REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 6296/2022

In the matter between:

M.S.M Applicant

In re the rule 43(6) application between:

M.M Applicant

and

R.O Respondent

Coram: Wille, J
Heard: 30 July 2024
Delivered: 13 August 2024

JUDGMENT

WILLE, J:

INTRODUCTION

[1] This is an application that raises some interesting, important and complex issues. The issues are easy to state but difficult to solve. The core issue concerns the precise judicial nature of interim financial assistance applications (and variations)

concerning matrimonial matters. The issue to be decided, among other things, is whether the judicial evaluation process to be applied is strictly adversarial or inquisitorial or a mixture of the two adjudication processes.[1]

[2] The facts that arose in this application were complex. The history of these various applications is a long one. Understanding the history, the chronological sequence of events, and the various role players is vital to a proper understanding of what unfolded in these various unfortunate applications.[2]

[3] The applicant in this reconsideration application shall be referred to as the applicant's brother. In the initial interim financial assistance application, the applicant will be referred to as the applicant's wife. The applicant in the financial assistance variation application will be referred to as the applicant. The applicant in the contempt of court application will be referred to as the applicant's wife. The applicant's subsequent wife will be referred to as the applicant's new wife. The applicant's new wife was previously married to the brother of the applicant's wife and will be referred to as the applicant's wife's brother. The initial trading close corporation, which the applicant and the applicant's brother started, will be called the close corporation. The other entity controlled by the applicant and the applicant's brother will be called the investment company. The attorney representing the applicant's brother and the trustees of the insolvent estate of the applicant will be referred to as the applicant's brother's attorney.[3]

THE INTERIM FINANCIAL APPLICATION

[4] The applicant's wife filed an application against the applicant for interim financial assistance for herself and the two minor children born of the marriage. The applicant opposed this application. The application sets out some of the important background facts that are worth mentioning.[4]

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[1] This in connection with rule 43 and rule 43(6) applications.
[2] The matter that presented before me for adjudication was the rule 43(6) variation application.
[3] The applicant's bother's attorney is Mr Lang from Tim du Toit Incorporated.
[4] This was the first application by the applicant's wife in terms of Rule 43 (1), (2), (3) and (4) of the Uniform Rules.

[5] The applicant and his wife were married following Islamic Law. A religious divorce between them was finalised. Action proceedings for a civil dissolution of the marriage followed. Regrettably, the parties cannot settle their disputes. Because of the stratagem adopted by the insolvent applicant, the applicant's wife had no option but to continue litigating with her husband. Undoubtedly, this is to the detriment of the parties' minor children.[5]

[6] More than two years ago, the applicant's wife obtained an interim financial assistance order in her favour and in addition to the benefit of the minor children. It is a matter of common cause that the applicant did not comply with the terms of the extant interim financial assistance order.[6]

[7] Irreconcilable differences manifested concerning the party's former matrimonial home. The applicant wanted their matrimonial home to be sold to settle debts allegedly owed to his brother and to satisfy his obligations in terms of the interim financial assistance order. The applicant's wife attempted to recover what was owed to her and their minor children by way of an execution process.[7]

[8] The applicant responded by utilising interpleader proceedings, alleging the goods attached under the warrant belonged to the close corporation that was now exclusively owned and controlled by the applicant's brother.[8]

[9] The only significant payment the applicant made during this time was to reduce the municipal arrears related to the former matrimonial home to prevent the disconnection of these municipal services. The reason for this payment was self-evident, as will later be demonstrated.[9]

THE SEQUESTRATION

[5] The applicant recorded that he had spent over R1million in legal fees.
[6] This explained the complex litigation that followed.
[7] She proceeded with a warrant of execution against the applicant's movable property.
[8] The applicant's wife was unable to make any financial recovery.
[9] This payment was made on 13 September 2022.

[10] The applicant's wife, after that, chartered an application for contempt of court as the applicant failed to comply with the interim financial assistance court order. Two days after this contempt application was launched, the applicant's brother launched an application to sequestrate his brother's estate.[10]

[11] It was alleged that the applicant's sequestration, at his brother's hand, caused immense turmoil for the minor children and the applicant's wife. It is difficult to fathom why the applicant (with the assistance of his brother) chose to take such a drastic step, knowing that it would harm the minor children of the marriage.[11]

[12] The sequestration application was conveniently launched only three months after the interim financial assistance order was granted. The alleged debts owed to the applicant's brother were based on five acknowledgements of debt. Some of these had already become prescribed due to the effluxion of time.[12]

[13] Other than the alleged debts owed to the applicant's brother (acquired by cession), the debts due by the applicant consisted of those amounts awarded against him by the interim financial assistance order and the bondholder of the former matrimonial home. The applicant had, in the interim, conveniently discharged the amounts owed regarding the municipal arrears.[13]

[14] A year before his brother sequestrated the applicant, the bond amount outstanding to the bondholder was about half a million rands. At the date of the provisional sequestration of the applicant's estate, the amount owed had grown to about one and a half million rands. During this period, the applicant withdrew about one million rand from the bond, alleging that he had to repay his brother.[14]

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[10] This was launched on 29 September 2022.
[11] This meant the former matrimonial home would have to be sold and vacated.
[12] Three years had long since passed, and only the remaining two debts allegedly remained outstanding.
[13] This is because the applicant's brother subsequently purchased the matrimonial home at a reduced price.
[14] Between the period of October 2021 and February 2022. The parties separated in [0].

[15] Thus, as the main creditor, the applicant's brother obtained effective control over the applicant's sequestrated estate. The attorney acting for the applicant's brother acted for the trustees of the applicant's insolvent estate and also for the applicant's new wife in proceedings that relate to the former matrimonial home.[15]

[16] This complex attorney-client relationship reared its head when the applicant's wife attempted to prove her claims against the applicant's insolvent estate. Although the interim financial assistance order underpinned her claims, it took the applicant's wife four months to prove two of the three claims against the insolvent estate because the trustees and the applicant's brother opposed this process. What was discerning was that the applicant was ordered to pay his wife a contribution towards her legal costs. This claim was oddly rejected when the trustees disputed the claim because the interim financial assistance order made provision for these costs to be paid into her erstwhile attorney's trust account and allegedly not the applicant's wife.[16]

[17] The applicant's trustees, at the instance of the applicant's brother, elected to interrogate the applicant's wife at a special meeting of creditors and alleged that they had a claim against her because she had occupied the former matrimonial home after the applicant's estate was placed into provisional sequestration and because she had sublet a room in the former matrimonial home to her friend to supplement her income. The trustees also elected to interrogate this alleged subtenant.[17]

[18] Unbeknown to the applicant's wife, the former matrimonial home was sold by the applicant's trustees to a discrete company owned and controlled by the applicant's brother for a purchase price below the municipal value and the forced sale value of this property. The applicant's wife became aware that the former matrimonial home had been disposed of effectively by the applicant's brother when

[15] Mr Lang acted for all these parties.
[16] The order for a contribution towards costs was intended for the benefit of the applicant's wife.
[17] No interrogation of the insolvent applicant was undertaken despite a request to the Master of the High Court.

she received a notice advising her that if she did not vacate the former matrimonial home, she and the minor children would be evicted.[18]

[19] It is alleged that despite the applicant having been sequestrated by his brother, the applicant continues to have an extremely close and good relationship with him. The applicant remains employed by the close corporation that runs a petrol station business and rents a large property his brother owns for a highly reduced rental. This close relationship bears further scrutiny because the applicant allegedly misappropriated over three million rands from the very close corporation where he now remains gainfully employed.[19]

[20] In support of this very close relationship allegation, the applicant's wife alleges that the applicant and his brother recently attended a family engagement and went out together for dinner. The applicant's wife avers that the applicant's sequestration was deliberately orchestrated so that he could avoid making any payments due in terms of the interim financial assistance order. Further, she alleges that the applicant's sequestration has enabled him to successfully oppose the contempt proceedings to compel him to comply with the extant court order to which I now turn.[20]

THE CONTEMPT APPLICATION

[21] The applicant's wife launched a contempt of court application against the applicant for non-payment in terms of the extant interim financial assistance court order. Shortly after this, the applicant's brother caused the applicant to be sequestrated. The applicant opposed the contempt application and filed a supplementary affidavit alleging his conduct was not *wilful* and *mala fide* because he was insolvent.[21]

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[18] The former matrimonial home was purchased by a discrete company owned by the applicant's brother.
[19] Despite the alleged misappropriation, the applicant continues to work for the close corporation.
[20] The contempt of court application was dismissed because the applicant had been sequestrated.
[21] These were the reasons for his failure to adhere to the terms of the court order.

[22] Rightly or wrongly, the court held that the applicant was not in contempt of the interim financial assistance order. The applicant's wife has filed an application for leave to appeal, which has yet to be heard despite the passage of some time. The applicant's wife alleges that despite her difficult financial position, she is attempting to gather the necessary evidence to have the applicant's sequestration set aside. In this connection, she advances that the attorney representing the applicant's brother told her in terms that the final sequestration application would be postponed as the court file could not be located. Still, despite this communication, he proceeded with the sequestration application despite her opposition.[22]

THE APPLICANT'S FINANCIAL POSITION

[23] One of the difficulties confronting the applicant's wife is that she does not have sufficient access to the financial records of the close corporation and the investment company. Further, the applicant's brother has opposed every step she has taken to secure access to these documents. The applicant allegedly only earns a gross salary of R35 000,00 per month from the close corporation.[23]

[24] Following his provisional and final sequestration, the applicant's lifestyle seemingly does not support what he says he earns because it is alleged that (a) the applicant purchased a new watch for his new wife for their engagement; (b) the applicant hired a venue on a wine estate where he proposed to his new wife; (c) the applicant purchased a diamond for his new wife and, (d) the applicant held an engagement party to lavish reception to celebrate his engagement after he had been provisionally sequestrated.[24]

[25] In addition, the applicant went on a tour abroad with his new wife. He also moved from his brother's apartment into his brother's house, for which he pays a nominal rental. The applicant drives a luxury sedan motor vehicle allegedly owned by the close corporation. The applicant opposed all the litigation with his wife and

[22] Mr. Lang allegedly told her that the court file could not be found, and that accordingly the application would be postponed.
[23] The applicant's wife avers that the applicant's lifestyle does not support this factual allegation.
[24] The applicant does not fully engage with these allegations.

preferred to pay legal fees rather than pay for the children's expenses. The applicant frequents expensive restaurants, arranges expensive outdoor activities with his children, and was scheduled to travel abroad again at the end of last year.[25]

CONSIDERATION

THE RELIEF SOUGHT

[26] This is an application for reconsideration and amendment of an order that I granted that the applicant's brother be directed to give evidence and supply documents to the court so that I could properly evaluate the applicant's variation application. The applicant's brother now requests that he be excused from giving evidence, and he only wants to supply certain documents under a strict confidentiality regime.[26]

[27] His main complaint is that the judicial procedure envisaged when dealing with interim financial assistance applications is strictly adversarial, not inquisitorial. I disagree. This is so because, in my view, the court is vested with a broad discretion when dealing with interim financial assistance applications and variations thereof. Further, the procedure envisaged and historically applied when dealing with these applications is not strictly adversarial, as contended by the applicant's brother.[27]

THE ORDER

[28] I ordered that the variation application be postponed for the hearing of oral evidence and that certain specific documentation be made available before the hearing. For the most part (as I understood it), this was by agreement between the applicant, the applicant's brother and the applicant's wife.[28]

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[25] In December 2023.
[26] This despite initially agreeing to testify and to supply the listed documents.
[27] The judicial function does have an inquisitorial ingredient when dealing with matters of this nature.
[28] The applicant's brother was contacted, and the date of the hearing was arranged by agreement.

[29] A draft of the proposed order was emailed to the attorney acting for the applicant's brother. The curt response by this attorney was that his client would consider his position once the order had been served on his client**.** Subsequently, the position taken by the applicant's brother (undoubtedly on the advice of his attorney) was that the order being granted against the applicant's brother without him having been cited as a party to the proceedings '*constituted a nullity and was not binding'* on the applicant's brother. This seems to echo the applicant's attitude, namely that he does not consider himself bound by court orders.[29]

RECONSIDERATION

[30] The reconsideration application was seemingly aimed at derailing the proceedings. It was also an attempt to amend the order, which I understood was granted by agreement after communication with the applicant's brother. A belated objection was also raised regarding the relevance of the documentation and that some of the documentation sought was confidential. The alleged legal basis for reconsidering and amending the order is not apparent from the averments made in the founding affidavit. I say this because the order was not granted urgently. Further, the applicant's brother may not have been present, but he was not legally absent because he was notified about the content of the proposed order, and his input was requested.[30]

[31] Notwithstanding this belated denial of the agreement, the applicant's brother was directed to attend to proceedings and produce documents through a court order that was served on him. In any event, despite all his technical objections, the applicant's brother has now been afforded a '*second bite at the cherry*' in that he has now had a hearing through these proceedings.[31]

SUBRULE 43 (5)

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[29] Thereafter, a different argument was advanced that the order was granted in the absence of the applicant's brother.
[30] The applicant's counsel indicated that the applicant's brother had agreed to appear and produce documents.
[31] No order was made adverse to the applicant's brother. The order was to regulate the procedure.

[32] This subrule empowers this court to hear such evidence as the court considers necessary. The wording of this portion of this subrule contemplates the exercise of discretion in the true sense in that the judicial decision-making process involves a choice between several equally permissible options. I exercised this discretion and directed the applicant's brother to make certain documentation available and to attend the variation hearing to give oral evidence.[32]

[33] In addition to the discretion given to the court in this subrule, the overarching provisions in the court's rules allow a court to direct the hearing of oral evidence in application proceedings. Further, the court has the inherent power to protect and regulate its process and develop the common law, considering the interests of justice.[33]

THE EVIDENCE

[34] The applicant's and his brother's financial affairs are inextricably linked and intertwined. As alluded to earlier in this judgment, many transactions between the brothers are self-evidently not arms-length commercial transactions. In these circumstances, the court is not expected to turn a blind eye to these transactions. Moreover, these brothers enjoy a close personal relationship and a very close business relationship.[34]

[35] The applicant's brother was fully aware that the applicant primarily supported the applicant's wife and their minor children, and it is a matter of concern that the applicant's brother nevertheless elected to sequestrate his brother by way of ceded claims to clothe him with claims as a creditor. This is despite the applicant allegedly misappropriating vast sums of money from his brother's business.[35]

[36] The applicant states that the sequestration of his estate is the material change in his circumstances. He says he cannot comply with the interim financial assistance

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[32] This culminated in the order that was granted with the list of documents attached thereto.
[33] Section 173 of the Constitution of the Republic of South Africa, 1996.
[34] To compound matters, Saadiq launched the sequestration application on 29 September 2022.
[35] The applicant remains employed by this very close corporation from which he allegedly misappropriated funds.

order solely because he has been sequestrated. He alleges that he is entitled to a variation of the interim financial assistance order as a matter of law.[36]

[37] Yet, in the same breath, the applicant alleges that the court cannot consider the circumstances of his sequestration. The alleged debts owed by the applicant to his brother were based on acknowledgements of debt. Two of these instruments have long since prescribed due to the effluxion of time. Also, some of these instruments were in the name of the close corporation and/or the investment company. One of these instruments (the fourth acknowledgement of debt) was subsequently ceded to the applicant's brother to clothe him with the *causa* to sequestrate his brother.[37]

[38] The papers do not explain the urgency for the sequestration of the applicant's estate. These alleged debts had remained unpaid for a considerable period. Unsurprisingly, the applicant did not oppose his sequestration. The applicant's conduct undeniably demonstrates that he and his brother were preparing for the sequestration of the applicant's estate. The sequestration application was not served on the applicant's wife, and she became aware of this application a mere three days before the applicant's estate was finally sequestrated.[38]

[39] Even on the return day, the attorney representing the applicant's brother advised that the *rule nisi* would be extended as the court file could not be located. This notwithstanding, a final order of sequestration was obtained despite the assurance that the matter fell to be postponed. The applicant's wife intends to set aside this sequestration order. Still, according to her, her difficulty is that all her attempts to gather information to initiate this process have been thwarted. The attorney acting for the applicant's brother also acts for the trustees of the applicant's insolvent estate.[39]

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[36] The applicant says that because he has been sequestrated, he is entitled to a variation order following rule 43(6).
[37] The creditor was Uniqco Energy (Pty) Ltd, previously trading as a close corporation.
[38] At this stage, she was advised that the application would be postponed.
[39] Mr. Lang of Tim du Toit Attorneys.

[40] This unsavoury relationship became apparent when the applicant's wife attempted to prove her claims against the insolvent estate. The applicant's wife was not advised regarding the statutory meeting of creditors and was obliged to request and convene a special meeting of creditors to attempt to file her claims for proof. The claims by the applicant's wife suffered a plethora of technical objections, and the applicant's wife was ultimately interrogated by the attorney representing the applicant's brother.[40]

[41] The trustees of the sequestrated estate sold the former matrimonial home to a discrete private company owned by the applicant's brother for a purchase price well below the property's market value. The applicant's wife became aware of this sale when she received an eviction notice demanding that she and the minor children were to vacate the former matrimonial home. The applicant's wife raised this concern with the trustees of the sequestrated estate and requested an investigation. Unsurprisingly, she was met with a demand for security for costs by the trustees.[41]

[42] Despite his sequestration, the applicant remains employed by the close corporation and has an excellent relationship with his brother. The close corporation reduced the applicant's salary only a year after the alleged misappropriation of funds occurred. This occurred only after the interim financial assistance order was granted and after the sequestration order was piloted.[42]

[43] One of the annexures to a care and contact report filed concerning the pending divorce action records was that the applicant advised that with the assistance of his brother, he would move back into the former matrimonial home, and the minor children would not need to move out of the former matrimonial home. For all these reasons, it is simply not open for the applicant's brother to contend that his evidence is not relevant to the proper determination of the variation application and that he ought to be excused from giving oral evidence.[43]

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[40] Her alleged subtenant was also interrogated by the applicant's trustees.
[41] The trustees requested the applicant's wife to fund the proposed insolvency interrogation.
[42] Despite the alleged misappropriation, the applicant enjoyed the same salary of more than a year.
[43] The applicant's brother bought the former matrimonial home through the vehicle of a company at a reduced price

CONFIDENTIALITY

[44] The applicant's brother proposed that certain documents (as listed in the annexure to the court order) be inspected at the offices of his attorney five days before the scheduled hearing of the variation application. Further, the applicant's brother proposed that the applicant's wife (and her legal representatives) may not make copies of certain documentation. Finally, he proposed that the applicant's wife be barred from inspecting or obtaining copies of certain specified documentation. In summary, rather than make the documentation available as specified in the list annexed to the court order, the applicant's brother seeks to *ex post facto* impose a confidentiality regime concerning the documents.[44]

[45] According to my understanding of our jurisprudence, confidentiality on its own is seldom a legitimate reason to refuse to make available a document that may be relevant to a determination of the issues before a court. As a matter of logic, this must be so unless a party clearly defines the relevant interest that, if disclosed, would infringe the confidentiality interest. The limited production of relevant documentation is not countenanced unless special circumstances exist.[45]

[46] That having been said, our courts have recognised that there are circumstances in which a court may have to impose restrictions on access to documents to balance the respective rights of parties. Self-evidently, a confidentiality regime order will be declined where no fact-specific claim of confidentiality was raised in the papers. The test to be applied in these circumstances has been eloquently formulated as follows:

> *'…Where absolute non-disclosure is not justified, the information at issue may – in the court's exercise of discretion – be disclosed, not disclosed or disclosed subject to a confidentiality regime. The court will weigh up the interests that favour disclosure against the asserted confidentiality interests.*

[44] This is after he had already made some of the documentation available following the order.
[45] Unilever PLC & another v Polagric (Pty) Ltd 2001 (2) SA 329 (C) at 341-342.

The outcome of that exercise of discretion will depend on the circumstances of each case…[46]

[47] The main claim by the applicant's brother is that some of the documents are confidential because they comprise personal bank statements and the close corporation's bank statements and financial documentation.[47]

[48] The alleged reasons advanced by the applicant's brother for this confidentiality regime are as follows: (a) his bank statements are by their very nature confidential and contain private information about his financial circumstances, and (b) the disclosure of the documents in the variation application will violate his fundamental right to privacy and dignity.[48]

[49] As far as the close corporation is concerned, the applicant's brother advances that these bank statements and financial documents contain confidential and private information regarding payments between the close corporation and himself and third parties, which are confidential and commercially sensitive.[49]

[50] In a final throw of the dice, the applicant's brother contends that the applicant's wife has disparaged him to community members and has discussed the contents of certain bank statements with them. The applicant's wife denies this. What is telling is that extracts from these bank statements were provided by the applicant's brother himself to the applicant to use as supporting evidence in the contempt application, albeit heavily redacted.[50]

[51] This notwithstanding, as a general proposition, commercial confidentiality *per se* is not recognised in our law as automatically creating a form of a legally protected privilege. Certain of the documentation requested are the bank statements of the close corporation, which are not protected by any special species of privilege.

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[46] Helen Suzman Foundation v Judicial Service Commission 2018 (4) SA 1 (CC) at paragraph 70.
[47] This is a statement made in a vacuum with no specificity.
[48] This is not justified if the documents are relevant and facilitate the pursuit of truth in proceedings between the parties.
[49] Again, the applicant's brother does not say why the protection sought is required.
[50] The belated confidentiality regime contended for needs to be explained.

Moreover, the precise nature of the alleged confidential and commercially sensitive information is not specified or categorised by the applicant's brother. It must be so that information is not confidential just because the person who would like it to be regarded as such says it is confidential.[51]

[52] I say this also because some of the bank statements and financial documents of the close corporation had already been provided to the applicant's wife before the launching of the reconsideration application. Significantly, it was never alleged at the time they were made available to the applicant's wife that the bank statements and other financial documents of the close corporation were confidential and or privileged.[52]

[53] This documentation listed is highly relevant because one of the debt instruments that underpinned the *causa* for the sequestration was in favour of the featured close corporation before they were ceded to the applicant's brother. In addition, the applicant allegedly misappropriated funds from this close corporation for an extended period over three years. Despite this discovery, the applicant continued to receive funds and draw benefits from the very close corporation that he had defrauded. This aspect alone bears some scrutiny concerning the underlying documentation allegedly in support of these claims. [53]

[54] The applicant in the variation application refers specifically to his loan account in the close corporation. The financial records evidencing the brothers' loan accounts will show whether the applicant and his brother loaned similar amounts to the close corporation. Even more importantly, it will highlight whether the amount deducted from the applicant's loan account following his alleged misappropriations from the close corporation were accurately recorded.[54]

INQUISITORIAL

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[51] The test for confidentiality cannot be a theoretical exercise without precise detail and motivation.
[52] This was a belated afterthought by the applicant's brother.
[53] This will directly affect the 'material change' contended for in the variation application.
[54] The loan accounts may also reveal what funds have been drawn down out of the close corporation.

[55] The main complaint by the applicant's brother is that he was not physically present before the order was granted and that the court adopted an impermissible inquisitorial approach. I have, in part, dealt with this as the applicant and his brother consented to provide testimony and submit the listed documents. In addition, the applicant's brother had more than a month to withdraw his consent and change his mind before the final order was granted. He did not do so.[55]

[56] Moreover, the order was not issued against the applicant's brother. Also, the order did not harm him, and he consented to give evidence. This notwithstanding, this court has the inherent power to protect and regulate its process and to develop the common law, considering the interests of justice. This is part and parcel of a court's constitutional mandate when considering the concept known as the interests of justice.[56]

[57] The order to direct the applicant's brother to give evidence and make documents available was strictly procedural to the variation application. The applicant's brother conceded that the order was incidental to the main dispute between the parties to the variation application.[57]

[58] Thus, what we are left with is the argument that it is not competent to compel the applicant's brother to give evidence. I disagree. I say so because the rules are to assist the court in rendering a just decision. The court, in cases such as these, must be influenced by fairness, equity and what is in the best interests of justice.[58]

[59] Most significantly, some of our jurisprudence dictates that there is no need for the court's interpretation of this specific subrule to be approached restrictively solely because the subrule has been postulated broadly. This has been most eloquently explained as follows:

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[55] The hearing was on 9 February 2024 and the order was granted on 28 March 2024.
[56] Section 173 of the Constitution of the Republic of South Africa, 1996.
[57] No order was granted that was adverse or harmful to the applicant's brother.
[58] Feldman v Feldman 1986 (1) SA 449 (TPD) at page 455 A-B.

'…*This expansive interpretation of the reach of the rule is also supported by the broad discretion afforded to the court in terms of rule 43(5), which provides that the court may hear such evidence as it considers necessary and may dismiss the application or make such order as it thinks fit to ensure a just and expeditious decision. Certainly, and in its terms, there is no need to interpret the rule restrictively. Rather, the discretion postulated is broad and would theoretically be wide enough to cover the order under consideration, at least from a procedural perspective*…'[59]

[60] It may be so that it is not often that oral evidence is called for in terms of this specific subrule. This does not mean it is impermissible. I do not doubt that the further evidence that the court may receive regarding this subrule may be either *viva voce* or adduced through an affidavit. Most importantly, this evidence should be received only as a result of a deliberate decision of the court, and no party may adduce such evidence as of right as this is a residual power that lies with the court. [60]

[61] Further, this residual power of the court must, of necessity, be unqualified and unrestricted, provided that it is directed solely at achieving a just and expeditious decision on the facts and issues that fall to be determined. Moreover, when a court has to determine what is in the best interests of minor dependent children, it has extremely wide powers. It is not bound by procedural strictures or by the limitations of the evidence presented or contentions advanced by the respective parties.[61]

[62] This does not mean that the entire process is now inquisitorial. All this means is that the court is given discretion in the true sense in that the judicial decision-making process involves a choice to hear any such evidence it considers necessary. This may involve giving evidence orally or by way of affidavit, and it may require a party that is before the court or a party that is not before the court to give such evidence directed solely at achieving a just and expeditious decision. [62]

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[59] JG v CG 12 (3) SA 103 (GSJ) at para 27.
[60] Erasmus Superior Court Practice, RS 23, 2024, D1 Rule 43-16.
[61] J.P.R.D v L.S.D (20916/2018) [2023] ZAWCHC 296 (23 November 2023) at para 25-26.
[62] It would be very difficult for a court to make a "just" and expeditious decision with its hands tied behind its back.

[63] Ultimately, the court determines the issue of relevance, and this does not depend upon the subjective view of the party called upon to testify and make the requested documents available. This aspect of the issue of relevance has been formulated as follows:

> *'…A generous approach is taken towards relevance in the sense that documents will be relevant if they contain information which may, either directly or indirectly, enable the party who seeks them to advance his or her case or damage the opponent's case…'*[63]

[64] I considered the list of documents to be made available by the applicant and the applicant's wife. I then compiled a list of relevant documents, considering, among other things, the following: (a) the applicant's brother caused the applicant's estate to be sequestrated, (b) because of this very sequestration, the applicant seeks a variation order, (c) the applicant's financial affairs are inextricably interwoven with the financial affairs of his brother and this extended to the events that occurred before and after the sequestration and, (d) the lives of the brothers were and are intertwined and they share not only a good personal relationship but a historical business relationship dating back more than a decade.[64]

[65] The applicant's brother was directed to make available the documentation listed in the order and has already complied with certain paragraphs of the order and made certain documentation available to the parties. Self-evidently, the only avenue of escape left for the applicant's brother is to contend that the remaining documentation he has not disclosed is confidential. As part of this stratagem, he proposes that the remaining documentation may only be inspected at his attorney's offices.[65]

[66] Further, the applicant's wife may not see these documents, and her legal representatives should not be permitted to make copies. There are two difficulties

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[63] Antonsson and Others v Jackson and Others 2020 (3) SA 113 (WCC) at para 48.
[64] From at least 2011.
[65] This inspection is to be attended only by legal representatives and held five days before the hearing.

with this flawed approach. It would serve no purpose to inspect the remaining documents without being able to refer to those documents at the hearing of the variation application.[66]

[67] Similarly, it would serve no purpose to inspect the remaining documents without being able to refer to those documents to the applicant's wife to receive her input and instructions relating to the documents. There is simply no explanation (let alone evidence) before me to permit the applicant's brother to dictate the terms under which these remaining documents will be made available to the court, the applicant's wife and her legal team.[67]

CONCLUSION

[68] In summary, the main complaint by the applicant's brother is that the approach I adopted was inquisitorial and not adversarial. It was argued that this approach was novel and impermissible. I disagree. I say this because where the interests of minor children are at play, the judicial approach should not be adversarial. I find strong support for my approach in this connection by one of the leading jurists in our country. Howie, JA (as he then was), with precise detail and clarity, identified the correct approach when the interests of minor children are concerned:

> *'…This litigation is not of the ordinary civil kind. It is not adversarial…[t]he litigation really involves judicial investigation, and the court can call evidence mero motu…"*[68]

[69] The remaining complaint by the applicant's brother (other than the list of documents to be produced) was that *viva voce* evidence was impermissible. As far as the *viva voce* testimony of the applicant's brother is concerned, the following was indicated in the very same jurisprudence, namely:

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[66] It would not be easy, if not impossible, to advance an argument without having copies of the required documents.
[67] The court could not determine the factors set out in sections 3(1)(c) of the Evidence Amendment Act.
[68] B v S 1995 (3) SA 571 (A) at page 584 J and 585 A.

'….Because the welfare of a minor is at stake, a court should be very slow to determine the facts by way of the usual opposed motion approach…'[69]

[70] Further, as illustrated, the facts of this case were peculiar. The interests of justice dictated, constitutionally measured, that the listed documents be produced and the *viva voce* evidence of the applicant's brother be permitted. I say this also because this process did not infringe any constitutional right as it was, by its very nature, procedural. This notwithstanding, a holistic approach and not a piecemeal approach must, of necessity, be adopted to render a just and expeditious decision.[70]

[71] Finally, the term '*the interests of justice'* (to ensure a just and expeditious decision) has often been referred to in our jurisprudence. The wording of the subrule is unambiguous. That being so, the judicial function is to expound and not to legislate. Thus, in applying our law, one of the interpretation concepts takes the form of a presumption that the legislature uses language consistently.[71]

[72] How the applicant's brother approached this application (considering the plight of the applicant's wife and minor children) indicates that his financial affairs are closely aligned with his brother's. This questions the entire basis for the sequestration and, in turn, the applicant's true financial position. In these circumstances, it cannot be expected of the court to turn a blind eye to the plethora of unanswered questions presented during the variation application.[72]

ORDER

[73] For all these reasons, the reconsideration application must fail, and there are no reasons why the costs should not follow the result. In the result, the following order is made:

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[69] B v S 1995 (3) SA 571 (A) at page 585 E.
[70] It would be inappropriate not to consider the circumstances surrounding the applicant's sequestration.
[71] SA Transport Services v Olgar 1986 (2) SA 688 (A).
[72] The testimony by the applicant's brother and the documents will hopefully answer many of these questions.

1. The application is dismissed.

2. The applicant in the reconsideration application (M.S.M) shall be liable for the costs of an incidental to the reconsideration application on the scale between (party and party) as taxed or agreed. These costs shall include the wasted costs occasioned by the postponement on 29 July 2024 and the costs of counsel on Scale C.

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E.D WILLE

(Cape Town)

LIST OF APPEARANCES

For the Applicant (MSM)

Counsel: Advocates B Gassner SC and A Thiart

Instructed by: Tim du Toit Attorneys (Mr Lang)

For the Applicant (MM)

Counsel: Advocate D Tredoux

Instructed by: JG Swart Attorneys Inc. (Mr Davids)

For the Respondent (RO)

Counsel: Advocates T Dicker SC and R Graham

Instructed by: Hayes Inc. (Ms Farish)