

SOUTH AFRICA / JUDGMENT

G.P.N v U.N (born W) (2677/2011)

[2012] ZAECGHC 31 (10 May 2012)

[2012] ZAECGHC 31**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

G Goosen

CASE / FILE NUMBER

2677/2011

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Source record**IN THE HIGH COURT OF****SOUTH AFRICA****(EASTERN CAPE,****GRAHAMSTOWN)****CASE NO: 2677/2011****Date****Heard: 29 March 2012****Date****Delivered: 10 May 2012**

In the matter between:

G P N

.....Applicant

and

U N (born W)

.....Respondent

JUDGMENT

GOOSEN, J:

This matter involves two applications and a counter-application. In the first instance the applicant applies for an order setting aside a warrant of execution and a notice of attachment issued in terms of Rule 45(12) issued pursuant to an order made in terms of Rule 43 by Kahla AJ on 23 September 2011. The second application concerns an application to set aside the order made by Kahla AJ. The counter-application brought by the respondent alleges that the applicant is in contempt of the order of Kahla AJ and seeks the applicant's committal to prison for such

alleged contempt.

All of this litigation flows from a pending divorce action between the parties. The parties were married to each other out of community of property and in terms of an antenuptial contract on 21 February 1998. There are two minor children born of the marriage, both daughters aged 12 and 10 years' respectively.

The applicant was (until recently) employed as an industrial mechanic by a company based on Das Island, in Abu Dhabi. Between 2005 and 2008 he was employed as a workshop foreman for Dynacorp International, a company assisting the Government of the United States of America in Afghanistan. During this period he was exposed to the war in Afghanistan and as a consequence of this he developed a post-traumatic stress disorder and mental illness associated therewith. As I understand matters, this illness resulted in the gradual breakdown of the marital relationship and gave rise to the institution of the divorce proceedings now pending between the parties.

In August 2011 the respondent brought an application in terms of Rule 43 for the payment of interim maintenance for herself and for each of the minor children. On 23 September Kahla AJ granted an order directing the applicant to pay maintenance to the respondent in the sum of R4,000.00 and for each of the children in the sum of R5,000.00. He was also ordered to pay an amount of R5,000.00 as a contribution to the respondent's costs. This order was subsequently varied, I was informed, in order to make it clear that the maintenance was payable monthly.

According to the respondent the applicant made due payment of the October and November maintenance payments on the 1st of the month. However the December maintenance payment was not made by 13 December

2011. On that date the respondent's attorneys addressed a letter to the applicant's attorneys pointing out that the maintenance payable on 1 December had not been paid and that the applicant was in breach of the order made by Kahla AJ. It was also pointed out that the applicant was in breach of a protection order which had been granted by a magistrate's court inasmuch as he was prohibited from subjecting the respondent to economic abuse. The letter proceeded to warn that unless payment was received by 12 noon on the 14th of December 2011 the respondent would proceed to obtain a warrant of arrest (presumably in respect of the protection order) against the applicant.

Reference was made in the respondent's letter of 13 December 2011 to an email addressed to the respondent by the applicant in which it is stated that "hell will freeze over before I pay you another cent." In response to this letter the applicant's attorneys wrote on 13 December 2011 that the applicant had requested his sister to deposit an amount of R9,000.00 into the respondent's account. In the light of this the email was described as "bemusing". The attorneys further stated that the respondent "should be receiving the R14,000.00 today". It was pointed out that the applicant's attorneys had previously advised (on 6 December 2011) that the applicant would be receiving his salary between the 7th and the 8th of December. The concluding paragraph of the letter reads as follows:

“Please be advised that upon our client’s return he will immediately be making an application to court in order to set aside the maintenance order as he will no longer be able to afford R14,000.00 per month. It is questionable as to whether he will be able to afford any amount, as he will be unemployed as of the 28th of December 2011 or thereabout. We shall keep you advised of such application in due course.”

Payment of the R9,000.00 was made on 14 December 2011 and the balance of R5,000.00 was paid on the 15th of December 2011.

On 9 January 2012 the respondent’s attorneys again wrote to the applicant’s attorneys in the light of the applicant’s failure to pay the maintenance due for January. It was stated that unless payment was made by 13 January 2012, contempt proceedings would be initiated. In response hereto the applicant’s attorneys wrote as follows:

“Our client has as yet not managed to obtain confirmation as to whether or not he will be employed in due course. At present he has no contract upon which to return to the UAE. As soon as this changes we shall inform you as such.”

Our client has further been severely short-changed in respect of his remuneration for his last trip to the UAE. He is therefore struggling to obtain the necessary funds to pay the R14,000.00 maintenance for January.

We have been instructed that he will pay on either 13 January or 14 January 2012 an amount of R9,000.00. Our client is hoping that his company will pay to him the remainder of his salary shortly and immediately upon receipt thereof will furnish to your client the remainder of the maintenance payment for January being R5,000.00.

We thank you for your understanding in respect of the above.”

On 19 January 2012 the respondent’s attorneys wrote to the applicant’s attorneys to advise that they had been instructed that the applicant had received a salary payment of R40,000.00 on 8 December 2011 and a further payment of R40,000.00 on 5 January

2012. It is not stated where this information was obtained. The letter proceeds as follows:

“Your client is now in breach of the High Court order and is in contempt of court as the R9,000.00 was paid 12 days late and R5,000.00 is still outstanding.”

We are accordingly referring this matter for the necessary warrant of arrest and will proceed with a garnishee notice, and a warrant of execution of assets (your client’s tools).

Your client is clearly incurring unnecessary and exorbitant costs in regard to his failure to make his monthly payments, for reasons only known to him, and this will be the subject of cross-examination during the trial.”

On the same day a writ of execution was issued by the registrar “to attach and take into execution the moveable goods” (a reference to the applicant’s tools being stored at the respondent’s home) “and to cause same to be sold for the payment of the sum of R5,000.00” (being the balance of the maintenance then payable) together with costs and charges. In addition a notice of attachment in terms of Rule 45(12) was issued for payment of the monthly maintenance of R14,000.00.

Service of the writ of execution and the notice of attachment occurred on the applicant’s attorneys on 19 January 2012. The R5,000.00 balance due for the January payment of maintenance was paid on 20 January 2012.

As a consequence of the service of the writ of execution upon the applicant’s attorneys an application to set aside the writ was launched on 31 January 2012. The matter was set down for hearing on 2 February 2012 but was postponed on that date in order to enable the respondent to file answering affidavits. Answering and replying affidavits were thereafter filed. I will hereunder refer to this application as “the execution application”.

On 13 February 2012 the applicant launched a further application to set aside the order of Kahla AJ. That application was also opposed and, furthermore, the respondent filed a counter-application to have the applicant committed for contempt of the order issued by Kahla AJ. I shall hereunder refer to these applications as the “setting aside application” and the “contempt application” respectively. I may mention that the opposition to the setting aside application also includes an application made by the respondent to strike-out a letter penned by the applicant’s psychologist upon which the applicant relies in the setting aside application.

I intend to deal with each of these applications in turn and in the context of so doing set out where necessary the relevant factual averments and submissions made by counsel appearing for the parties. I intend also at the conclusion of this judgment to make some remarks about the unfortunate manner in which this matter has been conducted.

The execution application

It is common cause that both the writ of execution and the notice of attachment in terms of rule 45(12) (the garnishee order) were only served upon the applicant’s attorney. No service was effected on the applicant in respect of the writ of execution nor was service of the garnishee order effected upon the named garnishee in the rule 45(12) notice.

It is accordingly common cause that there has, as a matter of fact, been no proper attachment pursuant to the writ or the garnishee order.

The respondent opposed the setting aside of the writ and garnishee order on two bases, namely a) that the application itself was fatally defective inasmuch as the founding affidavit was not signed nor sworn by the applicant; and b) that neither the writ of execution nor the garnishee order were wrongly issued in the circumstances of the matter.

I begin with the respondent's contentions that the garnishee notice was not wrongly issued. Rule 45(12) provides for an attachment of money due to a debtor but held by a third party. The rule states that:

"Whenever it is brought to the knowledge of the sheriff that there are debts which are subject to attachment, and are owing or accruing from a third person to the judgment debtor, the sheriff may, if requested thereto by the judgment creditor, attach the same, and thereupon shall serve a notice on such third person, hereinafter called the garnishee, requiring payment by him to the sheriff of so much of the debt as may be sufficient to satisfy the writ, and the sheriff may, upon any such payment, give a receipt to the garnishee which shall be a discharge, pro tanto, of the debt attached."

There is a dispute in the authorities as to whether the issue of such a notice attaching the salary of a debtor requires the sanction of a court (see *Foley v Taylor* 1971(4) SA 515(D); *Jeanes v Jeanes* 1977(2) SA 703(W) in support of such construction and, contra such construction see *Gouws v Theologo* 1980(2) SA 304(W) and *Pienaar v Pienaar* 2000(1) SA 231(O)).

I need not consider that dispute since, it seems to me, there is a more fundamental difficulty with the notice of attachment in terms of Rule 45(12). The notice refers to the garnishee as being "OCS Sharjah Offshore Crew Supply care of Rosemary Kruger". The affidavit in support of the garnishee order refers to Rosemary Kruger as being the applicant's "employment agent". No details regarding the garnishee is provided. However, in the Rule 43 application and in the contempt application, OCS Sharjah Offshore Crew Supply is referred to as a company based in Abu Dhabi. It is also common cause between the parties that the applicant was, at least until 31 January 2012, employed by this company in the United Arab Emirates. There is nothing to suggest that his employer (the garnishee) is an entity which is within the jurisdiction of this court.

Neither section 19 nor section 26 of the Supreme Court Act, Act 59 of 1959, confers upon this court jurisdiction to attach movables held by a party which is a peregrinis. In *Gwanza Trust v Lukhozi Consulting Engineers & Planners CC* [2001]1 All SA (Ck) the court, dealing with the proper interpretation of section 19 and section 26 in relation to the execution of a garnishee order, says the following (at 368 H – 369 A):

"The court has given consideration to whether the word 'execution' in subsection 26(1) must be given an extended meaning to cover all process relating to execution, which would include garnishee orders against peregrini. That construction would surely fly in the face of the abovementioned decisions and the interpretation already afforded the subsection,

namely, that it is intended to facilitate the service and execution of process, and not to create jurisdiction. If it were given the wider construction referred to above it would be creating jurisdiction in respect of the garnishee on the basis of the section

only, which was clearly not the intention of the Legislature. The word 'execution' can consequently not be given the wider construction set out above.

The position in our law therefore appears to be that a deputy sheriff can, on the strength of a writ of execution, attach the defendant's property which is outside the area of jurisdiction of the court, but within the area of another division, if such property is in the possession of the defendant. If the defendant fails to comply with the provisions of the writ, the court can compel him to do so. The same will apply to a peregrinis who has been joined as a party in terms of subsection 19(1)(b). Once the defendant's property, which is outside the court's area of jurisdiction, is not, however, held by the defendant himself, but by a third person, eg. his neighbour, the court is powerless to enforce a garnishee order against the third person and to recover the property as it does not have any jurisdiction over him. In that case the plaintiff will first have to follow the costly process of having the judgment confirmed by the court of the area in which the property is being held."

The court was there dealing with the position of a peregrinis who is nevertheless an incola of the Republic. The views expressed in the Gwanza Trust matter are, in my view, of equal application in circumstances where the peregrinis is a peregrinis of the Republic and where the attachment is an attachment of property not held within the borders of the Republic. In those circumstances, absent a process in terms of which a maintenance order issued by a High Court of this jurisdiction is rendered enforceable in a foreign jurisdiction, a Rule 45(12) notice of attachment cannot properly be issued against a peregrinis of this court. On this basis it seems to me that the Rule 45(12) notice issued is fatally defective inasmuch as it purports to authorise execution upon a party outside of this court's jurisdiction.

Insofar as the writ of execution is concerned the following merits consideration. The respondent's attorney addressed a letter in which it was threatened to attach certain movables, namely the tools of trade of the applicant, in order to effect payment of the balance of the maintenance payable by the applicant. The writ that was issued only refers to movables belonging to the applicant which are to be found at the address where the respondent is residing with the minor children. During argument I was informed from the bar that the only movables of the applicant at the respondent's address are his tools of trade and that there has been some difficulty between the parties in him obtaining these tools. This prompted an offer made from the bar that the applicant could at any time collect these tools of his trade.

As I have already mentioned it is common cause that the sheriff has not attached any of the applicant's movables. It is also common cause that attachment was sought in respect of the then unpaid portion of the maintenance due for January. That amount has now been paid. The causa giving rise to the attachment has accordingly fallen away. Ordinarily in those circumstances an applicant would be entitled to have the writ set aside (see *Le Roux v Yskor Landgoed (Edms) Bpk en Andere* 1984(4) SA 252(7) at 257; *Wichman v Standard Bank van Suid Afrika* [2002]1 All SA 558 (7) at 560).

There is the further consideration, namely that in terms of section 39 of the Supreme Court Act the sheriff or deputy sheriff shall not seize in execution of any process "(e) tools and implements of trade insofar as they do not exceed in value the amount determined by the Minister from time

to time by notice in the Gazette;” That amount has been determined as R2,000.001. In the light of section 39 the stated intention by the respondent’s attorney to attach and sell the applicant’s tools (as reflected in the letter to which reference has been made) is most unfortunate. It is indicative of the attitude of the respondent and the level of hostility which has characterized proceedings between the parties. Unfortunately it appears that the respondent’s representatives have not been able to bring some measure of sanity to bear in the proceedings.

This malaise was not confined to respondent’s representatives. The founding affidavit was not, at the time that the application was issued by the registrar, signed and sworn by the applicant. Indeed throughout the conduct of these proceedings and notwithstanding that the defect was specifically raised by the respondent, a duly attested affidavit was not furnished by the applicant. At the hearing of the matter and in response to a query by me as to whether an affidavit had at any stage been attested, applicant’s counsel handed up the signed and sworn version which appears to have been deposed to on the day that the application was issued although after the application was served upon the respondent. No explanation was given as to why this occurred.

In *Wingardt v Grobler* 2010(6) SA 148 (ECG) Alkema J, dealing with a similar circumstance in which founding affidavits had not been attested, said the following at paragraph 8 and 9:

“An affidavit is a written statement sworn to before a commissioner of oaths. An oath is administered in terms of the regulations made in terms of section 10 of the Justices of the Peace and Commissioners of Oaths Act, 16 of 1963. In terms of rule 6(1) of the Rules this court, a notice of motion must be supported by ‘an affidavit as to the facts upon which the applicant relies for relief’. As such, an affidavit constitutes the factual evidence before a court, upon which the matter is to be adjudicated. See Minister of Land Affairs & Agriculture & Others v D and F Wevell Trust & Others 2008(2) SA 184 (SCA) at 200 D. The same principle applies in the magistrate’s court. See Jones & Buckle Civil Practice of the Magistrate’s Court in South Africa 9 Edition vol 2 at 55 – 12A. It follows that, if there is no affidavit before a court in application proceedings in support of the relief claimed, there is no evidence upon which the relief can be granted.

It is trite that in certain circumstances a court has the discretion to condone strict compliance with the regulations prescribing the administration of oaths, but, when no oath was administered, there is no evidence before the court and the unattested statement is pro non scripto, and incapable of combination. The second and third appellants are accordingly not before this court, and they were also not before the court a quo.”

In my view, notwithstanding the belated submission of an attested affidavit, without any explanation nor any application for condonation, that is precisely the circumstance that applies here. There is no evidence adduced by the applicant upon which the relief sought in the notice of motion can be granted. Ordinarily that would result in the dismissal of the application since the applicant is not properly before the court. In this instance however I consider that that would bring about an injustice. Both the writ of execution and the Rule 45(12) notice have been issued although neither have been carried into effect and, until they are set aside, they exist. The circumstances in which they were issued and the facts relevant thereto are before me upon the evidence adduced by the respondent. For the reasons already stated both the writ and the notice

fall to be set aside inasmuch as the causa giving rise to the writ has fallen away and the garnishee notice cannot validly have been issued. I shall make such an order. I shall deal with the questions of costs hereunder.

The setting aside application

The application is founded in very terse terms. It is alleged that at the time that Kahla AJ made the order for interim maintenance in terms of Rule 43, the applicant was employed. It is alleged however that “the combined stress of working overseas and the divorce action made it impossible for me to continue working”. The applicant asserts that he was advised by his counselling psychologist that his condition was regressing and that “she advised me to cease working altogether”. He annexes a letter addressed by his psychologist to his employer in this regard. It is this letter which is the subject of the application to strike-out. The applicant resigned from his employment on 31 January 2012. Since he has no income he alleges he is unable to pay maintenance in terms of the order of Kahla AJ. For this reason he seeks the setting aside of the order.

The respondent raised two points in limine, the first being that the application, although brought on short form, was not founded on any grounds of urgency and should for that reason be dismissed. The second point relates to the fact that the applicant was sequestered by the North Gauteng High Court on 5 October 2011 and accordingly that the applicant lacks locus standi to bring the application.

The opposing affidavit filed by the respondent serves also as a founding affidavit in respect of the alleged contempt of the order of Kahla AJ. I intend to deal with this aspect separately hereunder.

In relation to the basis upon which the applicant seeks the setting aside of the order the respondent admits that the applicant has resigned but denies that he has no income and that he is unable to pay maintenance. There is an allegation that the applicant has secreted certain funds away and that he is accordingly able to pay the maintenance. This is denied. The thrust of the opposition is however that the applicant is seeking to frustrate the execution of the court order and to avoid paying maintenance in terms thereof.

For reasons which will be apparent from what follows hereunder I do not consider it necessary to deal with either of the points raised in limine or with the application to strike-out.

The setting aside application has not been brought in terms of Rule 43. Instead it is formulated as an ordinary application brought in terms of Rule 6 in which it is sought to invoke the court’s jurisdiction to set aside an order of court. No basis is set out in the affidavit upon which this court can exercise that jurisdiction to vary, rescind or set aside an order of court.

Rule 43 applies whenever a spouse seeks relief from a court in respect of, inter alia, maintenance pendente lite. The form of the proceedings and the procedure to be followed are set out in sub-rule (2) to (5). Rule 43 proceedings are designed to enable parties to a matrimonial dispute to deal expeditiously and relatively inexpensively with matters to be determined pending the finalisation of the divorce proceedings.

Sub-section (6) provides as follows:

“The court may, on the same procedure, vary its decision in the event of a material change taking place in the circumstances of either party or a child, or the contribution

towards costs proving to be inadequate.”

(Emphasis added.)

Two points should be noted in this regard. The first is that Rule 43 provides, in the context of the specialised proceedings created by the rule, for a basis upon which a court's orders made in terms of the rule may be varied. The second is that the form and procedure of the variation proceedings is the same as provided for in a Rule 43 application ab initio. Thus the number of sets of affidavits and the form and content of those affidavits as well as the form of the notice to be given to the respondent and the time periods for the filing of papers are regulated by the rule. In addition the rule imposes limitations on the party which are calculated to ensure not only that the application is expeditiously finalised but also that legal representatives are limited in the fees that may properly be charged for the conduct of interim proceedings in matrimonial matters.

The procedure provided for in rule 43 already provides for an expeditious hearing, although if warranted the application may be brought on an urgent basis.

The applicant in this matter ought to have followed this procedure and ought to have founded his case for variation of the order having regard to the considerations ordinarily operative in proceedings in terms of the Rule, not least the interests of the minor children about which there is not one jot in the applicant's application. In *Leppan v Leppan* 1988(4) SA 455 (W) the court stated at 457 F – H that:

“Rule 43 is clearly a special rule governing certain applications in contrast with the general directions created by rule 6 which normally govern applications. Rule 6 can therefore find application only on aspects which are not governed by rule 43. Rule 6 would therefore have continued application insofar as rule 6(12)(a) is concerned – and, if practitioners would take note, also the requirement that urgency must be set forth ‘explicitly’ as is required by rule 6(12)(b). The wording, the function of and the reasons for the existence of rule 43 all militate against an applicant having a choice which enables him to cause rule 43 to be inapplicable. In the circumstances enumerated in rule 43(1) neither a party nor a court can cause rule 43 not to apply. Nor can any ‘practice’ do so.”

In *Chelsea Estates & Contractors CC v Speed-O-Rama* 1993(1) SA 198 (SE) Mullins J referring to the decision in *Leppan*, stated at 202 D:

“Where there are specific provisions in the rules which provide for a particular form of application, such specific provisions must be followed, and not more general provisions.”

In my view this is not merely a matter of form over substance where a court would be inclined to treat the application as if it were one brought following a particular procedure. In my view this is a circumstance where properly one must insist that the parties utilise the rules that are specifically provided to deal with the resolution of interim disputes where divorce matters are pending. In this instance the applicant did not do so and I am not prepared to treat the matter as if it was indeed an application brought in terms of rule

43. I am in any event not persuaded that a proper case has been made out for the order sought in this matter, there being in my view insufficient evidential material placed before me to warrant the variation that the applicant seeks, particularly in the light of the fact that the interests of the minor children are nowhere addressed in the papers filed by the applicant.

It follows therefore that the setting aside application cannot succeed. I will deal with costs hereunder.

The counter-application for contempt

The respondent's counter-application for contempt of the order of Kahla AJ is founded principally on the allegations concerning the late payment of the December and January maintenance payments due by the applicant. It is also alleged that the applicant has not made payment of the February maintenance and notwithstanding that he only resigned his employment on 31 January 2012. It is further alleged that the applicant is presently in contempt of the order by reason of the fact that he resigned “from gainful employment for reasons which are not sufficient”. It is suggested that the applicant did this in order to “punish me for the divorce”.

It is common cause that the December and January payments were only made later in the month and that there was therefore a “delay” in making payment. The applicant explains that he was then having difficulty raising the money in order to make the payments due. The correspondence exchanged between the parties bears this out. It is apparent too that the applicant sought the assistance of his family in order to make the payments and in fact did make the payments.

Mr Hodge, for the applicant, sought to suggest that since the court order does not specify a date upon which payment must be made that the applicant cannot be in contempt by reason of a delay. It is so that the order does not specify a date for payment. This is unfortunate. However the prior practice was that payment was made on the 1st of the month. In my view the applicant is not entitled to delay payment when he is in fact able to make such payment. Such conduct

would be indicative of mala fides and may be found to be contemptuous of the court's order. In the case of the December and January maintenance payments the delay in payment is explained by the applicant who indicates that he was not initially able to raise the funds in order to make the payment. Payment was however thereafter made. As frustrating as this may be for the respondent and notwithstanding her suspicion that the applicant was being obstructive and

recalcitrant, there is no basis upon which to reject the explanation given by the applicant and to find that the applicant was mala fide and wilfully disobedient of the court's order.

The same applies in respect of the fact that the applicant resigned and is (at least at the time that the application was made) presently unemployed. Respondent contended that this was deliberately done to "to punish" her by rendering the applicant unable to meet his monthly maintenance obligations. Bizarre as that may sound, no doubt there are persons who would conduct themselves in such a reprehensible manner. The evidence before me however does not establish that this is what the applicant has done.

It is common cause that the applicant suffers from post-traumatic stress syndrome and that he is under treatment by a psychologist. The applicant states that a number of factors have induced him to resign and to return to live permanently in Grahamstown. These include the protracted nature of the divorce proceedings and the fact that they have become increasingly acrimonious. That this is so is borne out by the nature of these proceedings. He states too that long periods of work overseas coupled with the fact that when he returns to South Africa he is unable to see his children and that he has been unable to see his children for more than 6 months has greatly increased the stress from which he suffers and that as a result of this his psychological condition has deteriorated. These are the factors that induced him to resign. It is significant that the correspondence addressed by applicant's attorney to the respondent's attorney, in December 2011, foreshadowed the fact that the applicant may find himself in circumstances where he is no longer employed overseas.

The elements of the offence of contempt must be established beyond a reasonable doubt. In *Fakie NO v CCII Systems (Pty) Ltd* 2006(4) SA 326 (SCA) the court, dealing with the deliberate disobedience of a court order, (at 333 C – E) stated that:

"A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith)."

These requirements – that the refusal to obey should be both wilful and mala fide and that unreasonable compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional

violation of the court's dignity, repute or authority that this evinces."

The evidence before me does not establish, beyond a reasonable doubt, that the applicant is guilty of contempt. The parties are involved in an acrimonious dispute and that may colour their perception of one another. Such perception however is insufficient to conclude that one party is deliberately and mala fide defying a court order. The counter-application was brought in response to an application to set aside Kahla AJ's order and this notwithstanding the respondent's

representatives being forewarned that the applicant would seek such an order. The fact that the applicant seeks to set aside Kahla AJ's order is indicative of an attitude that is anything but contemptuous. On the contrary it reflects an appreciation by the applicant that the order must be complied with and that court sanction would be required for a variation of the obligation. On the basis of what I have set out above it follows that the counter-application for contempt must fail.

Costs

I turn now to deal with the question of an appropriate cost order to be made. Costs, it is trite, are within the discretion of the court. In exercising that discretion a court takes into account the circumstances of the matter, the issues adjudicated and the results of such adjudication, the conduct of the parties and what would be fair and just between the parties.

The obtaining of the writ of execution for purposes of attaching the applicant's tools was ill-advised and inappropriate given section 39 of the Supreme Court Act. So too was the issuing of the garnishee attachment notice in terms of rule 35(12) in circumstances where this court has no jurisdiction over the garnishee. It is this conduct which elicited the application to set the process aside, however defective such application may be. In these circumstances I consider that it would be appropriate for each party to pay their own costs.

Insofar as the setting aside and the contempt counter-applications are concerned, I consider that the same should apply. Much of the opposition to the setting aside application was based on the alleged contempt and the two applications were closely interlinked in argument. An order that the unsuccessful party should pay the costs will undoubtedly lead to further controversy between the parties regarding the allocation, on taxation, of costs to the separate issues. In my view that would serve only to exacerbate an already acrimonious relationship. The parties ought to be reminded that however embittered they may be the interests of the minor children born of their marriage are paramount. Just as the applicant is obliged to honour his maintenance obligations and to ensure that he secures gainful employment in order to do so, so too is the respondent. Such is the nature of the shared parental responsibility for which our law provides.

It is appropriate to comment briefly on the overall conduct of this matter. The parties have become engaged in a sharp exchange of correspondence relating to various matters relevant to the divorce action and have, as is apparent in this matter, become embroiled in extensive litigation. The court file in this matter consists of a large lever arch file of documents. In the several applications numerous allegations made in the one application are repeated in the other application. The documents as a whole are prolix yet at the heart of the dispute there is, with respect to the parties and mindful of the importance of ensuring that payment of maintenance is made in the best interests of the minor children, a simple issue. It appears that each step taken by the one party is met by a counter-step taken by the other. It is a worrying trend in matters of this nature that interlocutory skirmishes are conducted like a war of attrition. The courts are regularly confronted with reams of paper in these types of disputes. More often than not the representatives, once battle lines have been drawn between the parties, fuel the fires of the conflict and in the heat of the exchanges the parties suffer. Conducting litigation in this form,

particularly in matrimonial disputes where the interests of minor children are at stake, is to be deprecated. Legal representatives should note that the time may

well come when their conduct and their role in fanning the fires of conflict by ill-advised litigation will face court scrutiny.

In the result I make the following orders:

The Writ of Execution issued on 19 January 2012 under case number 2677/2011 is set aside.

The Notice of Attachment in terms of Rule 45(12) issued under case number 2677/2011 is set aside.

The applicant's application to set aside the order of Kahla AJ made on 23 September 2011 is dismissed.

The respondent's counter-application for committal of the applicant for contempt of court is dismissed.

In respect of the applications and counter-application each party is to pay his or her own costs.

G GOOSEN

JUDGE OF THE HIGH COURT

APPEARANCES:

FOR THE APPLICANT: Mr Hodge instructed by

Netteltons Attorneys

FOR THE RESPONDENTS: Mr Cole, instructed by

Wheeldon Rushmere & Cole

1GNR 2331 of 1 December 1993.

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