REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 15078/12

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

22/5/13
DATE

SIGNATURE

In the matter between

MODISE GEOFFREY KHOZA **Applicant**

and

REABETSOE LUCIA MOTSEPE **First Respondent**

SHERIFF JOHANNESBURG CENTRAL **Second Respondent**

JUDGMENT

MADIMA, AJ

Introduction

[1]. This is an application for interim relief. In his notice of motion the Applicant seeks *inter alia*, the following orders:

1. Dispensing with the forms and service provided for in the Rules of this Honourable Court disposing of the matter by way of urgency in terms of Rule 6(12).

2. First Respondent be interdicted and restrained from instructing the Second Respondent to remove the property he/she attached on 5 February 2013 in terms of the Notice of Attachment in Execution which is attached hereto and marked "A" from the Applicant's house.

   Alternative to 2 above

3. In the event the First Respondent has already given instructions to the Second Respondent, the Second Respondent is interdicted from carrying out the instructions of the First Respondent to remove the property set out in Annexure "A" hereto from the Applicant's house.

4. That the above orders set out in prayers 2 and 3 above, shall operate as interim orders pending the institution and finalization of an action to be instituted by the Applicant against the first Respondent within 10 court days of an order being granted herein for inter alia the following:

   4.1. A declarator (sic) order that the Applicant has as (sic) 8 March 2013 paid to the First Respondent an amount of R572 900-31 in terms of the Court Order granted by Van Oosten (sic) on 19 June 2012.

   4.2. The Applicant was by 8 March 2013, only obliged to pay to the First Respondent the total amount of R572 900-31.

   4.3. The Applicant has overpaid the First Respondent (sic) an amount of R657 082-30.

   4.4. The Applicant is entitled to set off the amounts he has overpaid the First Respondent as against those due to her in terms of the Court Order, aforestated.

   4.5. Further ancillary relief.

5. That the First Respondent shall pay the costs of this application on an attorney and own client basis.

6. Further and/or alternative relief.

The parties

[2]. The Applicant is an advocate of the High Court of South Africa. He is senior counsel. He practices his profession out of Pitje Chambers in Pritchard Street, Johannesburg ("chambers"). The Applicant was represented by Adv A.P.S. Nxumalo.

[3]. The First Respondent is a major housewife. She currently resides in Morningside, Sandton. She was represented by Adv P.V. Ternent. The Second Respondent is the Sheriff of Central Johannesburg. I wish to thank both counsel for their sterling heads and assistance in this matter.

[4]. The Applicant and First Respondent entered into a customary union in May 2011. The validity of this marriage is being disputed by the Applicant. I am not required to decide its validity in this application.

The Court order of 19 February 2013

[5]. On 19 June 2012 and pursuant to a Rule 43(1)(a) & (b) application, the Honourable Van Oosten J made the following Order

1. The Respondent's answering affidavit is struck out in its entirety.

2. Pending the further hearing of this application, the Respondent is to pay to the Applicant the monthly expenses listed by the Applicant in paragraph 23 of the founding affidavit and in addition thereto the amount of R35 000.00 per month the first payment to be made on 22 June and thereafter on or before the 7th day of each and every month.

3. The Respondent is to pay the wasted costs occasioned by the application to strike out, the limitation provided for in Rule 43(7) and (8) not to apply.

[6]. The expenses referred to in paragraph 23 of First Respondent's affidavit are listed therein *inter alia*, as

23.1. mortgage bond installments in the sum of R17 400 per month in respect of the Morningside property

23.2. levies in respect of the Morningside property in the sum of R1 000.00

23.3. Medical aid premiums

23.4. Comprehensive motor vehicle insurance

23.5. Garden service in respect of the Morningside property

23.6. Cellphone contract

23.7. Gym and personal trainer

23.8. School fees at Redhill for two children

The three writs

[7]. Three writs were issued in favour of the First Respondent pursuant to the order of Van Oosten of 19 June 2013 referred to above. The first writ was issued on 14 December 2012 for the amount of eighty eight thousand four hundred and eighty seven rand (R88 487.00), for the period between July 2012 and December 2012.

[8]. The second writ is dated 23 April 2013, and was issued in the balance of twenty four thousand seven hundred and seventy two rand and forty two cents (R24 772.42) for the unpaid maintenance of First Respondent for the period between February 2013 and April 2013.

[9]. The third writ is also dated 23 April 2013 and was issued for the amount of sixty three thousand eight hundred and eighteen rand and one cent

(R63 818.01) for unpaid Redhill school fees for the Second Respondent's children for the first school term of 2013.

The dispute

[10]. The First Respondent claims in her papers that the Applicant is in arrears with respect to payments he had been ordered to make to herself pursuant to the court order of 19 June 2013. The Applicant for his part claims that he has in fact overpaid First Respondent by the amount of one hundred and forty seven thousand eight hundred and thirty seven rand and fifty eight cents (R147 837.58). Applicant states that because of the overpayment, he would therefore not pay until a reconciliation of all payments has been concluded.

[11]. The Applicant seeks an interim order that would stop the execution of the writs pending the determination and reconciliation of all payments he has allegedly made to the First Respondent. I must state that this application is still to be made by the Applicant. One has to have regard to the notice of motion and the two sets of affidavits deposed to by and on behalf of the Applicant to arrive at this conclusion.

The application to amend Applicant's notice of motion

[12]. Before the hearing of this application, Mr. Nxumalo brought an application for amendment of the Applicant's notice of motion. Mr Nxumalo conceded that the notice of motion as it stood, that is, before the amendment, was, to use his exact words "*patently wrong*". Ms Ternent agreed and submitted that the notice of motion as it stood related to the first writ, which, she submitted correctly was not supported by the Applicant's founding affidavit or the affidavit that was deposed to on his behalf by his instructing attorney.

[13]. It is important that I reproduce the amended notice of motion in its entirety in order to highlight the difference between the two notices. The amended version seeks the following relief

1. Dispensing with the forms and service provided for in the Rules of this Honourable Court disposing of the matter by way of urgency in terms of Rule 6(12).

2. The Respondents be interdicted and restrained from instructing the Second Respondent to remove the Applicant's moveable assets in terms of Writs of Execution which are attached to the founding affidavit marked "MK4" and "MK5".

3. The Second Respondent is interdicted from carrying out the instructions of the First Respondent to remove the said moveable assets.

4. That the above orders set out in prayers 2 and 3 above, shall operate as interim orders pending the finalization of the application brought by the Applicant before this court, wherein the Applicant seeks *inter alia*, an order in the following terms:-

    4.1. A declaratory order that the Applicant has as (sic) 8 March 2013 paid to the First Respondent an amount of R572 900-31 in terms of the Court Order granted by Van Oosten (sic) on 19th June 2012.

    4.2. The Applicant was by 8th March 2013, only obliged to pay to the First Respondent the total amount of R572 900-31.

    4.3. The Applicant has overpaid the First Respondent (sic) an amount of R657 082-30.

    4.4. The Applicant is entitled to set off the amounts he has overpaid the First Respondent as against those due to her in terms of the Court Order, aforestated.

    4.5. Further ancillary relief.

5. That the First Respondent shall pay the costs of this application on an attorney and own client basis.

6. Further and/or alternative relief.

The difference between the two notices of motion

[14]. The difference between the initial notice of motion ("the initial notice") and the amended one ("the amended notice") is as follows:

[14.1] Prayer 2 of the initial notice refers to a notice of attachment in execution marked "A". Annex "A" refer to the first writ of December 2012. The corresponding prayer 2 in the amended notice refers to the writs of execution marked "MK4" and "MK5". These annexes refer to the second and third writ.

[14.2] Prayer 4 of the initial notice states that the orders set out in prayers 2 and 3 shall operate as interim orders pending the institution and finalization of an action to be instituted by the Applicant against the First Respondent within 10 court days of an order being granted....The corresponding prayer 4 in the amended notice states that the orders shall operate as interim orders pending the finalization of the application brought by the Applicant before this court .....(my emphasis)

[15]. It appears that the Applicant realized his mistake somewhat at an advanced stage of the process. The relief sought in the initial notice of motion regarding the first writ is fatally flawed. He knows that, hence the attempt to amend. The same goes for prayer 4. In the initial notice temporary relief is sought pending the finalization of an action still to be instituted, whilst in the amended version it appears as if an application has already been brought before the court.

[16]. The bringing of an amendment application at this late stage is prejudicial to the First Respondent. Apart from the lateness of the application, the amended version further muddies the waters. Allowing the amendment would have triggered a postponement application to afford the First Respondent an opportunity to respond accordingly. No postponement was sought. Mr. Nxumalo insisted that the First Respondent knew what case to answer with respect to the second and third writ, and must therefore

deal with it. Ms Ternent submitted that her client was prejudiced. The Applicant had to have made up his case in his founding papers. She cannot be expected to deal with these amendments in court as Mr. Nxumalo insisted.

[17]. I agree with the submission by Ms Ternent. The First Respondent cannot be expected to deal with such a substantial application for amendment of the notice of motion in court. The flaw in the initial notice and the subsequent correction in the amended version would necessitate the filing of further sets of affidavits by the parties. No such application was made by Mr. Nxumalo. He insisted that he would proceed on the basis of the papers already before me.

[18]. As I have already alluded above, the Applicant's founding affidavit is also problematic as it was not deposed to by the Applicant himself. Mr Nxumalo submitted that the Applicant was not available to do so at that time. He said that the matter was urgent and papers had to be filed. The Applicant instructed Mr. T. Mathopo, his instructing attorney, to depose to the affidavit in his stead. The Applicant, on his return from some other assignment, filed a replying affidavit wherein set out his case. By that time it was a little too late. Ms Ternent attacked Mr Mathopo's lack of personal knowledge of the facts contained therein. At best, submitted Ms Ternent, Mr Mathopo was not given proper instructions by the Applicant. I agree with this proposition. I set out my reasons below.

[19]. In Naude v Fraser [1998] 4 SA 539 (SCA) at 563E-564A, Schutz JA stated (in the context of judicial review) that: "It is one of the fundamentals of a fair trial, whether under the Constitution or at common law, standing co-equally with the right to be heard, that a party be apprised of the case which he faces. This is usually spoken of in the criminal context, but is no less true in the civil. There is little point in granting a person a hearing if he does not know how he is concerned, what case he has to meet. One of the numerous manifestations of the fundamental principle is the sub-rule that he who relies on a particular

section of a statute must either state the number of the section and the statute, or formulate his case sufficiently clearly so as to indicate what he is relying on: Yannakou v Apollo Club 1974 (1) SA 614 (A) at 623G. As the proposition itself indicates there is no magic in naming numbers. The significance is that the other party should be told what he is facing..... In Government of the Province of KwaZulu-Natal v Ngwane 1996 (4) SA 943 (A), Nienaber J said (at 949B-C), in my view correctly: 'Had the point been spelled out in the application papers the respondent, duly alerted, and could have responded on fact and on law' (my emphasis)

[20]. To his credit Mr Nxumalo, although in an unenviable position, tried to persuade me that much of Applicant's case was in the replying affidavit and that I should accept such evidence. This of course is not the norm. An Applicant must make his/her case in the founding affidavit and not in reply, and the Respondent needs to know what case he or she is to respond to.

[21]. Mr Nxumalo referred me to various authorities in this regard. He submitted that there would be no prejudice to the First Respondent if the amendment was granted. Ms Ternent for her part stated that indeed the First Respondent would be prejudiced by bringing the amendment at this late stage. The Myers v Abramson [1951] 3 All SA 82 (C) case to which Mr. Nxumalo referred me, is distinguishable from the instant application. In that case the court was seized of an application for absolution. Granting the amendment would not be prejudicial to any of the parties. This application is different.

[22]. The guiding principles in deciding whether an amendment should be granted or not were set out in Moolman v Estate Moolman and Another [1927] CPD 27, at page 29. The Court held that "the practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or, in other words, unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed".

[23]. In Rishton v Rishton [1927] TPD 718, the Court also adopted as a guide to our Courts the practice in the English courts. There the court held that "My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he has done some injury to his opponent which could not be compensated for by costs or otherwise". And further that "However negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs".

[24]. Allowing the amendment would be prejudicial to the First Respondent at this late stage. The Applicant had three court days, that is 6, 7 and 8 May 2013 to bring such an application. He did not do so. There are two further considerations I need to take into account in deciding whether to grant the amendment or not. These are whether the Applicant is *mala fide* in bringing the application to amend, and whether the amendment can be made without an injustice to First Respondent, and if so, whether an appropriate cost order would not compensate the First Respondent for the injustice.

[25]. There is nothing that suggests that the Applicant is *mala fide* in bringing the application to amend his notice of motion. At best the Applicant was grossly negligent. I have already stated above, the Applicant is a senior counsel and officer of this court. He should know better. I shall assume that no pleadings ever leave his chambers without his meticulous scrutiny. That is why he is senior counsel. I therefore attach a higher standard of care on him than I would ordinarily attach with respect to a lay litigant. In this regard the Applicant failed himself badly.

[26]. Can the injustice visited upon the First Respondent by the late application to amend be mitigated by an appropriate cost order? I have taken into

account that the parties are before me because of money squabbles. The Applicant claims to not only have paid First Respondent, but overpaid monies due to her. The First Respondent alleges that she has not been paid all the monies due to her and the Applicant is in contempt of the Order of Van Oosten J.

[27]. I possess no desire to grant a cost order against the Applicant that would not be paid without embroiling the First Respondent in yet another application. I doubt very much that, that route would be sufficient compensation for the injustice to First Respondent.

[28]. It is for the above reasons that I am inclined to dismiss the application to amend Applicant's notice of motion.

The application for interim relief

[29]. I have already stated above that the first, second and third writs arose from a court order dated 19 June 2012 granted by Van Oosten J in Rule 43 proceedings.

[30]. It appears that the First Respondent is not, at this stage concerned about the first writ. Her concern is the execution of the second and third writs. The Applicant's application for interim relief is premised on the first writ. This explains the confusion around the initial notice of motion and the subsequent unsuccessful attempt to have it amended. This further explains the Applicant's attempt to resurrect his case in reply.

[31]. Even if I were to accept the Applicant's replying affidavit as evidence, it still does not offer any credible answer to the second and third writs.

Issues for determination

[32]. In his submission Mr Nxumalo asked that I determine whether the Applicant has as at 8 March 2013 paid to the First Respondent an amount of five hundred and twenty seven thousand nine hundred rand and thirty one cents (R527 900-31) in terms of the Court order of 8 March 2013, and secondly, whether the Applicant was as at 8 March 2013 only obliged to pay to the First Respondent a total amount of five hundred and twenty seven thousand nine hundred rand and thirty one cents (R572 900-31).

[33]. The Applicant alleges that he has overpaid the First Respondent by an amount of one hundred and forty seven thousand eight hundred and thirty seven rand and fifty eight cents (R147 837-58). He further states that by November 2012 he had paid First Respondent an amount of five hundred and forty five thousand nine hundred and thirty rand (R545 930.00) against the due amount of three hundred and eighty one nine hundred and thirty three rand and fifty four cents (R381 933-54). These amounts may well have been paid by the Applicant to the First Respondent. They however do not address the amounts claimed as per the second and third writs.

[34]. I asked Mr Nxumalo to refer me anywhere in the Applicant's papers where there is proof that Applicant has indeed paid any of the amounts he claims to have paid. He was not able to do so. Instead he showed me an amount of about thirty thousand rand and some change (R30 000.00) in one of the annexures. This is not what the First Respondent is about. For her part, the First Respondent states in her affidavit that the Applicant has not paid any amount to her as per the Order of Van Oosten J for the months of February, March and April 2013 broken down as follows

7.1. the mortgage bond installments in respect of the Morningside property

7.1.1	February 2013	R17 400.00
7.1.2	March 2013	R17 400.00
7.1.3	April 2013	R17 400.00

7.2 levies in respect of the Morningside property

7.2.1	February 2013	R1 000.00
7.2.2	March 2013	R1 000.00
7.2.3	April 2013	R1 000.00

7.3 Maintenance in the sum of R35 000.00 per month

7.3.1	February 2013	R35 000.00
7.3.2	March 2013	R35 000.00
7.3.3	April 2013	R35 000.00

7.4 Garden service in respect of the Morningside property

7.4.1	February 2013	R1 000.00
7.4.2	March 2013	R1 000.00
7.4.3	April 2013	R1 000.00

7.5 Gym and personal trainer

7.5.1	February 2013	R3 120.00
7.5.2	March 2013	R3 120.00
7.5.3	April 2013	R3 120.00

Total due	R172 560.00
Less alleged overpayment	R147 837.58
Balance outstanding	**R24 722.42**

[35]. The outstanding balance of twenty four thousand seven hundred and twenty two rand and forty two cents (R24 722.42) is the subject of the second writ. The First Respondent submitted that even in the event that

the Applicant could have overpaid in the amount of one hundred and forty seven thousand eight hundred and thirty seven rand and fifty eight cents (R147 722.42) as claimed, he still is in arrears in the amount of twenty four thousand seven hundred and twenty two rand and forty two cents (R24 722.42). As already stated above, the third writ is with respect to the amount of sixty three thousand eight hundred and eighteen rand and one cent (R63 818.01) in respect of unpaid school fees for the First Respondent's children at Redhill. This amount has also not been paid by the Applicant to date.

Requisites for interim relief

[36]. There are certain requirements that must be met by an applicant seeking temporary relief. The applicant must show (a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established, although open to some doubt, (b) that if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right, (c) that the balance of convenience favours the granting of interim relief; and (d) that the applicant has no other satisfactory remedy. [Prest C.B, The Law and Practice of Interdicts, Juta & Co 1996, page 50].

[37]. The Applicant states in his affidavit that he has "shown a prima facie right not to have my property excused in execution of the amount the First Respondent claims against me until it is determined whether or not the money I have paid her, was a donation or not. Whether or not she had indeed used the Discovery Credit Card as alleged in this affidavit". The Applicant further states that he has a well grounded apprehension that the First Respondent and her attorneys will send the Sheriff to remove his

property. He further states that the balance of convenience is in his favour and finally that he has no alternative remedy.

[38]. I do not agree with the submission that the Applicant has satisfied the requisites for the granting of interim relief. The Applicant was not able to provide any proof, as a minimum, that he had paid any monies to the First Respondent in the months on February, March and April 2013. The First Respondent is within her right to attach and sell in execution in order to satisfy a debt owing to her by Applicant. The Applicant might well have a well grounded apprehension that his goods might be attached. He could have prevented all of this by abiding by the Court Order that required him to pay in the first place.

[39]. By failing to pay as so ordered, or offering some proof that he has indeed paid some money to the First Respondent, the Applicant will struggle to convince this court that the balance of convenience is in his favour.

[40]. The Applicant, to avert the inevitable, would have to pay all the monies owing to the First Respondent in terms of the two writs in question.

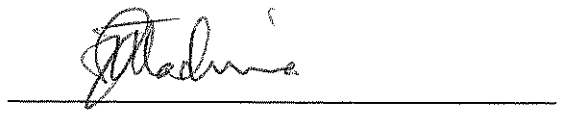
[41]. I am accordingly satisfied that the application should fail.

[42]. My order is as follows:

42.1 The application for amendment of the notice of motion is dismissed.

42.2 The application for interim relief is dismissed.

42.3 The Applicant to pay the cost of the application.



TS MADIMA: AJ

ACTING JUDGE OF THE HIGH COURT

On behalf of the Applicant:	Adv A.P.S Nxumalo
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On behalf of the First Respondent:	Adv P.V Ternent
Instructed by:	Kim Meikle Attorneys
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Dates of Hearing:	9 May 2013
Date of Judgment:	22 May 2013