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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION,
JOHANNESBURG**

CASE NO: 2023/00100

- (1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

.....

DATE

.....

SIGNATURE

In the matter between:

J[...] M[...]Applicant

and

N[...] L[...] J[...] C[...]Respondent

JUDGMENT

GRAVES AJ:

[1] Ms N.L.J. C[...] applies on motion in terms of Uniform Rule 6(12)(c) for reconsideration of an order granted *ex parte* against her by SENYATSI J on 9 March 2023 in favour of against Ms J. M[...], a practising attorney.¹ The part of the order obtained at the instance of Ms M[...] (hereafter “the Applicant”) which Ms C[...] (hereafter “the Respondent”) wishes to be set aside, authorised the Sheriff to attach and take under his control for the purposes of confirming jurisdiction, a certain immovable property situated at 2[...] T[...] C[...], [...] T[...] S[...], F[...], Johannesburg, as well as funds held by the Respondent in bank accounts at Capitec Bank and Investec Bank, respectively. Further relief sought and granted *ex parte* (and not challenged by the Respondent) authorised the Applicant to serve by edictal citation a summons for recovery of legal fees and disbursements owed by the Respondent to the Applicant in the sum of R883 813,30. A copy of the Summons and *Intendit* were attached to the *ex parte* application (which form part of the reconsideration application).

BACKGROUND TO THE RECONSIDERATION APPLICATION

[2] The founding affidavit in the attachment application dated 28 February 2023 read with the annexures sets out the basis of the claim, and the contractual dispute between the parties. These are the essential features alleged by the Applicant:

- [2.1] the Respondent was said to be a Pilates instructor at that time (February 2023) working at a resort in the Turks and Caicos Islands in the British West Indies;
- [2.2] around July 2021, the Respondent instructed the Applicant to act on her behalf concerning her matrimonial matters. At that stage, the Respondent was residing in Singapore with her estranged husband;
- [2.3] the professional legal services to the Respondent included investigations into personal assets, diverse legal matters concerning, *inter alia*, laws of other jurisdictions and various preliminary legal activities, including Rule 43 proceedings;

¹ As this is an application for reconsideration in accordance with Rule 6(12)(c) I will refer to the parties as they were referred to in the original, *ex parte* papers.

- [2.4] the Applicant says that pursuant to her services rendered to the Respondent a settlement agreement was signed by the parties on 14 October 2022 and subsequently made an order of Court in terms of which a decree of divorce was granted the Respondent received R3 500 000,00 as a settlement from her former husband, each party to pay its own costs;
- [2.5] the settlement amount was paid to the Respondent into her bank account in Singapore, proof of which was attached to the founding affidavit;
- [2.6] on 13 October 2022, the Applicant furnished the Respondent with her *pro forma* statement of account for services rendered and disbursements incurred, excluding counsel's fees yet to be submitted (as notified to the Respondent);
- [2.7] the Applicant met with the Respondent in Cape Town following the finalisation of the divorce, on which occasion the Applicant presented a rough statement of account (which she says was heavily discounted) for the sum of R303 898,36. This statement took into account a prior payment by the Respondent payment of R10 000,00;
- [2.8] the Respondent rejected the account during this meeting and demanded that a bill of costs be taxed. Shortly after the meeting she deposited the sum of R150 000,00 into the Applicant's bank account and set a WhatsApp message to the Applicant expressing her gratitude;
- [2.9] the Applicant prepared a bill of costs in the form that would be presented for taxation, which reflects the sum of R880 813,30 (R3 000,00 less than the amount claimed in the summons) and which she sent to the Respondent on 3 February 2023;
- [2.10] in response the Respondent sent an email on 3 February 2023, asking for all previous bills of cost which she said she wished to refer to her consultants. The bills were forwarded to her at her various email addresses and by WhatsApp on 7 February 2023;
- [2.11] this elicited an email from the Respondent advising that she would not consent to service of any legal process by email, WhatsApp or text as

she was not in South Africa and that the Applicant should follow the proper procedure for service of the legal documents, as per the Uniform Rules of Court;

[2.12] the Applicant states in her founding affidavit that the Respondent no longer resided in South Africa, and that she was unable to serve the notice of taxation and/or bill of costs or other documents on the Respondent other than by edictal citation at (what she understood to be) her work address in the Caribbean and also by electronic means of email and WhatsApp. The Applicant noted that the Respondent clearly had no intention of paying her fees and disbursements and that she had no alternative but to institute legal proceedings for recovery thereof.

[3] The Applicant served her Combined Summons pursuant to the order granted and the Respondent during June 2023 delivered her Plea, in which she denied the terms of the agreement as alleged by the Applicant and maintained that her mandate granted to the Applicant was on a *pro bono* basis. In the alternative and in the event of it being found that the Applicant was entitled to charge for her services, the Respondent alleged that the bill of costs had yet to be taxed and that the Applicant was consequently not entitled to payment of the amount demanded.²

[4] On 10 August 2023, the Respondent launched an application as a matter of urgency asking for setting aside of paragraph 6 of the order for attachment of the immovable property and the two bank accounts, and also for the setting aside of any writs issued out pursuant thereto. The Respondent's case for setting aside was contained in an answering affidavit, to which the Applicant replied.

[5] The case made out by the Respondent in her application for reconsideration is this:

² It was not argued by the Respondent, correctly in my view that the lack of taxation of the bill was a bar to the institution of the action by the Applicant – see **Benson and another v Walters and others**, 1984 (1) SA 73 (A), at 83 A – 84 B.

[5.1] she is domiciled at 2[...] T[...] C[...], [...] T[...] Street, F[...], Johannesburg (being the immovable property attached) and is a citizen of South Africa by birth;

[5.2] she denies that she is a *peregrinus* and maintains that she is an *incola* of the Court;

[5.3] she requires urgent relief due to the attachment of her bank accounts, the proceeds of which are required for support of family members and expenses in relation to the immovable property;³

[5.4] she contends that an *incola* is defined as a person either domiciled or resident within a Court's jurisdiction. She goes on to state the following:

"13. I do not have any other citizenship and I am ordinarily resident in Johannesburg. I am currently staying in the USA; however, I must return to South Africa as my visa only permits me to stay in the USA for a maximum period of six months at a time." [emphasis added]

A copy of the visa was annexed to her papers.

[5.5] She repeats that the mandate granted to the Applicant was *pro bono* and sets out extracts from a series of WhatsApp communications with the son of the Applicant on various dates in April 2020. She maintains that the tenor of these communications demonstrate that the mandate to the Applicant was *pro bono*. She says that the earlier payments made to the Applicant in the sums of R12 000,00, R10 000,00 and R150 000,00 were, in her words, *"made by me ex gratia to express my gratitude for the Applicant assisting me, effectively pro bono"*;

[5.6] finally, she disputes that the Applicant carried out her mandate diligently or that the services rendered by the Applicant were the reason for the settlement concluded.

[6] In reply the Applicant refers to previous statements made by the Respondent to her concerning her intention to continue with her profession as a travelling Pilates instructor in the United States, courting American celebrity clients. The Applicant attaches to her reply a communication addressed by the Respondent to

³ The expenses were categorised as rates, taxes, utilities, levies and other property expenses, payment to her mother on a government pension requiring money for food and living, payment to her unemployed brother and payments for the well-being of her niece.

the Legal Practice Council (“LPC”) on 6 February 2023, enquiring as to the procedure necessary to lodge a complaint against J. M[...] Attorneys, and complaining that the Applicant was attempting to extract moneys from her for work rendered *pro deo*. She also complained that the Applicant was in possession of the original title deed for her father’s small apartment in Florida where her brother lives. The communication to the LPC ends with the following paragraph:

“I live in California, USA, with my new husband and kids. I am travelling Pilates teacher and have been doing so for many years. Therefore I do not have a South African number at this moment but my current WhatsApp number is [...] or call [...].”

[7] During argument I raised with counsel how this application for reconsideration should be approached from a procedural perspective with reference to the affidavits filed by the respective parties in the reconsideration application. Both Counsel advanced submissions on the procedure. Having considered the authorities I am satisfied that the approach to be followed is that set out in the majority judgment of Wallis JA (supported by MOCUMIE, SCHIPPERS JJA and MOKGOHLOA AJA) in **Afgri Grain Marketing (Pty) Ltd v Trustees for the Time-being of Copenship Bulkers A/S (in liquidation) and others**.⁴ It is there set out that a party wishing to have an order set aside on the ground that the papers do not make out a case for that relief may set the matter down for argument and reconsideration, on those papers. The matter is then argued on the original papers and it is not open to the original applicant, save possibly in the most exceptional circumstances, or where the need to do so has been foreshadowed in the original papers, to bolster its original application by filing a supplementary founding affidavit. But as an alternative the party seeking reconsideration may file an answering affidavit in which it traverses either the entire case against it, or restricts itself to certain issues relevant to the reconsideration. The filing of such an affidavit does not preclude that party seeking reconsideration from arguing at the outset, on the basis of the application papers alone, that the applicant has not made out a case for relief. Where an answering affidavit is filed, the other party is entitled to deliver a reply. Where the party

⁴ [2019] 3 All SA 321 (SCA)

seeking reconsideration does not argue a preliminary point at the outset the case must be argued on all the factual material before the court dealing with the reconsideration proceedings.⁵

In the case before me the Respondent's answering affidavit and the contents of that affidavit featured predominantly before me as a basis for setting aside the *ex parte* order granted. In these circumstances final relief (which is sought) can only be granted if the facts set out in the Applicant's affidavits and as admitted by the Respondent, together with the facts alleged by the Respondent justify the order sought, subject to limited exceptions. In certain circumstances the denial by a respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of facts. In such a case, and where the respondent has not availed herself of the right to apply for the deponents to be called for cross-examination under Rule 6(5)(g) of the Rules of Court and the Court is satisfied as to the inherent credibility of the Applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact amongst those upon which it determines whether the Applicant is entitled to the final relief sought.⁶ The exception to the above general rule in **Plascon-Evans** applies where the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the Court is justified in rejecting them merely on the papers.⁷

EVALUATION OF THE APPLICATION TO SET ASIDE

[8] The original application for leave to sue by edictal citation and for attachment of assets was to confirm jurisdiction. Such an attachment presupposes that the Court has jurisdiction over the cause, but lacks jurisdiction over the person of the defendant and is only available against a foreign *peregrinus*.⁸ A foreign *peregrinus* is someone who is domiciled or resident outside of the country.⁹ On

⁵ At paras [13] and [14]

⁶ **Plascon-Evans Paints (Tvl) v van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634D – 635D ; **National Director of Public Prosecutions v Zuma** 2009 (2) SA 277 (SCA), at para [26].

⁷ **National Director of Public Prosecutions**, *id.*

⁸ **LAWSA**, vol. 4 (3rd ed.), para 40, and cases referred to in footnotes 5 and 7.

⁹ *Id.*, para 31.

the Applicant's version the Respondent is neither resident nor domiciled in South Africa. On the Respondent's version on her papers, she is both domiciled and resident within South Africa. This is the primary dispute to be resolved.

[9] The parties were *ad idem* that this Court has jurisdiction over the cause, this being a reference to the existence of a contract / mandate between the parties, albeit that the terms thereof were disputed. It seems to me that the fact that the contract would be performed in South Africa provides the necessary jurisdictional basis, *viz a ratione contractus*.¹⁰

[10] The supplementary heads filed by the Respondent's counsel questioned certain procedural matters concerning the Applicant's use of the *ex parte* procedure and the true need for attachment, considering that the Applicant was not seeking *Mareva*- type relief. These matters were not strongly pressed in argument, correctly in my view.

Is the Respondent a foreign peregrinus?

[11] The Respondent's case in her application to set aside the attachment is that she is domiciled at 2[...] T[...] C[...], F[...], Johannesburg, and that she is "*ordinarily resident in Johannesburg*", but currently staying in the USA. Counsel for the Respondent referred me to the decision of the Full Court in **Tick v Broude and another**¹¹ where, with reference to **Pollak: The South African Law of Jurisdiction** the Court accepted that in modern South African law the term *incola* is used with reference to a litigant who is either domiciled or resident in the area to which the Court belongs. The term *peregrinus* is used with reference to a litigant who is neither domiciled nor resident in such an area. A person who is not an *incola* is a *peregrinus*.¹² As far as residence is concerned the Court in **Tick** said that this is a concept which conveys some sense of stability, or something of a

¹⁰ **Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in liquidation)** 1987 (4) SA 883 (A), at 888 H – 889 A.

¹¹ 1973 (1) SA 462 (T).

¹² At 467 A-D

settled nature.¹³ In **Mayne v Main**¹⁴ this statement was approved and to which the Supreme Court of Appeal added that a person can only be residing in one place at any given moment, and a presence which is merely fleeting or transient would not satisfy the requirement for residence, some greater degree of permanence being necessary. What is required is that there is some good reason for regarding the nominated residence as the place of ordinary habitation at date of service, and that when it is said that an individual resides at a place, it obviously means that it is his home, his place of abode, the place where he generally sleeps after the work of the day is done.¹⁵

[12] The notion that the Respondent resides in Florida, Johannesburg cannot be sustained. The high watermark of her case is that she is staying in the USA and must return to South Africa – for a period not stated – as her visa only allows her to stay in the USA for a maximum period of six months. The copy of the visa attached to the answering affidavit reflects an issue date of 20 December 2017 and an expiration date of 19 December 2027. There is no indication on the visa that she is only permitted to stay in the USA for a period of six months, or any other limited period. A further difficulty for the Respondent arises from the extract from her Respondent's email to the LPC, already referred to. The unequivocal, *ex curial* statement by the Respondent that she lives in California, USA with her new husband and children is irreconcilable with the notion that she is resident in Florida.

[13] On the issue of domicile both parties relied upon a judgment of Mabuse J in the Gauteng Division, Pretoria, reported *sub nom AV v WV*.¹⁶ Although the facts of this judgment differs in material respects from the case before me, parts of the judgment have a bearing. The background before that court were these: the applicant, AV had instituted divorce proceedings against the respondent, WV in the Gauteng Court. In her summons she alleged that she was temporarily resident

¹³ At 469 F-G

¹⁴ 2001 (2) SA 1239 (SCA)

¹⁵ At paras [4] and [5]

¹⁶ Case number 5881/17, dated 6 July 2017.

in Dubai, but had a chosen *domicilium* in Pretoria, Gauteng. It was pleaded that the respondent (defendant) was similarly temporarily resident in Dubai, but with a chosen *domicilium* in Pretoria.

[14] The respondent filed a special plea denying that he was domicile or resident in the area of jurisdiction of the Gauteng Court on the date on which the action was instituted. He further alleged that both parties had not been domiciled in the jurisdiction of the Gauteng Court for approximately eight years and that they were resident in Dubai. He said that he would continue to reside at the said address until completion of his present employment as an airline pilot at the end of September 2021 on reaching the age of 60. He denied that the Gauteng Court had jurisdiction for the purposes of the divorce and further denied that the applicant resided at the address in Pretoria, this being the address of her brother. The respondent had himself instituted divorce proceedings out of a Court in Dubai despite his knowledge of the applicant's initial edictal citation application before the Gauteng Court.

[15] The applicant sought an interdict against the respondent to prevent him from proceeding with divorce proceedings in Dubai, which application was brought as a matter of urgency. The applicant succeeded in obtaining the interdict sought, to which was added a declaration that the Court had jurisdiction to adjudicate on the pending divorce action in the Gauteng Court. In reaching this decision the Court answered the question of whether there was jurisdiction to entertain the divorce action that the applicant had initiated. The answer to this turned upon the comprehensive analysis of domicile by the learned judge with reference to a range of authorities. It is unnecessary to canvas the various authorities cited, but I find helpful the following extract from the judgment of the House of Lords (Scotland) in **Udny v Udny** ¹⁷ where it was said:

“Domicil [spelling in original] of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with the unlimited intention of continuing to reside there. This is a description of the circumstances which create or constitute a

¹⁷ (1859) 7 M.H.L. 89.

domicil, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief of illness. And it must be residence fixed, not for any defined period or particular purpose, but general and definite in its future duration."

[Emphasis added]

In arriving at the conclusion referred to above the Mabuse J referred to **Conflict of Laws, Private International Law** (7th ed.) by R.H. Graveson which refers to domicile as meaning home, the permanent home, having regard to the conception of law employed to establish a connection for certain legal purposes between an individual and the legal system of the territory with which he either has the closest connection in fact, or is considered by law to have because of his dependence on another person. It was found that the respondent in **AV v WV** could not discharge the *onus* found to be upon him ¹⁸ of showing that either he, or the applicant, had changed their domicile of origin from South Africa to Dubai. One of the features weighing heavily with the Court was that the *onus* had not been discharged of demonstrating that the applicant had abandoned her former domicile in South Africa *inter alia* because the reasons for the parties' presence in Dubai was predominantly because of the respondent's work as an airline pilot in possession of a visa that only enabled him to work there, and that the applicant had been located in Dubai because of her marriage to the respondent.

[16] I accept that the facts of that case justified the resulting order notwithstanding the unusual application of the principles of *onus*, which can easily be ascribed to the particular factual matrix and to the fact that the judgment was granted in an urgent application. I do not however, find the facts of this judgment in any way determinative of the present matter before me. Whilst I was urged by the Respondent's counsel to give sufficient weight to the Respondent's assertions under oath that she was domiciled in Sout Africa, it was legitimately pointed out by the Applicant's counsel that the Respondent's version was terse to the point of

¹⁸ The circumstances in which the respondent attracted the *onus* are not clear from the judgment, and I merely note that this would not represent the usual and ordinary incidence of the *onus*.

being uninformative. She states that she is domiciled and ordinarily resident in Johannesburg, the latter assertion sought to be supported by reference to the visa, which I have mentioned above. It is significant that the copy of the visa annexed contains redactions which obliterate the Respondent's passport number and the visa type / class. I accept that certain sensitive information may be redacted from documents which will find their way into the public realm. But in the circumstances of this reconsideration application the type of visa granted to the Respondent may well have shed light on the type of visa / conditions attached to the visa. Not only is this information not available from the copy, but the Respondent, having attached the redacted visa to her answering affidavit proffers no explanation for the redaction, nor gives any hint of what has been redacted. And in response to the Applicant's allegation in the founding affidavit concerning her belief that the Respondent is working for a particular Singaporean company in the British West Indies, the Respondent denies that she is working for this company in this location, stating that the company is no longer in business.

[17] Manifestly absent is any information relating to whether the Respondent is, or is not working for another employer and, if so, where she is employed. Her statement that she is living in the USA is similarly lacking in any detail which would have been expected concerning her whereabouts and residential circumstances. Finally, her failure to disclose in her answering affidavit that she is married and in a relationship where there are children (whether born of her present matrimonial relationship or not), is of concern when considering her duty to take the Court into her confidence.

[18] The Applicant's founding affidavit contains such information regarding the Respondent's history of employment and assumed location in the British West Indies, being as much as I believe was within the Applicant's knowledge. Manifestly, it is the Respondent who has all relevant knowledge of the circumstances; I am satisfied that this is within her exclusive knowledge. Where a matter is within the exclusive knowledge of one of the litigants less evidence will be required from the other party to discharge the *onus* of proof. That is particularly the case where the party possessed of the relevant knowledge does not produce

it. And if the evidence provided by the party on whom the burden of proof lies calls for an answer, the failure to produce countervailing evidence strengthens the case for the party bearing the *onus*.¹⁹

Has the Applicant discharged the onus?

[19] The Applicant set out the following case in her founding papers: she rendered legal services in divorce proceedings to the Respondent and incurred disbursements between 2021 and 2022 (although the Respondent disputes her liability); the Respondent made a series of payments to the Applicant (despite the Respondent alleging that these were gratuitous); she needs to serve her claim for fees (based on a bill of costs drawn, but not taxed) on the Respondent, who had declined to accept service of papers save under the Uniform Rules; the Respondent is a Pilates instructor who has practised her profession outside of South Africa for a period not less than four years prior to the present time; during 2022, when the settlement agreement in the divorce proceedings was made an order of Court during October 2022, the Respondent appears to have been located in Singapore, in which jurisdiction the proceedings of the settlement were deposited at the Respondent's request; a written contract of employment as a pilates instructor between the Respondent and PC Hotel Management Limited, Turks and Caicos Islands was concluded during March 2022 reflecting her place of work as Parrot Cay Resort, Turks and Caicos Islands (when filing her answering affidavits for reconsideration, the Respondent denied this employment on the basis that the company that she had been working for was no longer in business, but notably she declined to state her present employment or physical whereabouts); the Respondent owns a half share in the T[...] S[...] apartment (the Respondent does not deal with this in her answering affidavit).

[20] The Respondent's version on her affidavit seeking reconsideration makes these assertions: she is a citizen of South Africa since birth and is domiciled at 2[...] T[...] C[...], F[...]; she is ordinarily resident in Johannesburg, but is currently

¹⁹ **Polokwane Local Municipality v Granor Passi (Pty) Ltd and another** [2019] 2 All SA 307 (SCA), at paras [37] and [38]

staying in the USA, being required by her visa to return to South Africa every six months; she no longer works for the company in the British West Indies, which is no longer in business; she is an *incola* of this Court and is not a *peregrinus*; the Applicant cannot succeed in her action; the funds in her bank account are required for the benefit of her grandmother and brother and she would therefore not dissipate the assets. She does not deal with the Applicant's allegation in her founding affidavit that the Respondent is the half-owner of the Florida apartment. She provides no details in her answering affidavit of her employment circumstances, marital status or family circumstances, nor her whereabouts in the USA.

[21] I find the Respondent's assertion that she is domiciled at T[...] C[...], Johannesburg and that she is ordinarily resident in Johannesburg unconvincing and lacking factual foundation. This assertion relies for its probity solely on her say-so, which I do not accept. A genuine dispute of fact is not raised when this is evaluated with the other evidence before me. The Respondent's email of 6 February 2023, addressed to the LPC the final paragraph of which is quoted above was attached by the Applicant to her replying affidavit. The unequivocal statement by the Respondent to the LPC of her location in California with her new husband and children and her assertion that she had been a travelling Pilates teacher for some years, indisputably called for a response in papers before this court if the Respondent wished her own assertion of domicile and residence in South Africa to be accepted. The response could have been either by means of a further affidavit (which she would most likely have been granted leave to deliver) or by seeking an oral hearing.²⁰ She sought neither. This is coupled to the redactions to the copy of the Respondent's visa which she attached to her answering affidavit. She could not sensibly have believed that a court hearing her reconsideration application would not require a fuller and better explanation regarding her present matrimonial, familial and residential circumstances to consider her unsupported statement in her answer that she is domiciled in South Africa. I need not resolve the dispute about the basis on which the Applicant

²⁰ Rule 6(5)(g)

rendered legal services to the Respondent; it is sufficient to find that the claim is not inherently implausible.

[22] There is no credible evidence before me that the Respondent is domiciled in South Africa based on residence that is fixed, being not for any defined period or particular purpose but general and definite in its future duration.²¹ I therefore conclude that the Respondent's version is archetypically bald and uncreditworthy, as well as being palpably implausible.²² This is plainly an instance where the Respondent has exclusive knowledge of her own personal circumstances and has chosen not to disclose these. It is difficult to avoid the inference that this non-disclosure was motivated by the knowledge that the full facts, if disclosed, would not assist her cause. In these circumstances less evidence is required from the Applicant to discharge the *onus*, as set out in the judgment of the Supreme Court of Appeal in **Polokwane Local Municipality**.

[23] I find that the Applicant has satisfied the burden of establishing that the Respondent is not an *incola* of South Africa, from which follows the axiom that she is a *peregrinus*. Due to the extreme paucity of information provided by the Respondent I cannot reach - nor do I need to reach - a firm conclusion as to whether she is domiciled in the USA, but this is a strong likelihood.

[24] Under rule 6(12)(c) a court has a wide discretion on the factors which may determine whether an order falls to be reconsidered, including the nature of the order granted and the period during which it has remained operative. Other factors to be taken into consideration are whether an imbalance, oppression or injustice has resulted, and, if so, the nature and extent thereof, and whether alternative remedies are available.²³ I cannot find that any of these features apply in favour of the Respondent and in the exercise of this discretion, I dismiss the reconsideration application.

²¹ **Udny**, above

²² See: **National Director of Public Prosecutions** above, para [26].

²³ **Erasmus: Superior Court Practice** sv Rule 6(12)(c).

[25] The Applicant has been successful in opposing the reconsideration application and is entitled to her costs. Applicant's counsel asks for punitive costs. Whilst I am unimpressed with the Respondent's lack of candour I am not convinced that the case merits punitive costs. The parties did not address me on the effect of the amendment to Uniform Rule 69 which altered the tariff of fees on the party and party scale with effect from 12 April 2024, but I am satisfied that the issues raised justify Scale C.

[26] I make the following order:

1. The reconsideration application by the Respondent, Ms N[...] L[...] J[...] C[...] to vary the order granted by SENYATSI J on 9 March 2023 under this case number, is dismissed.
2. The Respondent is ordered to pay the costs of the application to set aside as follows:
 - (a) on the party-and-party scale, from the date of the filing of the application to set aside, until 11 April 2024; and
 - (b) from 12 April 2024, on Scale C as set out in Uniform Rule 69.

N.J. GRAVES

Acting Judge of the High Court of
South Africa
Gauteng Local Division
Johannesburg

APPEARANCES:

Date of hearing: 30 July 2024

Date of judgment: 12 August 2024

Counsel for the applicant: ADV. S. Vorster

Instructed by: **J Mahomed Attorneys**

Ref: J Mahomed

Counsel for the defendants: ADV. X de Beer
Instructed by: **Martin Vermaak Attorneys**
Ref: P Mostert