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Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. 6034/2016

Before: The Hon. Ms Acting Justice Hofmeyr

Date of hearing: 3 August 2023

Date of judgment: 11 August 2023

In the matter between:

J[…] M[…] G[…] W[…]	Applicant
And	
M[…] J[…] W[…]	First Respondent
THE SHERIFF, JOHANNESBURG NORTH	Second Respondent

JUDGMENT

Judgment handed down electronically by circulation to the parties' legal representatives on email and released to SAFLII

HOFMEYR AJ:

1 The applicant and the first respondent were divorced in 2016. For convenience, I shall refer to the first respondent as “the respondent” in this judgment because the second respondent took no active part in the proceedings. The parties concluded a settlement agreement at the time of their divorce to deal with issues such as maintenance and care for their children.

2 A number of years later, in mid-2022, the respondent caused a warrant of execution to be issued against the applicant, for the amount of R172,222.97 which related to alleged arrear maintenance in the amount of R46,000.00 and alleged arrear school fees from 2016 in the amount of R129,222.97.

3 Pursuant to the issue of the warrant, the sheriff attached a number of the applicant’s movables and prepared an inventory. However, an arrangement was reached between the parties and the movables were not removed from the applicant’s residence. That has been the position since the issue of the warrant and remains the position. The applicant has therefore not be deprived of his movable property but it remains attached pursuant to the warrant.

4 The applicant launched proceedings in this Court on 8 July 2022 to have the warrant and attachment set aside, alternatively stayed, while the matter is referred to oral evidence. I shall refer to the application as “the main application”.

5 The respondent was slow to deal with the matter. She only opposed the application on 1 September 2022 and filed her answering affidavit on 7 September 2022. As a result, the matter, which was originally set down on the unopposed roll for 14 September 2022, was postponed to 13 February 2023 with an order requiring the respondent to pay the wasted costs of the postponement.

6 When the respondent filed her answering affidavit on 7 September 2022, she did not seek condonation for the late filing of the affidavit but she did indicate, through her attorneys in correspondence, that she would bring a formal condonation application.

7 However, she did not do so for many months. Instead, in the week prior to the hearing of the main application, she delivered a condonation application. The applicant did not have sufficient time to answer the condonation application so the matter was again postponed but costs of that postponement were reserved.

8 The matters before me are therefore fourfold:

8.1 Who should pay the reserved costs of the postponement in February this year?

8.2 Should condonation be granted for the late filing of the respondent's answering affidavit in the main application?

8.3 Should the main application be granted?

8.4 Who should bear the costs of both the condonation application and the main application?

9 I shall deal with each issue in turn.

The reserved costs of the postponement in February

10 Despite indicating in September 2022 that she would bring a condonation application, the respondent delayed for five months and then only filed the application in the week before the scheduled hearing of the main application.

11 Her approach in the condonation application was quite extraordinary. Despite not seeking condonation when she initially delivered her answering affidavit in the main application, and despite delaying for five months to bring the condonation application, she gave the applicant a day and a half to oppose the application and a further half day

to file opposing papers. There was no justification for this precipitous and prejudicial handling of her request for condonation. There was not even an explanation in her founding affidavit in the condonation application of why she deemed it appropriate to so severely truncate the timelines for the applicant to answer the application.

12 The late delivery of the condonation application was the cause of the postponement of the main application from 13 February 2023. No adequate explanation for her delay was proffered. The respondent should therefore be ordered to pay the wasted costs of the February 2023 postponement.

The condonation application

13 The reasons given for the respondent's delay in filing her answering affidavit in the main application were twofold. She said that she is a single mother and has her time taken up with care for their children and running her own business. She also explained that she was very concerned about the legal fees involved in opposing the application and hoped that the parties could find each other. But when they could not, she realised that she would need to oppose the application to avoid having the warrant set aside on an unopposed basis.

14 Courts have a general discretion to condone the late filing of affidavits when it is in the interests of justice to do so.[1] The difficulty that I have with the respondent's explanation of her delay is that she was content to incur legal costs and to act swiftly when she decided to take steps to have the applicant's property attached but she was not as wiling to incur those fees and act timeously when she was a respondent in these proceedings.

15 The respondent's conduct must be placed in its proper context. At the time that the respondent caused the warrant to be issued, the arrears that she says justified the

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1 *Baron and Others v Claytile (Pty) Ltd and Another* 2017 (5) SA 329 (CC) para 26

warrant had been unpaid, on her own version, for six years and three years, respectively. It is clear from the papers that the parties have been unable to resolve matters amicably for some time. However, when the applicant then took steps to have that warrant set aside, the respondent's main explanation for not abiding the rules of court is that she had hoped the parties could find each other. In the full context of their dealings with each other prior to the issue of the warrant, that was an unrealistic expectation.

16 The respondent's explanation for her delay is therefore less than compelling. But no prejudice has arisen from her delay. Mr Ebersöhn, who appeared for the applicant, confirmed that there is no allegation on the papers of prejudice to the applicant as a result of the delay in the matter – the attached movables have not been removed.

17 When considering whether to condone the late filing of the respondent's answering affidavit, I am also required to assess the merits of her defence to the main application.[2] As I shall set out in more detail below, I find that the respondent has a good defence on the merits of the case set out in the applicant's founding affidavit. The fact that her defence is a strong one, and there has been no prejudice to the applicant as a result of the delay, tilts the balance in favour of admitting the affidavit despite its late delivery and the weak explanation provided for its delay.

18 Mr Torrington, who appeared for the respondent, advanced a further argument in favour of condonation. He argued that because the applicant had filed a replying affidavit in the main application, he had taken a further step in the proceedings and had therefore abandoned his right to oppose the condonation application. Mr Torrington relied on the case of *Ardnamurchan Estates (Pty) Ltd v Renewables Cookhouse Wind Farms 1 (RF) (Pty) Ltd and Others* [2021] All SA 829 (ECG) for this proposition. It is not clear to me that the decision in *Ardnamurchan* is correct because our law generally

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2 *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) at 720E – G; *Darries v Sheriff, Magistrate's Court, Wynberg* 1998 (3) SA 34 (SCA) at 40H – 41E

applies a strict approach to the waiver of rights,[3] and in Ardnamurchan's case, the applicant had expressly stated, when filing the replying affidavit, that it did so without conceding that the answering affidavit was properly before court. However, I do not need to make a finding on this issue because I have, in any event, decided to grant the condonation application for the reasons given above.

19 The costs of the condonation application require consideration. When the respondent brought the condonation application, she was seeking an indulgence from the court which would ordinarily mean that she should bear the costs of the application. But more than this, she delayed, without good explanation, for five months before even bringing the application and she gave the applicant only two days to answer. The applicant was within his rights to oppose the condonation by the sheer fact of its lateness.

20 I therefore find that condonation should be granted but that the respondent should bear the costs of the condonation application.

The main application

21 By the time the application was argued before me, the applicant had paid the respondent a further amount. It was therefore common cause between the parties that this payment, together with the facts that emerged in the respondent's own answering affidavit, meant that the claim for arrear maintenance of R46,000.00 was no longer in issue.

22 The question before me was therefore whether to set aside the warrant in so far as it was underpinned by a claim for payment of alleged arrear school fees.

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[3] See, for example, *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) para 81

23 The applicant brought his application to set aside the warrant, in so far as the arrear school fees was concerned, on the basis that the settlement agreement that had been concluded between the parties at the time of their divorce required the respondent to pay the school fees out of monies that she received from the applicant's ABSA pension funds. He said that the respondent had, in fact, paid the school fees out of those funds and therefore denied that he owed the respondent any amount in relation to the school fees.

24 The respondent's defence to this allegation was that the applicant's obligation to pay the school fees was *in addition* to the monies that she was to receive from his ABSA pension funds. In other words, on her interpretation of the settle agreement, it provided that she would be paid the pension monies and it was not expected that the school fees would be paid *from* those funds. Payment of the school fees was an additional obligation placed on the applicant under the agreement.

25 The respondent's interpretation of the settlement agreement accords with its own terms, as well as the subsequent conduct of the parties.

The settlement agreement

26 The relevant clause of the agreement is clause 3.5. Under the agreement, the applicant is referred to as the Defendant and the respondent as the Plaintiff. Clause 3.5 reads as follows:

> "*Defendant undertakes to pay the full amount due to the minor children's present schools (as referred to in clause 3.8 below) for the 2016 year in advance on date of receipt of the funds referred to in clauses 5.8 and 5.9 below. Defendant authorises plaintiff to pay such amounts as set out in clause 6 below*."

27 It was common cause between the parties that the "funds referred to in clauses 5.8 and 5.9 below" were the two ABSA pension funds to which the respondent had a 100% and a 43.26% entitlement respectively.

28 It was also common cause that the amounts set out in clause 6 of the agreement were amounts that would be paid from the applicant's Investec account.

29 The bone of contention between the parties was what the first sentence of clause 3.5 meant. Did it mean that the school fees were to be paid *from* the amounts that were owed to the respondent or merely that the applicant was to pay the school fees *on the date* that the respondent received the amounts owing to her?

30 It is firmly established in our law that the interpretation of legal documents requires the consideration of a triad of text, context and purpose.[4]

31 In the case of clause 3.5, the plain text of the clause supports the respondent's interpretation. It says in clear terms that it is the Defendant [the applicant] who undertakes to pay the school fees. It then says that the undertaking is to pay on the date that the funds from his pension are received. The clause does not say that the undertaking is to pay the school fees *from* the pension funds received. On the contrary, if that was its intended meaning, it would not make sense to say that it was the Defendant [the applicant] who undertook to pay the school fees. It ought to have said that it was the Plaintiff [the respondent] who undertook to pay the school fees from the monies she received from the pension funds.

32 Furthermore, the method by which the payment was to be effected was from the applicant's Investec account. The Investec account held his monies. This payment mechanism therefore further reinforced that it was his obligation to pay the school fees

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4 *Close-Up Mining and Others v Boruchowitz NO and Another* 2023 (4) SA 38 (SCA) para 23

and not the respondent's, because the method of payment would be from *his* Investec bank account.

33 The parties' subsequent conduct, which is relevant context for the interpretation of the agreement,[5] also reinforced that this was their common understanding of the agreement.

34 In his replying affidavit, the applicant denied the respondent's interpretation of the agreement but then said that the 2016 school fees were "in any event, deducted from [his] portion of the purchase price of [his] undivided half share in the matrimonial home".

35 In essence, what the applicant was saying in this section of his replying affidavit is that even if the respondent's interpretation of the settlement agreement prevailed and he was liable for the 2016 school fees, he had already paid them because the respondent had deducted them from his share of the proceeds of the sale of their matrimonial home. The applicant attached copies of Whatsapp communications between him and the respondent, around the time of the sale of their home, in which the respondent clearly stated that she was going to deduct the 2016 school fees from the amount that she paid over to the applicant from the proceeds of the sale of their home.

36 This conduct of the parties is consistent with the respondent's interpretation of the agreement. It was because the respondent was not required to pay the school fees, but had in fact done so at the time, that when the house was later sold, she deducted an amount for the 2016 school fees from the amount she paid over to the applicant. This common approach to the proceeds from the sale of their home indicates that they both accepted that it was the applicant's liability to pay the school fees. If this was not their common understanding, one would have expected the applicant to protest when the

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5 *Passenger Rail Agency of South Africa v Sbhahle Free Services CC* (230/2019) ZASCA 90 (4 August 2020) held at para 26

respondent said she was going to deduct the school fees from what she was paying him. But he did not raise any disagreement.

37 In my view, it is clear from the language of the agreement itself, the common cause aspects of its interpretation between the parties, and their subsequent consistent conduct, that the applicant bore the obligation to pay the 2016 school fees.

38 This means that the respondent's interpretation of the agreement is the correct one and the applicant ought not to succeed in setting aside the warrant based on the applicant's incorrect interpretation of the agreement.

39 However, that cannot be the end of the matter because the subsequent conduct of the parties (which confirms the respondent's interpretation of the agreement) also implies that the respondent has already been reimbursed for the school fees. And if the respondent has already been reimbursed for the school fees, then the warrant of execution should not remain in place.

40 This point, about the subsequent conduct of the parties when their matrimonial home was sold, was not set out in the founding papers. It was introduced in reply. As I read the replying affidavit, the applicant introduced the Whatsapp communications not to detract from his main argument – namely that he was not liable under the terms of the settlement agreement – but as an alternative point. He maintained that he was not liable to pay the school fees, but even if he were wrong on his interpretation of the settlement agreement, then he said that he had already paid for them because they were deducted from the portion he was paid from the proceeds of the matrimonial home.

41 At the hearing of the matter, Mr Torrington implored me to disregard the facts about the Whatsapp communications in the reply or to postpone the matter, if I was inclined to consider them, so that the respondent could file a further affidavit.

42 It is trite that a party must make out his case in motion proceedings in his founding affidavit and that he will not generally be allowed to supplement his case by adducing supporting facts in the replying affidavit. But this is not an absolute rule. In *Mostert and Others v FirstRand Bank t/a RMB Private Bank and Another*, the Supreme Court of Appeal explained the position as follows:

> "*It is trite that in motion proceedings, the affidavits constitute both the pleadings and the evidence. As a respondent has the right to know what case he or she has to meet and to respond thereto, the general rule is that an applicant will not be permitted to make or supplement his or her case in the replying affidavit. This is not, however, an absolute rule. A court may in the exercise of its discretion in exceptional cases allow new matter in a replying affidavit. See the oft-quoted dictum in Shephard v Tuckers Land and Development Corporation (Pty) Ltd (1) 1978 (1) SA 173 (W) at 177G – 178A and the judgment of this court in Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others 2013 (2) SA 204 (SCA) para 26. In the exercise of this discretion a court should in particular have regard to: (i) whether all the facts necessary to determine the new matter raised in the replying affidavit were placed before the court; (ii) whether the determination of the new matter will prejudice the respondent in a manner that could not be put right by orders in respect of postponement and costs; (iii) whether the new matter was known to the applicant when the application was launched; and (iv) whether the disallowance of the new matter will result in unnecessary waste of costs.*"[6]

43 The question before me is therefore whether, notwithstanding the fact that the Whatsapp communications are attached to the replying affidavit, I should take them into account in determining whether to set aside the warrant of execution. I conclude that I should for the following two main reasons.

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6 *Mostert and Others v FirstRand Bank t/a RMB Private Bank and Another* 2018 (4) SA 443 (SCA) para 13

44 First, it is not clear to me that the Whatsapp communications that are attached to the replying affidavit amount to a new case in reply. The Whatsapp communications were introduced by the applicant in response to the respondent's contrary interpretation of the settlement agreement. His main case for setting aside the warrant was that he was not required to pay for the school fees as it had been agreed between the parties that they would be paid out of the monies that the respondent received from his two ABSA pensions. However, when she proffered an alternative interpretation of the settlement agreement, he responded to say that he still stood by his interpretation but, even if he was wrong, he had already paid for the school fees because the respondent had deducted them from the amount he was paid out on the sale of their matrimonial home. That is not a new case in reply. It is a response to an alternative interpretation of their agreement advanced by the respondent in her answering affidavit.

45 Second, even if I am wrong and the Whatsapp communications are a new case or a supplemental case in reply, then they should still be allowed for the following reasons.

> 45.1 The Whatsapp communications were attached to the applicant's replying affidavit that was filed on 21 September 2022. That is just short of eleven months ago. In all that time, the respondent has not taken steps to seek leave to file a further affidavit to deal with the allegations[7] or to bring an application to strike out the new matter in reply. Both of those options were available to her, but neither of them was taken up. It was simply too late in the day, at the hearing of a matter that has twice been postponed because of the respondent's tardiness, to claim that the whole matter should be postponed, again, to allow her yet a further opportunity to put up a response, when she could have done so at any point in the last eleven months.

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[7] See, for example, *Scibit Scientific Bitware (Pty) Ltd v Potgieter* 2021 JDR 2855 (FB) para 28

45.2 But more than this, the respondent has, in fact, filed two further affidavits in this matter. On 8 February 2023, the respondent delivered the founding affidavit in her condonation application. It is clear from that affidavit that the respondent had considered the contents of the applicant's replying affidavit by the time she deposed to the condonation affidavit. This appears in paragraph 13.2 of her founding affidavit where she pointed out that the applicant had "put forward different versions as to whether he indeed paid the fees or not".

45.3 On 1 March 2023, the respondent deposed to her replying affidavit in the condonation application. That was the second affidavit she deposed to after the applicant filed his replying affidavit in the main application. In her replying affidavit in the condonation application, the respondent deals with the merits of the applicant's case for the setting aside of the warrant but she never addresses the import of the Whatsapp communications attached to the applicant's replying affidavit. Those Whatsapp messages imply that she has already been reimbursed for the 2016 school fees.

45.4 If the respondent had a clear and definitive answer to those facts, one would have expected her to set them out when she was dealing with the merits of the main application in either her founding affidavit in the condonation application or her replying affidavit in that application. Both of those affidavits were filed after the applicant's replying affidavit in the main application and both of those affidavits dealt with the merits of his case for setting aside the warrant.

45.5 Finally, the setting aside of the warrant will not be determinative of the respondent's rights because if, despite the fact that she has not taken the court into her confidence in these proceedings and explained the Whatsapp communications, she does have a valid response to them which shows that the applicant still owes her for the 2016 school fees, she could have another warrant of execution issued on that basis.

45.6 At the hearing of the matter, I raised with counsel for both parties whether there would be anything to preclude the respondent causing a further warrant to be issued if she is still owed for the 2016 school fees, notwithstanding what is set out in the Whatsapp communications. Both counsel agreed that there would be nothing standing in her way.

46 This is, therefore, one of those exceptional cases in which, even if the Whatsapp communications attached to the replying affidavit are new matter, they should, nonetheless, be admitted. Once they are admitted, the warrant must be set aside, because on the papers before me, the respondent has already been reimbursed for the 2016 school fees.

47 The issue of costs in the main application is not straightforward because, although the warrant will be set aside, it will be set aside for a reason different to the main ground on which the applicant approached the court. The applicant's main case before this court was that under the settlement agreement, he was not required to pay for the children's 2016 school fees. However, the agreement itself and the parties' subsequent conduct shows that not to have been correct.

48 Thus, although the applicant has succeeded in having the warrant set aside, it is on a basis that is not only different to his main case for setting aside the warrant, but also inconsistent with it. The respondent successfully met the case set out in the founding affidavit. But the facts set out in the reply, which she has failed to dispute for eleven months, means the warrant must be set aside.

49 In all the circumstances, the fairest costs order in the main application will be for each party to bear their own costs. I shall therefore make no order as to costs in the main application.

Order

50 I therefore make the following order:

(a) The respondent is to pay the wasted costs of the postponement of the matter on 13 February 2023.

(b) The condonation application is granted.

(c) The respondent is to pay the costs of the condonation application.

(d) In the main application, the warrant of execution issued by this Court on 29 April 2022 under case number 6043/2016 is set aside.

(e) The attachment of the applicant's movable property pursuant to that warrant of execution is set aside.

(f) There is no order as to costs in the main application.

K HOFMEYR
ACTING JUDGE OF THE HIGH COURT

APPEARANCES

Applicant's counsel:	Dr Ebersöhn
Applicant's attorneys:	Gerrie Ebersöhn Attorneys Inc
First Respondent's counsel:	Adv Torrington
First Respondent's attorneys:	Butler Blankenberg Nielsen Safodien Inc