgment to date of payment'. This order was made consequent upon an application by the Appellant that payment of the accrual amount to the Respondent be deferred.

[43] S 10 of the Matrimonial Property Act provides:

> '10. Deferment of satisfaction of accrual claim –
>
> A court may on the application of a person against whom the accrual claim lies, order that satisfaction of the claim be deferred on such condition, including

conditions relating to the furnishing of security, the payment of interest, the payment of instalments and the delivery or transfer of specified assets, as the court may deem just'. (My emphasis)

[44] In arriving at the aforesaid conclusion, the court *a quo* noted that since the parties separated, the Appellant accessed significant sums of money from, *inter alia*, the mortgage bond account over the Hawaan Forest Property; cash investments held at Barclay's Bank, France; and cash investments at Lloyds TSB Bank in the United Kingdom. This was done with the knowledge that he would have to pay the Respondent an accrual claim.

[45] Ms *Law* submitted that the court *a quo* erred in that it failed to take cognisance of all the expenses and maintenance payments that the Appellant was obliged to pay. As such the Appellant ought not to be burned by having to pay interest on the deferred accrual payment.

[46] The obligation to pay maintenance is not to be conflated with the payment of interest on the accrual claim. The court *a quo* noted that had the Appellant not conducted himself in the manner aforesaid, he would not have found himself in the position where he would be unable to pay the accrual amount immediately.

[47] I am of the view that the court *a quo* did not err in arriving at this conclusion and the Appellant cannot succeed in respect of this ground of appeal.

(e) Annual maintenance increase of 10 percent

[48] As stated earlier, the appeal in respect of the maintenance payable by the Appellant to the Respondent, in respect of the minor child, is limited to the order that the maintenance payment shall increase annually by 10%. The basis for this appeal is that there was no evidence before the court *a quo* that the increase was reasonable or necessary.

[49] A reading of the record does not support this submission. In her claim in reconvention, the Respondent sought an order for maintenance, on behalf of the minor child, at the rate of R10 000.00 per month together with an annual increase of 10%. When the Respondent testified, it was immediately brought to the attention of the court that the Appellant's affordability to pay maintenance was not an issue. This was repeated many times during the course of the trial. At no stage did the Appellant contend that the requested escalation rate of 10% was unreasonable or unaffordable. Accordingly, I am of the view that there is no basis upon which the Appellant can now contend that the court *a quo* erred in directing that the maintenance payments increase by 10% per annum. In any event should the Appellant's affordability to pay maintenance become an issue, he can always approach the Maintenance Court for the necessary relief.

(f) <u>Maintenance payable by the Appellant to the Respondent pending the sale of the jointly owned properties</u>

[50] Paragraph 6 of the court order provides for the payment of maintenance for the Respondent. In her amended claim in reconvention, the Respondent sought an order directing the Appellant to continue to pay maintenance to her in terms of the

rule 43 application granted on 12 August 2013. This request was made following the Appellant's application for a deferral of the payment of the accrual claim.

[51] On 13 February 2017 the parties were divorced. One of the Respondent's concerns at the time was her inability to maintain herself without finalising her accrual claim. The Appellant acknowledged this and tendered to continue his obligations in terms of the rule 43 order.

[52] The court *a quo*, after considering the Respondent's financial position, concluded that had the Appellant been in a position to pay the Respondent's accrual claim immediately after judgment, there would not have been a need to order rehabilitative maintenance. In the result he ordered that the Appellant continue with his rule 43 obligations until the Hawaan property (jointly owned by the parties) has been sold and transferred.

[53] The Appellant has not shown how the court *a quo* failed to exercise its discretion judicially in arriving at the aforesaid conclusion. The only submission made on behalf of the Appellant was that there was insufficient evidence before the court *a quo*. This however is in stark contrast to the evidence relied upon by the court *a quo* as is evident in the extensive judgment before us. I am not persuaded that the Appellant should succeed in respect of this ground of appeal.

(g) Costs

[54] It is trite that the courts have a discretion in awarding costs. Such discretion should be exercised judicially and not arbitrarily and should take into account all of

the facts of the case. The powers of a court of appeal are limited where such discretion has been exercised judicially.

[55] In *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC), the constitutional court affirmed the principle that an appeal court will not interfere with the discretion exercised by a court, if it is exercised judicially. At paragraph [107] it held:

> ' . . . it would only be permissible for this court to interfere with that discretion if it can be shown that the court whose decision is under attack –
>
> > 'Had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all relevant facts and principles''.

[56] In *Hotz and Others v University of Cape Town* 2018 (1) SA 369 (CC) the constitutional court defined a court of appeal's limitations to interfere with cost orders based on discretion as follows:

> 'It is established that a court of first instance has discretion to determine the costs to be awarded in light of the particular circumstances of the case. Indeed, where the discretion is one in the true sense, contemplating that a court chooses from a range of options, a court of appeal will require a good reason to interfere with the exercise of that discretion. A cautious approach is, therefore, required. A court of appeal may have a different view on whether the costs award was just and equitable. However, it should be careful not to substitute its own view for that of the High Court because it

may, in certain circumstances, be inappropriate to interfere with the High Court's exercise of discretion.' (My emphasis) (At paragraph [28]).

[57] The Appellant advanced the following grounds as to why this court should interfere with the court *a quo*'s cost order. These are:

(a) that the court erred by not taking into account the outcome of the rule 43 applications in respect of which costs were reserved on 12 August 2013 and 24 September 2014;

(b) that the court *a quo* ignored the reserved costs of the applications on 12 December 2013, 25 June 2014, 2 October 2015 and 29 October 2015, which costs ought to have been granted in favour of the Appellant;

(c) that the court *a quo* failed to take into account that the greater part of the trial was in respect of the best interests of the minor child for which the court *a quo* ought not to have penalised the Appellant; and

(d) that the court *a quo* was influenced by the findings insofar as the accrual claim was concerned.

[58] I have already dealt with the merits of the appeal. Most of the trial related to the determination of the Respondent's accrual claim. It is common cause that the Appellant disposed of assets of significant value days before the trial commenced. The Respondent was successful in her accrual claim and in part also with regards to certain aspects of the access rights to the minor child. The Respondent, in my view, had substantial success in the proceedings and is entitled to costs. Various issues

were raised before the court *a quo* and the Respondent had to lead evidence on each and every aspect. It was submitted by counsel for the Respondent that the Appellant conducted the trial in an obstructive manner. The record certainly supports this submission.

[59] It is necessary to consider the challenge made to the reserved costs in the rule 43 applications. The Appellant is seemingly of the view that he was successful in the first rule 43 application before the court. I have carefully considered the relief that was sought by the Respondent in that application and when it is compared with the order issued by Henriques J on 12 August 2013, there can be no doubt that she was successful in the application and was entitled to costs. The same goes for the application in terms of rule 43(6) before Ploos van Amstel J on 27 November 2014.

[60] It is evident from the record that the application launched on 2 October 2015 before Vahed J had not been finalised by the time the trial commenced. On 5 September 2016, the court *a quo* ruled that the trial should proceed rather than waste time with the rule 43 application that had commenced before Vahed J on 2 October 2015. It was a sensible judicial approach and the learned judge cannot be faltered in the manner in which he exercised his discretion. The trial superseded the application before Vahed J and accordingly the only costs order that should have followed is the one issued by the court *a quo*.

[61] In the result I am of the view that this court should not intefere with the costs order issued by the court *a quo*. Accordingly, the Appellant has no prospects of success on this ground of appeal.

[62] In the circumstances the Appellant has no prospects of success on the merits. I accordingly make the following order:

1. The application to lead further evidence in terms of s 19 of the Superior Courts Act is dismissed with costs.

2. The application for condonation is dismissed with costs, such costs are to include the Respondent's costs on appeal.

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KRUGER J

I agree

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STEYN J

I agree

_____

D PILLAY J

CASE INFORMATION

APPEARANCES

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Date of Hearing	:	27 July 2020
Date delivered	:	25 August 2020