Republic of South Africa

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

Case no. 2331/2017
and case no. 3487/19

Before: The Hon. Mr Justice Binns-Ward

Hearing: 11 September 2019
Judgment: 20 September 2019

In case no. 2331/2017 in the matter between:

H G Applicant

and

A G Respondent

and

In case no. 3487/2019 in the matter between:

A G Applicant

and

H G First Respondent

REGISTRAR, HIGH COURT, CAPE TOWN Second Respondent

JUDGMENT

BINNS-WARD J:

Introduction

[1] Two applications, in case no.s 2331/2017 and 3487/2019, respectively, came up for hearing before me together. The parties in both applications are husband and wife. As the wife is the applicant in one of the applications and in the other it is the husband, it will assist the narrative if I refer to them by their respective spousal roles rather than as the applicant or the respondent as the case might be.

[2] The application in case no. 2331/2017 is for an order holding the husband to be in contempt of court arising out of his alleged failure to comply with an order obtained by the applicant in earlier proceedings between the parties in terms of rule 43 of the Uniform Rules of Court. The other matter concerns an application by the husband for the setting aside of a subpoena *duces tecum* that has been served on a commercial bank at the instance of the wife for the production of the records related to the banking accounts conducted with it by a number of different companies in which the husband is a shareholder, and in respect of which banking accounts he has signing powers.

[3] A divorce action between the parties is currently pending in proceedings in case no. 2331/2017. Their marriage was contracted out of community of property after the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract that excluded the accrual regime. Accordingly, the only proprietary issue in the divorce proceedings is the wife's claim for maintenance. Her personal maintenance claim is framed in the following terms in the particulars of claim: '*An order directing* [the husband] *to maintain* [the wife] *until her death or remarriage, whichever occurs first, by: (i) payment ... of such monthly amount as* [the court] *should determine reasonable having regard to the proprietary consequences of the marriage and the parties' respective income, means and needs, ...; (ii) ... retaining her as a member of a medical aid scheme offering comprehensive cover for all medical and related expenses ... (iii) payment of the sum of R200 000 ... towards holiday costs ...*'. She also seeks an order that the monetary amounts aforementioned should be increased annually in line with the consumer price index.

[4] The wife has, however, also incorporated a claim in the pleadings in the divorce action for a declaration that a partnership has subsisted between the parties since a date prior

to their marriage. In that regard she has sought an order for the appointment of a receiver to identify and realise the assets in the partnership for distribution between them. The claim based on the alleged partnership is disputed.

[5] The determination by the court seized of the partnership issue will conceivably bear on any decision in respect of the wife's claim for maintenance in the divorce action. If the partnership claim were to be upheld, and dependant on the nature and value of the partnership assets that fell to be distributed to the wife, it might even be that she would have no reasonable need for personal maintenance. It therefore came as no surprise to me to hear from the husband's counsel that an application for a separation of issues in the pending action is under consideration. There would be a certain logicality in the partnership question being determined separately from and before the wife's claim for personal maintenance.

[6] The order in terms of rule 43 was made in the context of the pending divorce action, and the subpoena that is the subject matter of proceedings under case no. 3487/19 was issued at the instance of the wife in that action.

[7] I propose to treat first of the contempt of court application.

Contempt of court application

[8] An order was made by Gamble J on 5 December 2017 in the rule 43 proceedings, in which the wife was the applicant and the husband the respondent. It ran to eight pages in length. The provisions thereof that are relevant for present purposes go as follows:

A) BY AGREEMENT BETWEEN THE PARTIES, pending the determination of the divorce hearing, an order is granted in the following terms:

1. On a *pendente lite* basis:

1.1 …
1.2 the primary residence of the children will be with the applicant;
1.3 …

2. The respondent is directed to make payment of the following expenses *pendente lite*:

2.1 the following expenses in respect of the Mercedes Benz GL motor vehicle currently in the applicant's possession and which she may utilise *pendente lite*:
2.1.1 the monthly instalments payable to Mercedes Benz Finance:

2.1.2 the monthly insurance premiums payable in respect of comprehensive insurance;

2.1.3 vehicle licence; and

2.1.4 maintenance and repairs including the replacement of tyres, if necessary;

2.2 the costs of retaining the applicant and the children as dependent members on the respondent's existing Discovery hospital plan and by bearing all the medical expenses incurred in private healthcare in excess of the cover provided by the aforementioned medical aid scheme, such costs to include all medical, dental, pharmaceutical (including levies), surgical, hospital, orthodontic and ophthalmic (including spectacles and/or contact lenses), physiotherapeutic, psychotherapeutic, occupational therapeutic, homeopathic, chiropractic and similar medical expenses which are not covered by the medical aid scheme. The respondent shall reimburse the applicant for all expenses so incurred in respect of which she has made payment, or shall make payment directly to the service providers, as the case may be, within 5 (five) days of the applicant providing the respondent with proof of payment and/or the relevant invoice;

2.3 [A] Junior's monthly cell phone account in full directly to Vodacom (limited to the current monthly premiums presently payable in respect of the current contract);

2.4 The children's school fees, punctually and directly to [school A] and [school B], as well as the payment of all reasonable expenses incurred in respect of the children's education, such costs to include, without limiting the generality of the aforegoing, additional tuition fees, as well as the cost of any extracurricular school and sporting activities (including school tours, trips and outings) in which they may participate, as well as the cost of all books and prescribed stationery at the beginning of each year and any additional stationery required each term (for example project boards, labels, book covers and basic stationery to replenish school required items), school uniforms, equipment (including computer maintenance, hardware and software) and attire relating to their education and/or the sporting and/or extra-mural activities engaged in by them. The respondent shall reimburse the applicant for all expenses so incurred in respect of which she has made payment, or shall make payment directly to the service providers, as the case may be, within 5 (five) days of the applicant providing the respondent with proof of payment and/or the relevant invoice;

2.5 The children's current extra-mural activities directly to the service providers namely:

2.5.1 [A] jnr: crossfit and waterpolo;

2.5.2 [L]: hockey and waterpolo;

2.5.3 [L2]: soccer and waterpolo;

2.6 The monthly rental at the property currently occupied by the applicant and the children in the sum of R53 500.00 (Fifty Three Thousand Five Hundred Rand) per month;

2.7 The pre-paid electricity in the amount of R5 000.00 (Five Thousand Rand) per month in respect of the applicant's and the children's accommodation;

2.8 The monthly salary of the applicant's current domestic worker, …;

3. … ;

4. … .

B) HAVING HEARD COUNSEL for the parties and having perused the documentation files of record, the following further order is made:

1. The respondent shall maintain the applicant and the parties' minor children *pendente lite* as follows:

1.1 By effecting payment of the cum of R145 000.00 (One Hundred and Forty Five Thousand Rand) per month to the applicant, on or before 7 December 2017 and thereafter, on or before the first day of each succeeding month into an account nominated by the applicant from time to time in writing, without deduction or set off;

1.2 By making a garage card available to the applicant for the use by the applicant only in respect of her vehicle with a maximum limit of R5 000.00 (Five Thousand Rand) per month;

1.3 Payment of a maximum amount of R20 000.00 (Twenty Thousand Rand) per child per annum *pendente lite* towards the cost of each child's birthday party (exclusive of any personal gifts or presents), such amount to be paid directly to the relevant service providers, alternatively, the respondent shall reimburse the applicant for all expenses so incurred by her in respect of the birthday parties in respect of which she has made payment within 5 (five) days of the applicant providing the respondent with proof of payment and/or the relevant invoices;

1.4 Payment of the sum of R200 000.00 (Two Hundred Thousand Rand) per annum *pendente lite* towards the applicant's and the children's holiday costs with the applicant at a

destination as determined by her. The amount shall be paid by the respondent annually in advance to the applicant by no later than 15 December of each year commencing in 2017. The applicant shall utilise the said contribution at her sole discretion towards her holiday costs with the children over the ensuing 12 month period;

1.5 Payment of the refuse, sewage and water account in respect of the applicant's accommodation;

2. Directing that the maintenance payable by the respondent, as referred to in paragraphs A2.7 and B1.1 – B1.5 above, shall increase annually on 1 December in accordance with such rise as may have occurred in the Consumer Price Index for the Republic of South Africa as notified by Statistics South Africa (or its successor) from time to time for the preceding year, the first such increase to be effected on 1 December 2018;

3. … ;

4. … .

[9] The wife alleged in her founding affidavit that the husband has failed to comply with the order made in the rule 43 proceedings in the following respects:

1. He has not paid the CPI related increase on the monthly cash maintenance payable in terms of para. B1.1 read with para. B2 of the order.
2. He has refused to reimburse her for medical expenses not covered by medical aid incurred in respect of her and the children in the sum of R46 164,10, and for which he is allegedly liable in terms of para. A2.2 of the order.
3. He has refused to increase the payments for which he is liable in respect of prepaid electricity in terms of para. A2.7 and in respect of expenses incurred on the garage card provided to the wife in terms of para. B1.2 of the order. The alleged extent of his default in this regard was R2 080 at 21 March 2019, being the date upon which the supporting affidavit was deposed to.
4. He has failed to fully reimburse the amount of R32 032 paid by the wife in respect of the annual school fees in respect of the parties' daughter. In this regard it is apparent that the husband has chosen to reimburse the amount in monthly instalments rather than in a lump sum, which meant that as at 21 March 2019 an amount of R25 625 remained outstanding. The husband is alleged to be in default of his obligations in terms of para. A2.4 of the order in this regard.

5. He has allegedly failed to pay expenses incurred by the wife as at 7 February 2019 in the sum of R54 418, 27 in respect of 'prescribed stationery and school books, school uniforms, and clothing relating to the children's education, sporting and extramural activities'; that, also in breach of para. A2.4 of the order.

6. He has failed to pay expenses in the sum of R43 500 incurred in respect of the children's extramural activities, including the costs of a personal trainer for A jnr., allegedly agreed to when A jnr. ceased taking part in Crossfit (referred to in para. A2.5.1 of the order). It would appear that the non-payment in question is alleged to have been in breach of the husband's obligations under para. A2.4 or A2.5.1 of the order.

7. He was said to have to failed, in breach of para. A2.4 of the order, to pay for the couple's son, L2's, involvement in a school rugby tour. An amount of R1275 was involved.

8. He refused to pay for repairs to the motor vehicle that is made available for the wife's use. The amount involved is R5 183,50. The non-payment is alleged to be in breach of para. A2.1.4 of the order.

9. It is apparently in issue whether the husband's obligation to settle the water account for the premises at which the wife and the parties' children live includes liabilities incurred by way of penalties imposed for excessive usage.

[10] Subsequent to the institution of the proceedings the wife obtained payment of the sum of R163 651,24 in reduction of her claim in terms of the rule 43 order by way of the proceeds of a writ of execution against the husband's property.

[11] The wife has sought an order that the husband be found to be in contempt of court and that he be sentenced to imprisonment for a period of six months, to be wholly suspended for three years on condition (i) that he not again be found to be in contempt of court during the period of suspension and (ii) that he pay the amounts still outstanding in terms of the rule 43 order to the wife within 10 days of the date of the contempt of court order. The requirements for proving contempt of court in proceedings in which an order of committal or other penal sanction is sought by way of remedy have been settled in *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA), which has been affirmed in the Constitutional Court's judgment in *Pheko v Ekurhuleni City II* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) and a number of subsequent judgments of the apex court.

[12] The object of contempt proceedings is to obtain the imposition of a sanction that will vindicate the court's honour consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order.[1] An applicant who seeks a remedy founded on an alleged contempt of a court order *ad factum praestandum* must prove (i) the existence of the order, (ii) that it has been duly served on, or brought to the notice of, the alleged contemnor; (iii) that there has been non-compliance with the order; and (iv) that the non-compliance was wilful or *mala fide*. Where the first three of the aforementioned requirements have been established, an evidential onus burdens the respondent to negative on a balance of probability the presumption of wilfulness or *mala fides*. All things considered a court will not make an order for the alleged contemnor's committal to prison or impose a penal sanction unless the contempt has been proved beyond reasonable doubt.

[13] There is no issue in the current matter concerning the existence of the order or that the husband has notice of it. The matter of alleged non-compliance with it is contentious, however. And, at least in part, the contestation goes to the import of the order on a proper construction of its provisions.

[14] It is necessary in the circumstances for this court to resolve the dispute about the proper construction of the rule 43 order so that the parties can reassess the extent of their respective obligations and entitlements in terms of it on a firmer footing. It is well established that an order of court falls to be construed according to the ordinary rules and principles pertaining to the construction of documents generally; see *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 304D-F and the other authority cited there, and also *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* [2012] ZASCA 49; 2013 (2) SA 204 (SCA) at para 13, *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC) at para 29 and *S.O.S Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation (SOC) Limited and Others* [2018] ZACC 37; 2018 (12) BCLR 1553 (CC); 2019 (1) SA 370 (CC) at paras 52-54. I should point out immediately that the order does not read sensibly in all respects. However, to the extent that the defects are obvious, they afford no reason not to give effect to the evident objects of the order, which are in all respects clearly enough apparent. So, for example, where paragraph B2 of the order, construed literally, appears to make extent of the husband's obligation to pay certain expenses in terms of paragraph B1.5

[1] *Pheko* supra, at para. 28.

linked to the consumer price index, the direction was clearly *per incuriam*, it being evident on a sensible construction of the order that the husband is obliged - subject to what I shall hold later in respect of the water accounts - to pay the amounts actually due in respect of the accounts mentioned in that paragraph irrespective of the effect of inflation.

[15] The husband contends that he has '*paid the amounts which* [he is] *required, on a proper reading of the Rule 43 order, to pay*'. He points out that in the 16 months between the making of the order and the deposition of his answering affidavit he had expended a total R4 344 669.36 in compliance with its requirements. He does not contest his liability to pay an increased amount of monthly maintenance in terms of para. B1.1 of the rule 43 order. He appears to have thought that payment of the outstanding amount due in this regard had been secured by the attachment of his share portfolio and with monies obtained by the wife by means of execution against the balance in his personal bank accounts. In the peculiar circumstances I am not persuaded that his position in this regard, even if factually incorrect, can be held to be contemptuous.

[16] The complaint in regard to the allegedly unpaid medical expenses has been bedevilled by disputes as to whether everything that the wife has claimed from the husband in that regard fell within the ambit of the order. In particular, the issue arose as to whether certain of the claims were in respect of 'medical expenses' properly so called. The wife conceded in a letter from her attorneys dated 7 February 2019 that some of the claimed expenses were indeed not medical expenses, and she abated her claim by just over R3 000 accordingly. It also became apparent after the application had been launched that the wife had duplicated some of the claims and that the husband had, apparently unbeknown to the wife, settled some of the claims by direct payment to the service providers.

[17] It is regrettable that these issues were not clarified before proceedings were instituted. It seems to me to reflect an inappropriately undiscriminating approach by the wife to the computation of the claims (it matters not to the court whether she does the computation herself or leaves it to her advisors) and an unacceptable lack of communication between the parties on matters of accounting and expenditure. Rushing to court in respect of issues that objectively should have been resolved before the institution of proceedings is an abuse of the court's processes in my view and falls to be discouraged.

[18] My assessment is that both parties are at fault in this regard. The point may be illustrated by considering that whilst the wife's attorneys submitted their client's claim for

medical expenses in the sum of R45 689.88 to the husband's attorneys in a letter dated 27 December 2018 supported by an itemised schedule and copies of invoices and/or proof of payment, the husband's attorneys responded laconically on 22 January 2019 stating that '[n]*umerous items purchased by your client at* [various pharmacies are named] *are not in accordance with the said* [rule 43] *order*'. No detail is provided as to which items have been placed in dispute, and no indication is given of the husband's willingness to comply with his obligation to pay for those items that it is apparently accepted are covered by the order. There is merely an allegation that the husband can no longer afford to comply with the terms of the rule 43 order and a tender of substituted relief *pendente lite* on a materially lesser scale as from 1 February 2019, failing acceptance of which an application is threatened for the variation of the order.

[19] Matters were undoubtedly not assisted by the timing of the wife's demands for payment. Her attorneys' letter was, as mentioned, dated 27 December, and a response was demanded by 7 January. Having regard to the time of year, the timing was hardly diplomatic and liable on that account to evoke hostility rather than cooperation. Such provocations should be avoided, and the parties' legal representatives should be sensitive to the need to foster constructive interaction between their clients so as to avoid or minimise the need for litigation.

[20] The husband also appears to raise an objection to having to pay certain of the wife's claims for expenditure on medical expenses or the children for which the husband is liable in terms of the rule 43 order to reimburse her on the basis that she has not furnished him with both a copy of the applicable invoice and proof or payment. Whilst it is apparent from what has been described earlier in this judgment that there is a need for the parties to improve their communication inter se concerning what has already been paid for and what has not in respect of claims submitted by the wife to the husband, so that erroneous double payments and other claims-related misunderstandings could be avoided, it is nevertheless clear that the order which uses the sometimes deprecated, but nevertheless commonly employed, expression '*and/or*',[2] does not require that the wife's itemised expenditure claims be supported in every case by an invoice and proof of payment.

[21] There is also a dispute about the wife's claim for payment of certain printing and stationery costs alleged to have been incurred in respect of the parties' children. Included in

[2] '*And/or*' was referred to in *Bonitto v Fuerst Brothers & Co Ltd* [1944] AC 75 at 82 by Lord Simon LC as a 'bastard conjunction'.

the items concerned are the purchase by the wife of several hundred 'polyprop' bags, a number of 'ziploc' bags and metres of ribbon cord and jute roll. The husband suspects that some of these amounts are in point of fact in respect of purchases for a business that has been established by the wife. It would appear that the husband was also of the opinion that the children's printing requirements could be adequately met at their respective schools. The wife has produced evidence that suggests that the husband's opinion is misplaced. It would seem that the fact of the matter is that the school printing facilities are limited and that availing of them is expensive.

[22] It should not be for the court to have to resolve petty disputes on relative trivialities such as this. The objection based on the 'polyprop' bags, for example, was raised at a late stage when the wife did not have the opportunity to deal with it in her affidavit in reply. I expect the parties to have resolved their differences in regard to these issues before the matter comes before me again in terms of the directions that I shall give at the end of this judgment, and if they are unable to do that, to have succinctly explained why they are unable to do so. I also suggest that they work out a modus operandi so that future claims for expenditure that have the potential to become contentious are rendered less liable to do so. It is a matter of establishing and maintaining more effective channels of communication and consultation.

[23] The claim that the husband is in breach of his obligation to have paid the wife an amount of R200 000 increased in line with the rise in the consumer price index between 1 December 2017 and 1 December 2018 is premised on a misinterpretation of paragraph B1.4 of the rule 43 order. The wife appears to understand that she is entitled to the payment irrespective of whether she has actually applied the amount paid to her in the previous year for the given purpose. The husband contends on the other hand that the order makes it clear that the allowance is to be spent by the wife on holidays for herself with the children. He says in this regard '*It can never be implied that* [the wife] *would benefit from said payment in her personal capacity beyond the purpose for which this annual payment is specifically made*'. He avers that he had requested the wife to account to him for the expenditure incurred in respect of the amount of R200 000 that he had paid in 2017 and says (unnecessarily enigmatically) that '*on receipt of same, I will take guidance from my legal representatives pertaining to payment accordingly being made to* [the wife].

[24] In my judgment the husband is correct that paragraph B1.4 contemplates that the allowance provided for therein be expended exclusively for the stated purpose, i.e. '*towards the* [wife]*'s and the children's holiday costs with the* [wife] *at a destination as determined by*

her'. The 'sole discretion' vested in the wife in terms of the provision pertains to her right to determine when and where the holidays should take place during each stipulated 12-month period and how the holiday-related expenditure should be applied. She has the sole say as to how long or short the holidays should be and as to matters such as the class of air travel to be used or the standard of accommodation to be availed of for that purpose. It does not, however, vest her with any discretion to use the allowance for anything other than the aforementioned stated purpose, or to do so outside the stipulated period. It follows that should she not use any part of the allowance for the given purpose and within the stipulated period, the unused balance falls to be credited against the husband payment obligation in terms of paragraph B1.4 in respect of the following year. Were it otherwise, the wife could forego holidays with the children or economise on travel and accommodation and apply any consequently unutilised part of the allowance for any other purpose she saw fit. Or she could carry over any saving from one year for expenditure on holidays in the following year. That is clearly not the object or intention of the provision, nor is it consistent with the import of the wording of the paragraph properly construed.

[25] It necessarily follows that an accounting is required in respect of the wife's expenditure in terms of the provision before the amount of the husband's obligation to make payment for the following year can be determined. The required accounting should obviously be done before and as close as practically possible to the middle of December each year so that the husband can make payment of the sum required on the 15th day of the month (or if that is not a business day, on the first business day thereafter).

[26] The necessarily implied requirements of paragraph B1.4 have not been met in this case, and, until they have been, the husband cannot be held to be in breach of his obligation in terms of that paragraph of the order to make his inflation linked payment towards his wife's and children's holiday expenses for the year that commenced on 15 December 2018.

[27] The garage card related maintenance obligation does not, on a proper interpretation of the rule 43 order, commit the husband to pay the wife a contribution towards her fuel expenses in a given amount every month. It commits him rather to making the use of a card with a maximum monthly facility available to the wife to cover her fuel expenses, which is something different. Properly construed paragraph B1.2 read with paragraph B2 of the rule 43 order is a conventional order *ad factum praestandum*, not one *ad pecuniam solvendam*.[3]

[3] For a historical overview of how the courts in this country came to treat orders for the payment of periodic maintenance in matrimonial proceedings as orders *ad factum praestandum*, for the purposes of contempt

To the extent that the husband has not caused the originally determined maximum facility in respect of the card that he has made available to the wife in compliance with the order in the amount of R5000 to be increased with effect from 1 December 2018 in line with the increase in the cost of living as determined with reference to the consumer price index, he has been in breach of the rule 43 order and is liable to remedy the position forthwith.

[28] The wife's claim for a reimbursement of the lump sum that she disbursed in respect of the couple's daughter's school fees is misconceived in my judgment. As mentioned, the husband is reimbursing the amount in monthly instalments. The terms of the order (paragraph A2.4) directed *the husband* to pay the children's school fees directly to the schools concerned. There is no explanation why the wife took it upon herself to pay the school fees. She says that she paid the fees in a lump sum in order to obtain the benefit of the discount that was afforded if they were settled in whole upfront. Apparently, it had been the couple's practice in the past to make payment in that fashion and for that very reason. But that is irrelevant in my view. The obligation to pay the fees having been imposed on the husband in terms of the court order, it was up to him, and not the wife, to determine whether he should settle the debt in a way that would attract the benefit of the discount or not. Having chosen to pay the fees herself, the wife cannot be heard to complain if the husband reimburses her by way of monthly instalments in the manner in which he could have complied with the court order by paying the school. He has certainly not been shown to be in breach of paragraph A2.4 of the order by doing so.

[29] The claim for payment of a personal trainer for the parties' son, A jnr., does not appear to me to fall within the ambit of the rule 43 order. The order provides, in paragraph A2.5.1, for the payment of the expenses incurred in respect of the boy's gym training at Crossfit. Crossfit, so I was informed from the bar, is a gymnasium or a chain of gymnasia. A jnr. has reportedly chosen to give up training at Crossfit, and the claim for a personal trainer at another gym is in substitution for the item of expenditure expressly provided for in paragraph A2.5.1 of the order. The wife says that the husband agreed to pay for the personal trainer. He denies that he did so. Indeed, he claims that he had continued paying for the Crossfit membership for a period, not having been informed that his son was no longer using it.

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proceedings, rather than as orders *ad pecuniam solvendam*, which they logically are, see the full court's judgment in *Hofmeyr v Fourie; BJBS Contractors (Pty) Ltd v Lategan* 1975 (2) SA 590 (C).

[30] If the wife seeks to claim the amount concerned in terms of an agreement, she may, of course, do so in the appropriate way. But it does not appear to me that she may do so under the auspices of the extant rule 43 order. It was contended in correspondence from the wife's attorney that the expenditure incurred in respect of the personal trainer would in any event fall under the general terms of paragraph A2.4 of the order. I do not agree. Such an interpretation of the order would imply that the general and non-specific provisions of the order could cover for substitutes for or alternatives to matters that had been specially and specifically provided for in other provisions of the order. That begs the question 'if the expenditure were covered by the general provisions of the order, what would be the reason for the specific provisions?'

[31] Lawyers will be familiar in the context of interpreting documents with the maxim *generalia specialibus non derogant* (general provisions do not derogate from specific ones). I think that the construction contended for by the wife's attorney would operate in direct opposition to the generally accepted interpretative approach expressed in the maxim. It does not seem to be a sustainable approach to the proper construction of the order. It would imply a degree of tautology that the learned judge who made the order (albeit by agreement between the parties) could hardly have intended. In my judgment, it is apparent from the context that the extracurricular activities to which paragraph A2.4 of the order is directed are activities engaged in by the children incidentally to their schooling. The rugby tour to be referred to later would be an example. That, after all, is the ordinary connotation of the word 'extracurricular'.[4] 'Extramural', which is also used in the paragraph, has essentially the same meaning.[5] In the result I do not consider that there is a valid basis to hold the husband in contempt for his failure to pay for a personal trainer for A jnr.

[32] It has become common ground that the husband had, unbeknown to the wife, paid a total of R15 525,36 directly to service providers in respect of the children's extramural activities. The wife also made payment to the service providers, resulting in a duplication of payment. It is painfully evident in this instance too that this unwholesome situation has arisen through an unacceptable lack of communication between the parties concerning the efficient and effective implementation of the rule 43 order.

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[4] 'Extracurricular' is defined in the Oxford Dictionary of English as *'(of an activity at a school or college) pursued in addition to the normal course of study*'.

[5] 'Extramural' in the pertinent sense is defined in the same dictionary as meaning '*additional to one's work or course of study*'.

[33] It was also common ground by the time of the hearing that the husband had paid the amount of R1275 claimed by the wife in respect of the cost of a school rugby tour in which their son, L2, had participated. This was another instance of a claim being advanced because of a lack of communication.

[34] The husband has refused to pay for the repairs necessitated to the vehicle that is made available for use by the wife in terms of paragraph A2.1 of the rule 43 order. His position is that the terms of the order do not oblige him to pay expenses that are caused through the wife's negligent driving of the vehicle or those that she could recover from the vehicle's insurer. The short answer to those contentions is that the terms of the order unambiguously require him to pay for any necessary repairs or maintenance to the vehicle. The obligation clearly extends to the cost of repairing any damage accidentally caused to the vehicle. It is also clear that the husband is obliged to keep the vehicle comprehensively insured and that he, and not the wife, would accordingly be responsible for prosecuting any claims for indemnity against the insurer should the occasion arise. As it is, the evidence suggests that amount of the claim is such as to render any claim against the insurer unviable.

[35] In the circumstances, whilst I consider the position adopted by the husband in this regard to have been unreasonable, I am nevertheless not satisfied that it has been proven that he acted mala fide in refusing to pay for the repairs. This judgment serves to clarify the position, and there is therefore no basis upon which the husband may hereafter validly persist in his failure to pay the repair costs.

[36] Turning then to the husband's contention that the terms of paragraph B1.5 do not oblige him to pay for penalties imposed in respect of excessive water consumption at the property where his wife and children live. I agree that that is so. Judicial notice may be taken that water restrictions apply in most of the Western Cape Province in consequence of the recently experienced drought. One of the ways in which the local authorities who are obliged by directives issued by the national Department of Water Affairs to limit water consumption seek to achieve compliance with that obligation is to impose restrictions on domestic consumers and to financially penalise those who disregard the applicable limits. In my judgment, on a proper construction of the rule 43 order, its provision that the husband must pay the water account is not intended to indemnify the wife against penalties imposed for consumption of water in breach of the restriction imposed in terms of an applicable by-law. The provision obliges the husband to pay the account for water lawfully consumed at

the property; it does not require him to pay for penalties incurred for water consumption in excess of that permitted by law or regulation.

[37] It would appear that the husband may have withheld compliance with those provisions in the rule 43 order that require him to increase certain payments annually in line with the applicable changes in the consumer price index on the basis that he intends making application in terms of rule 43(6) for a variation of the order. An indication of the nature of the variation that he will apparently seek has been given in the correspondence between the parties' attorneys. It proposes a material reduction in the extent of his monetary obligations in terms of the order as it currently stands. The application has not been proceeded with yet because of an agreement between the parties that it would be withheld until after the determination of the other application that is before me for the setting aside of the aforementioned subpoena *duces tecum*. I refrain from expressing any view on the advisability of that agreement. Suffice it to say that the prospect of a variation of the existing order affords no justification to withhold compliance with that order before any variation that may be sought is actually granted.

[38] The wife's calculation of the amount she contends is outstanding by the husband in terms of the rule 43 order has in material respects been done on an interpretation of the order that differs from that declared in the preceding paragraphs of this judgment. Ms *Buikman* SC, who appeared for the wife at the hearing, handed up a useful recapitulation of what the wife contended to be outstanding. It would serve no purpose to set it out because it is evident that the calculation will require revisiting in the light of this judgment. I am therefore not in a position until that has been done to reach a conclusion on the contempt of court application.

[39] It is of concern, however, that it has been necessary for the wife to obtain satisfaction of a substantial amount of the sum that has fallen due in terms of the rule 43 order by means of execution against the husband's property. While that means of obtaining satisfaction of a maintenance order is available, its availability does not derogate from the established characterisation of periodic maintenance orders as orders *ad factum praestandum*. In my view the somewhat unconventional characterisation has become entrenched as a manifestation of judicial policy. It is implicit in that policy that the beneficiaries of such orders should in principle not be required to enforce them by taking out writs of execution as a judgment creditor would for the enforcement of an order *ad pecuniam solvendam*. It follows that a judgment debtor in terms of a maintenance order sounding in money is prima

facie in contempt if he or she fails to comply with the order and leaves it to the judgment creditor to try to enforce it by execution. There is a duty on such a judgment debtor to proactively discharge the maintenance obligation imposed in terms of the court order. It cannot be treated like a commercial debt.

[40] On account of the concern noted in the preceding paragraph, I have decided *mero motu* to give directions for the further conduct of the contempt of court application; cf. P*heko* supra, at paras. 29-30 and 37. It will be directed that the parties effect a reconciliation of the outstanding obligations in terms of the rule 43 order and the husband's discharge thereof consistently with the clarification as to the import of the order in this judgment. The husband will be directed to ensure that his payments in terms of the rule 43 order are brought up to date in accordance with such reconciliation by a given date. And the issue of his alleged contempt of court, including the question of whether it might be held to be wilful or mala fide, will be considered in the context of his compliance with the said directions on a date to be fixed. It would be appropriate in the circumstances for the matter to be retained by me for the purpose of the envisaged further consideration and eventual determination of the contempt of court application.

[41] The parties are urged to comply punctiliously with the directions given by the court in the order to be made at the end of this judgment. The order is directed at bringing these proceedings to an effective and final determination on a constructive basis. I consider it only fair to give warning that any inexcusable failure to comply by either party may have far-reaching consequences. In the case of the wife, it could result in the striking of her application from the roll with an adverse costs order. In the case of the husband, he should be reminded that whilst an order for committal for contempt of court is ordinarily suspended on condition that non-compliance with the court's order is remedied within a stated time, that is not invariably the case. Committal can also competently be ordered for punitive rather than coercive purposes; cf. *Pheko* supra, at para. 30-31.

The application in case no. 3487/19 to set aside a subpoena

[42] The nature of this application to set aside a subpoena *duces tecum* served on Absa Bank Ltd to produce the banking account statements of certain companies in which the husband is a shareholder, and in respect of the which accounts he is an authorised signatory, has already been described in general terms in paragraph [2] above. The subpoena was issued at the instance of the wife ostensibly to procure evidence for use in the pending

divorce action between the parties. The bank has already complied with the subpoena and has lodged the subpoenaed documentation with the registrar in compliance with rule 38 of the Uniform Rules of Court. The husband became of aware that the subpoena had been served only because the bank advised him of the matter and gave him notice of its intention to comply with the subpoena. The registrar, who has been cited as the second respondent in the application, but has taken no part in the proceedings, would in the ordinary course have made the documentation available to the parties for inspection and copying. However, in the circumstances of the intervening application for the setting aside of the subpoena, arrangements were made that the documentation would be held by the registrar under seal pending the determination of the application.

[43] The general principles applicable to the determination of applications of this nature are well settled. In *Beinash v Wixley* 1997 (3) SA 721 (SCA), [1997] 2 All SA 241, [1997] ZASCA 32 at pp.734D-735A (SALR), Mahomed CJ summarised the approach adopted by the courts as follows:

> There can be no doubt that every Court is entitled to protect itself and others against an abuse of its processes. Where it is satisfied that the issue of a subpoena in a particular case indeed constitutes an abuse it is quite entitled to set it aside. As was said by De Villiers JA in *Hudson v Hudson and Another* 1927 AD 259 at 268:
>
> > 'When . . . the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse.'
>
> What does constitute an abuse of the process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of 'abuse of process'. It can be said in general terms, however, that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective. …
>
> Ordinarily, a litigant is of course entitled to obtain the production of any document relevant to his or her case in the pursuit of the truth, unless the disclosure of the document is protected by law. The process of a subpoena is designed precisely to protect that right. The ends of justice would be prejudiced if that right was impeded. For this reason the Court must be cautious in exercising its power to set aside a subpoena on the grounds that it constitutes an abuse of process. It is a power which will be exercised in rare cases, but once it is clear that the subpoena in issue in any particular matter constitutes an abuse of the process, they will not hesitate to say so and to protect both the Court and the parties affected thereby from such abuse. (*Sher and Others v Sadowitz* 1970 (1) SA 193 (C); *S v Matisonn* 1981 (3) SA 302 (A).)

Cf. also *Mostert and Others v Nash and Another* 2018 (5) SA 409 (SCA) at para 25, *Meyers v Marcus* 2004 (5) SA 315 (C) and *South African Coaters (Pty) Ltd v St Paul Insurance Co (SA) Ltd and Others* 2007 (6) SA 628 (D).

[44] The husband contends that the use of the subpoena in the current matter is an abuse of the court's process and an unwarranted breach of the confidentiality of the companies' information. He points out through his counsel that not even a shareholder is entitled as of right to direct access to a company's unpublished financial records.

[45] In respect of the latter point it is striking that the affected companies have taken no issue with compliance by their banker with the subpoena. The point has not been taken by the wife, but I have some doubt in the circumstances whether the husband has the necessary standing to challenge a subpoena on a third party.

[46] The question of standing enjoyed some attention in a comparable, albeit factually distinguishable, context in the *South African Coaters* case mentioned earlier. As I understand that judgment it held that even if the applicant to set aside a subpoena *duces tecum* had no proprietary interest in the subpoenaed documents he or she would still have standing to attack the subpoena if it could be shown that its issue involved an abuse of the process of the court. I think it must be implied in Magid J's finding to that effect that the abuse of process concerned must nevertheless be one that in some or other cognisable way adversely impacts on the applicant's rights or interests.

[47] In the current matter the husband argues that the information in the subpoenaed bank statements that might give some revelation of his personal financial affairs could be obtained by other means; for example, through discovery by himself of documents such as his tax returns. (Discovery has not yet taken place in the action, although the pleadings having closed there is no reason why it should not have.) Even assuming that discovery would afford an alternative way to obtain the evidence, I am not persuaded in the particular circumstances of this case that would show that the procurement of the subpoena is an abuse that impacts adversely on the husband's rights or interests. Discovery is a most useful procedure in litigation, but its effectiveness is to a significant extent dependant on the litigants' honesty and bona fides. Subpoenas *duces tecum* are a discrete tool that can be availed of, amongst other purposes, as a checking mechanism in respect of the adequacy or probity of an opponent's discovery. As Koen J pertinently observed in *M v M* [2016] ZAKZPHC 59 (20 July 2016), at para. 16, '*The right to issue a subpoena duces tecum as of*

right, is a very powerful tool in the hands of a litigant in pursuit of the truth, who wishes to place all relevant facts and documents relevant to a lis before a trial court. Not surprisingly then, the grounds for interfering with that right are circumscribed in restrictive terms.'.[6] And in this case it is any event not apparent that the husband, at least not in his personal capacity, would receive or be in possession of the companies' bank statements, and hence it is not obvious that they would be discoverable in his hands. The persons more obviously liable to be called, if necessary, as witnesses to produce them would be the bank or the company secretaries of the companies concerned.

[48] A subpoena that requires the production of obviously irrelevant evidence would ordinarily be regarded as an abuse of process because on the face of matters it would suggest the use of the court's process for an ulterior purpose, or at the very least for a purpose for which it was not intended. But, as pointed out by Griesel J in *Meyers v Marcus* supra, at para. 35, '*the issues of relevance and abuse of the process, though possibly inter-related, are separate and distinct. Thus, a subpoena issued in respect of a witness unable to give relevant evidence or to produce relevant documents will ordinarily amount to an abuse of the process of the court. However, the converse is not necessarily true: the evidence sought to be obtained may be relevant and yet amount to an abuse of the process. This will be so, inter alia, where the subpoena is issued for an improper purpose*'. An example, in which a subpoena *duces tecum* for the production of relevant documentary evidence might be found to be an abuse of process is when the timing of its procurement suggests that it has been procured for an ulterior purpose. This was one of the considerations that weighed with the appeal court in *Beinash v Wixley* in its conclusion that the respondent in that matter had been on good ground in seeking the setting aside of the subpoena there in issue; see *Beinash* supra, at 735I-736C.

[49] In the current matter, Ms *Holderness*, who appeared for the husband, argued that the bank statements were irrelevant in the context of the pleaded case in the pending action. She emphasised that the pleaded claim in respect of partnership-related relief was for declaratory relief and the appointment of a receiver. It would not require the court, if it were persuaded to grant the declaratory order, to determine what the assets of the partnership were. Some of

[6] When the learned judge referred to 'restrictive terms' he had in mind the provisions of s 36(5) of the Superior Courts Act 10 of 2013, but he did proceed in the following paragraph to acknowledge, with reference to the unaffected common law, that those provisions were not exhaustive. The judgments referred to in para. [43] above, in which the common law was applied, all contain remarks emphasising the caution that falls to be exercised before a decision is made to set aside a subpoena *duces tecum*. They subscribe to the judicial policy that it should be done only in the clearest of cases, when it is certain that the measure is warranted.

the companies concerned are in any event not alleged to be involved in the partnership contended for by the wife. Ms *Holderness* also stressed the likelihood of the partnership-related claim being separated from, and determined before the other issues in the action, and argued that the timing of the procurement of the subpoena insofar as the information in the bank statements might disclose evidence concerning the husband's means of possible relevance to the determination of the wife's claim in terms of s 7(2) of the Divorce Act showed that the bank statements were being sought for the extraneous purpose of harassing the husband in interlocutory proceedings. In this regard Ms *Holderness* argued that, taking into account the likelihood of the aforementioned separation of issues, the trial of the wife's maintenance claim, if it takes place at all, will only come on in two or so years from now at the earliest. She argued this begged the question of why the wife should have any bona fide reason to obtain the subpoenaed documentation at this stage.

[50] I am inclined to agree that the subpoenaed documentation has no discernible relevance in the partnership-related claim. The issue of a separation of issues was not relied on by the husband in his supporting affidavit, however. And an application for a separation of issues in terms of rule 33(4) has not yet been made, as far as I am aware. Until a separation of issues is agreed upon or directed, the wife is entirely within her rights to prepare her case for trial by obtaining the relevant evidence on all the pleaded issues. I am accordingly not satisfied on that score that the procurement of the subpoena was an abuse of the court's process.

[51] It is apparent from the wife's answering affidavit, and not effectively rebutted by the husband in reply, that evidential material already obtained by the wife shows that various of the husband's apparently personal expenses have been funded through the companies in which he is shareholder. In the circumstances it is not possible for the husband to gainsay the wife's assertion that the information in the subpoenaed bank statements may very conceivably afford evidence that would be germane to some of the considerations that any court seized of a claim in terms of s 7(2) of the Divorce Act is enjoined to have regard, viz. the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, and the standard of living of the parties prior to the divorce.

[52] It may well be that the evidence obtained under the subpoena might be of use to the wife in any interlocutory proceedings related to the interim maintenance regime pending the determination of the divorce action, but if that is incidentally so, so be it. It would not make obtaining the evidence at this stage an abuse. The collection of evidence at any early stage is

ordinarily a legitimate exercise in the preparation for a trial. It may even be conducive to an early settlement of the case – something that, were it to be achieved, would generally be in the interests not only of the parties themselves, but also in the interests of administration of justice because it would alleviate pressure on the trial rolls. As matters stand, the only pertinent further interlocutory proceedings threatened at this stage are an application by the husband to reduce the extent of his maintenance obligations *pendente lite*. In that context it hardly behoves him to contend, as he also did, that the evidence his wife seeks to obtain by way of the subpoena is unnecessary because, he asserts with prejudice, he is able to pay any amount of maintenance the trial court may order.

[53] In the circumstances, assuming in the husband's favour that he had the legal standing to bring the application (about which I remain doubtful), he has failed to discharge the heavy onus of proving that the procurement of subpoena *duces tecum* was an abuse of the court's process. In the result the application to set the subpoena aside must fail. There is no reason why costs should not follow the result.

[54] The following orders are made:

A. **In the contempt of court application in case no. 2331/2017:**

1. The respondent is directed to -

   i. within 5 days of the date of this order, settle in full the amount in which he may currently be in arrears by reason of any failure by him to date to comply with the provisions of paragraph B2 of the rule 43 order (properly read), excluding only the amount that is the subject of paragraph B1.4 thereof;

   ii. within 5 days of the service by email on his attorneys of record of the accounting by the applicant directed in terms of paragraph 6 of this order, settle in full the amount of his outstanding liability in terms of paragraph B1.4 of the rule 43 order in respect of the period 15 December 2018-14 December 2019;

   iii. within 5 days of the date of this order, arrange for the monthly expenditure limit on the garage card provided to the applicant in terms of paragraph B1.2 of the rule 43 order to be increased as required by paragraph B2 of the order; and

iv. within 5 days of the date of this order, to reimburse the applicant for the cost of repairs to the motor vehicle used by her in terms of paragraph A2 of the rule 43 order.

2. The parties are directed, in cooperation with each other, to draw up a reconciliation account in respect of the payments due by the respondent to the applicant in terms of the rule 43 order in accordance with the tenor thereof as construed in this judgment. The said account must treat of the outstanding amounts due at the date of the institution of the contempt of court application and of any payments by the respondent in settlement thereof, and must, in particular, identifiably reflect the extent of the respondent's compliance with the terms of paragraph 1 of this order.

3. The aforementioned statement of account, signed by the attorneys of record of both of the parties, must be filed of record with the registrar of the presiding judge (Binns-Ward J) by Thursday, 31 October 2019.

4. The respondent is directed to ensure that all of his outstanding obligations in terms of the agreed items reflected on the aforementioned statement of account, besides those specifically provided for in terms of paragraph 1 above, are discharged on or before 31 October 2019.

5. In the event that the parties are unable to agree on any item to be accounted for in terms of the aforementioned statement of account, each party is directed to deliver an affidavit succinctly setting forth the reasons for the disagreement and their contentions as to how the issue in contestation should be determined. Any affidavit falling to be delivered in terms of this paragraph must be delivered by Tuesday, 5 November 2019 and the filing thereof is to be effected with the registrar of the presiding judge.

6. For the purposes of enabling compliance by the respondent with paragraph 1(ii) of this order, the applicant is directed to account to the respondent in respect of her expenditure of the amount of R200 000 paid to her by the respondent in terms of paragraph B1.4 in respect of the period 15 December 2017- 14 December 2018 by no later than Thursday, 17 October 2019.

7. For the purposes of enabling further compliance by the respondent with paragraph B1.4 of the rule 43 order, the applicant is directed to account to the respondent in

respect of her expenditure on holidays for herself and the children during the period 15 December 2018 – 14 December 2019 by no later than Thursday, 5 December 2019, and upon timeous receipt of the account, the respondent is directed to effect payment of the amount due by him in terms of paragraph B1.4 by noon on Monday, 16 December 2019.

8. The application is postponed to Monday 3 February 2020 for further consideration and final determination in the context of the parties' compliance with the aforegoing directions.

B. **In the application in case no. 3487/19 to set aside a subpoena:**

1. The application is dismissed with costs.

A.G. BINNS-WARD
Judge of the High Court