

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No. 078368 / 2024

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED: **YES**

DATE 4 February 2025

SIGNATURE

In the matter between:

J[...] R[...]

APPLICANT

and

L[...] R[...]

RESPONDENT

JUDGMENT

NEUKIRCHER J

[1] On 16 July 2024 the present applicant launched an urgent Rule 45A application against the first respondent and the Sheriff, Pretoria East. The application was set down for hearing on 30 July 2024. The amended Notice of Motion¹ sought the following relief:

¹ Dated 25 July 2024

- “1. That the matter be heard as one of urgency in terms of Rule 6(12), the requirements of the Rules of Court in respect of notice and service being dispensed with and the applicants’ departure therefrom are condoned;
2. That the warrant of execution under case number 113220/2023, dated 2 July 2024, be and is hereby suspended;
3. That the attachment of the applicant’s movable property identified in the notice of attachment in execution under case number 113220/2023, dated 3 July 2024, be set aside consequent to 2 supra;
4. That:
 - 4.1 Paragraph 7 of the order under case number 113220/2023, made by Neukircher J on 5 February 2024 be and is hereby suspended; and
 - 4.2 Any and all right to execution, or ongoing execution of the above paragraph of the order be and is hereby suspended; and
 - 4.3 The order as per 4.1 and 4.2 supra be made pending the outcome (inclusive of any appeal processes and/or settlement thereof) of the action instituted by the applicant under case number 2024-073340; and
 - 4.4 Should the parties fail to prosecute the action under case number 2024-073340, the order as per 4.1 and 4.2 supra is automatically discharged...”

[2] The application did not fare well – it was struck from the roll due to a lack of urgency.

[3] The application was then set down for hearing on the ordinary Family Court roll. In effect, what the applicant seeks to do is to suspend the balance of an accrual payment² - which is over-due to the first respondent (the respondent) - pending the finalization of an action which he has now instituted against her. It is common cause that the action was launched on 3 July 2024 under case no 07334/2024 in this division.

² An amount of R1 009 700-50 (the R1 million)

[4] It is also common cause that when the applicant failed/refused to pay the R1 million to the respondent, her attorneys (Adams & Adams) caused a Writ of Execution (the Writ) to be issued on 2 July 2024 and it was served. It is this Writ that applicant seeks to suspend in terms of Rule 45A.

[5] Rule 45A states:

“The court may, on application, suspend the operation and execution of any order for such period as it may deem fit: Provided that in the case of an appeal, such suspension is in compliance with section 18 of the Act.”

[6] When considering the Rule 45A application, it is useful to bear in mind a few facts:

- a) the parties were involved in divorce proceedings in this court under case number 113220/23;
- b) after much to-ing and fro-ing they eventually signed a settlement agreement (the Settlement) on 29 September 2023;
- c) the unopposed divorce action was set down for hearing before me on 5 February 2024, after the Notice of Set Down had been served on applicant via email. Importantly, applicant does not deny any of this;
- d) I granted the decree of divorce incorporating the Settlement.

[7] In broad terms, the Settlement makes provision for:

- a) primary care and residence of and contact with the parties' three minor children;
- b) mediation and dispute resolution in regards of the children;
- c) maintenance for the children;
- d) the division of assets.

[8] Whilst the applicant initially took issue with the entire settlement, in his replying affidavit he conceded that the most contentious clause was Clause 7 which reads:

“CASH PAYMENT

- 7.1 The Defendant shall pay a sum of R1 859 700.50 (ONE MILLION EIGHT HUNDRED AND FIFTY NINE THOUSAND AND SEVEN HUNDRED RAND AND FIFTY CENTS) (“the Settlement Amount”) to the Plaintiff within 60 days.
- 7.2 The payment referred to in paragraph 7.1 shall be made by the Defendant to the Plaintiff together with the further benefits and assets provided for in this agreement, free of deduction and set-off, in full and final settlement of all and any claims that the Plaintiff has in terms of the parties’ marital regime and any other cause of action, if any.”

[9] Thus, it is common cause that according to the Settlement the applicant was to pay to respondent R1 859 700-50 on or before 4 April 2024, of which he had already paid to R850 000 to her prior to the divorce being granted. Thus, as at date of divorce, the amount due and payable was R1 009 700-50.

[10] The applicant attempts to string his bow with an argument that, as only the amount of R1 009 700-50 was owing when the divorce order was granted, and that the order fails to record this, this vitiates the order. But this argument is untenable and must be rejected: obviously any amount now payable to the respondent must take into account any payments already made. The fact that the Writ of Execution is in the amount of R1 009 700-50 clearly indicates that this is what occurred.

[11] But the applicant’s main attack is that the amount of R1 859 700-50 represents the accrual payable to the respondent in full settlement of the division of the parties’ patrimonial benefits. He alleges:

- a) that the Settlement was erroneously alternatively fraudulently made an order on 5 February 2024 in that:
 - (i) the amount of R1 859 700-50 was derived from an accrual calculation done by an independent third party;
 - (ii) the parties believed this calculation to be accurate;
 - (iii) the calculation was materially flawed alternatively did not constitute a valid and lawful calculation;

- (iv) the Settlement therefore did not reflect the “common and continuing intention of the parties”;
- (v) “[u]pon Becoming aware of the consequences of the above mentioned and having obtained advice from my legal representatives on the recourse available to me, I requested the respondent not to employ any execution steps in relation to the order against me until I have applied to vary or rectify settlement agreement”.

[12] What is interesting about this matter is that the respondent was perfectly content to agree to settle and pay the respondent R1 859 700-50, perfectly content to sign the Settlement³, perfectly content to pay respondent R850 000 in November 2023 and perfectly content to have the Settlement made an order of court four-and-a-half months later. It is also important to note that at all stages, the applicant was properly represented.

[13] It is clear however, that it was when he realized that he would have to pay the respondent the remaining R1 million that the shoe began to pinch. On 12 April 2024, a week after the balance of the money was to be paid, his attorney (FVS) approached Adams and Adams seeking to stay any execution processes “until such time that we can provide you with our clients instructions pertaining to the terms of the settlement agreement...”. Unsurprisingly, the request was refused.

[14] On 8 May 2024 FVS sought another undertaking not to enforce payment - this time pending an application for rectification. It took FVS another month to explain to Adams and Adams that the reason for the request was that the applicant disputed the accrual calculation.

[15] What stands out in all of this is that, despite this alleged dispute, it is only the monetary payment that was, and is, disputed by the applicant:

- a) there is no dispute regarding the division of the movable property or that each party would “retain any and all additional assets of whatsoever

³ The settlement of 29 September 2023 was not the first draft signed by the applicant - but in the previous draft signed by him also included precisely the same amount.

nature currently registered or held in their respective names and/or under their control - as the sole and exclusive property, including but not limited to vehicles, investments, shares, retirement annuities and pension funds, if any”;

- b) nor is there a dispute regarding the transfer of the immovable property into the applicant's name against payment of an amount of R1 231 032-00.

[16] But lest it be assumed that the latter amount was paid to the respondent plus an additional amount of R1 850 000-00, the voice note sent to the respondent on 23 April 2024 says differently. In this, he states that the respondent should have been paid R1 800 000-00 for her share in the joint property, despite the Settlement stating otherwise.

[17] In any event, in the event that the applicant seeks a recalculation of the accrual, at the very least he should have tendered restitution - he does not.

[18] In my view, the applicant attempts to make out a case for the grant of the Rule 45A in three distinct documents:

- a) his founding affidavit;
- b) his replying affidavit where he materially amends his case; and
- c) his particulars of claim in the action instituted under case number 073340/2024 on 3 July 2024.

[19] I have already outlined the thrust of the allegations in the founding affidavit. In essence the applicant alleges that:

- a) he became aware of the “legal flaws” in the accrual calculation in June 2024 “in response to legal advice in relation thereto”;
- b) that he consulted regarding “the possible routes to rectification over a period of time”;
- c) that an accrual calculation by an entity known as PAS was used and this calculation contained several errors in the values placed on certain

assets - for example the movables were valued at R1 000 000-00 but the sheriff valued the same at R25 010-00;

- d) that he had already voiced his disquiet over the valuations prior to signing the Settlement;
- e) that the parties should “approach a professional to recalculate the accrual payable herein and that the cost associated with employing said professional be split equally between the parties” and
- f) once the calculation is completed the applicant will approach a court for variation “with the respondents consent”.

[20] The applicant’s argument that the accrual was calculated incorrectly is that:

- a) the parties agreed to exclude their respective business interests (that is the respondent’s medical practice and the applicant’s shares in his business), but he was informed in July 2024 that assets cannot be excluded from the accrual calculation except by ante-nuptial or post-nuptial contract that is duly registered and notarized⁴;
- b) the parties, impermissibly, agreed to exclude their timeshare;
- c) the parties agreed to value their household content at R1 million each whereas the sheriff clearly shows his assets were valued considerably lower;
- d) the values utilised were based on estimates which is “not a proposition good in law”;
- e) the values utilised to calculate the accrual were all obtained / agreed prior to dissolution of the marriage which is directly contrary to the correct and lawful position in terms of both statute and authority by the Court⁵.

[21] Given the allegedly “fatally flawed” calculation, the applicant alleges “that the inclusion of the amount⁶ leads to a grave injustice in that it ostensibly entitles the respondent to an amount she should not lawfully be entitled to...” He thus alleges that the Settlement should be varied or rectified.

⁴ In my view this advice is incorrect: parties can agree to any financial settlement irrespective of what the actual values of their respective estates are

⁵ The applicant cites the decision of *AB v JB* 2016 (5) SA 211 (SCA) as support for this allegation

⁶ Ie in the Settlement

[22] As a sweetener, the applicant then tenders to transfer an amount of R1 000 000 into FVS's trust account as security pending the finalization of the action. He alleges that there can therefore be no prejudice to the respondent.

[23] He finally alleges that it is necessary to institute the action "so that the settlement agreement reflects the parties' true intentions".

[24] The particulars of claim are not exactly a model of clarity - this much was conceded by Mr Alberts⁷ during his reply. He also conceded that the particulars of claim does not make out a case for rectification. In fact, he conceded that "it would have been ideal" to plead rectification.

[25] What is ultimately sought in the particulars of claim is:

- a) a rescission of clauses 7.9 and 10.1 of the Settlement⁸;
- b) the determination of the patrimonial consequences of the marriage be referred for determination in a trial de novo "which trial may be instituted in any regional court with jurisdiction";
- c) alternatively that clause 7 be rescinded;
- d) alternatively the clause 7 be severed or struck therefrom and/or be declared to be invalid;
- e) that the parties be ordered to approach an independent expert with experience in accrual calculation to calculate the accrual;
- f) alternatively the patrimonial consequences being referred to court to be determined *de novo* once the appropriate valuations of the parties' various assets have been done.

The respondent has filed an exception to the particulars of claim.

[26] The test to establish a *prima facie* right, even if open to come doubt, in proceedings in which an interim interdict is sought⁹ and those in which an

⁷ For applicant

⁸ As the argument in regard of clauses 9 and 10.1 was abandoned in argument before me, I do not intend to deal with them

exception¹⁰ is filed are not the same. Therefore any opinion expressed herein is not binding on a court adjudicating the exception in due course.

[27] The applicant has also conceded that the present application falls to be adjudicated on the principles a court considers when granting an interim interdict in general:

- a) the applicant must establish a *prima facie* right, if open to some doubt;¹¹
- b) there must be a well-grounded apprehension of imminent harm;
- c) the balance of convenience must fall in his favour; and
- d) he must have no other suitable remedy¹².

[28] It must be borne in mind that an interim interdict is a provisional order designed to protect the rights of the complainant party pending an action or application to establish the respective rights of the parties. It does not determine the final determination of the rights of the parties.¹³

[29] Bearing this in mind I turn to the requirements for the relief sought by the applicant.

Prima facie case

⁹ *Webster v Mitchell* at 1189; the qualification added in and *Gool v Minister of Justice & Another* 1955 (2) SA 682 (C) at 688 B-E: "With great deference, I venture to think that in some of these decisions insufficient weight was accorded to the use of the word 'established' by INNES, C.J., in the now classical phrase . . . 'where the right asserted by the applicant, though *prima facie* established, is open to some doubt'. In granting the rule *nisi* in the present case HERBSTEIN, J., adopted and applied the views expressed by CLAYDEN, J., in *Webster v Mitchell*, *supra*, the head-note of which reads as follows:

'In an application for a temporary interdict, applicant's right need not be shown by a balance of probabilities; it is sufficient if such right is *prima facie* established, though open to some doubt. The proper manner of approach is to take the facts as set out by the applicant together with any facts set out by the respondent which applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by respondent should then be considered, and if serious doubt is thrown upon the case of applicant he could not succeed.'

¹⁰ A pleading must be set out in an intelligible and lucid form which allows the defendant to plead to it (Herbstein and Van Winsen ... 5th Ed, 2009 ch 22 – p 635); *Factory Investments (Pty) Ltd v Record Industries Ltd* 1957 (2) SA 306 (T) at p310

¹¹ *Ferreira v Levin NO; Vryenhoek v Powell NO* 1995 (2) SA 813 (W) at 817I – 818B, 824 I-J.

¹² *Setlogelo v Setlogelo* 1914 AD 221; *Webster v Mitchell* 1948 (1) SA 1186 (WHD)

¹³ *Airoadexpress (Pty) Ltd v Chairman Local Road Transportation Board, Durban, and Others* 1986 (2) SA 663 (A) at 681 D-F

[30] According to the applicant, his prima facie right is founded on the “right in law not to be subject to a continuing injustice and/or unlawfully obtained court order”, and that he has “the right to have the proprietary consequences of my marriage be determined in a manner that is consistent with the prescripts of the law (both in terms of the Divorce Act and other legislation and the various divisions of the High Court, Supreme Court of Appeal and Constitutional Court on the subject, which position and the respondent should have been advised of).”

[31] In founding this “right”, the applicant relies on the allegations set out in paragraph 19 and 20 supra and various WhatsApp and e-mail conversations that took place between the parties between June 2023 and September 2023, and the discussions between the parties regarding the calculation of the accrual. However, whatever these were and whatever confusion applicant alleges there was vis-à-vis the calculation, the following facts cannot be ignored:

- a) the applicant was legally represented;
- b) he signed two Settlement agreements, both of which contained the same accrual amount;
- c) if he was dissatisfied with the accrual calculation, nothing prevented him from appointing his own expert to do the calculation;
- d) he was notified of the date of hearing and failed to act.

[32] But even more puzzling is that fact that a year after signing the Settlement, and months after the divorce order was granted and after this dispute was raised, the applicant has still failed to get out of the blocks and has abjectly failed to provide this court with even a rudimentary calculation of what he says the accrual is¹⁴.

[33] The remedy utilised by the applicant in these proceedings is rectification but it is very apparent, and was conceded, that this is not the case made out by him in the pending action¹⁵. Given that this discrepancy was pointed out to the applicant by the

¹⁴ *GJW v LW* (2023-114308) [2024] ZAGPPHC 823 (8 August 2024)

¹⁵ The principle is the following:

... it is clear that the remedy of rectification is not one which easily lends itself to a fallback position by way of afterthought. It is a settled principle that a party who seeks rectification must show facts

respondent as far back as 24 July 2024 when the answering affidavit was filed - and the respondent has filed an exception to the particulars of claim - it is somewhat puzzling that the applicant's two cases remain at odds with each other. In my view, this is fatal to the issue of whether the applicant has managed to establish a *prima facie* right.

[34] But applicant's argument vis-à-vis his alleged *prima facie* right goes further: he specifically argues that "[a] double-barrelled approach is often favoured whereby first a decree of divorce then a computation of the accrual is sought in the action, it is however not valid in law to make the calculation before dissolution".

[35] For this submission, the applicant relies on *AB v JB*¹⁶. But in my view, the applicant has misconstrued the judgment. In *AB v JB*, the SCA found that the line of authorities¹⁷ which held that the date for determination of accrual is at *litis contestatio* rather than at the dissolution of the marriage were wrongly decided.¹⁸

[36] In my view, and given the above, the values of the parties' respective estates are to be placed before the court in a divorce action so that at the time of the decree of divorce is granted, the court then determines the division of the accrual. The manner in which this is done is either via an agreement regarding the values, or the appointment of experts who opine on the values. Either is permissible. The fact that the values are obtained prior to trial does not make them invalid.

[37] In any event, this application is so replete with contradictions as well as a lack of either specificity or essential allegations that it fails to even begin to found the applicant's *prima facie* right. Thus, the applicant's argument is rejected.

[38] Furthermore, the applicant entered into the Settlement which contains a non-variation clause. It states:

entitling him to that relief 'in the clearest and most satisfactory manner' – *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004 (6) SA 29 (SCA) paragraph 21 at 38I – 39A.

¹⁶ 2016 (5) SA 211 (SCA)

¹⁷ *MB v NB* 2010 (3) SA 220 (GSJ); *MB v DB* 2013 (6) SA 86 (KZD); *KS v MS* 2010 (1) SA 6 (KZD)

¹⁸ *AB v JB* paragraph 20

“This agreement constitutes the full and final settlement of any and all of the issues arising out of the divorce action, save and accept that which is contained herein before, and neither party shall have any further claims against the other party whatsoever.”

[39] In *SH v GF*¹⁹ the SCA stated:

“[16] In any event the view of Kollapen AJ that in the light of the oral agreement of variation of the maintenance order it would offend against public policy to enforce the non-variation clause, cannot be endorsed. This court has for decades confirmed that the validity of a non-variation clause such as the one in question is itself based on considerations of public policy, and this is now rooted in the Constitution. See *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A) at 767A – and *Brisley v Drotsky* 2002 (4) SA 1 (SCA) (2002 (12) BCLR 1229; [2002] 3 All SA 363) paras 7, 8, 90 and 91. Despite the disavowal by the learned judge, the policy considerations that he relied upon are precisely those that were weighed up in *Shifren*. In *Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd (AVUSA Media Ltd and Others as Amici Curiae)* 2011 (5) SA 329 (SCA) para 35 Brand JA said:

'As explained in *Brisley v Drotsky* 2002 (4) SA 1 (SCA) (para 8), when this court has taken a policy decision, we cannot change it just because we would have decided the matter differently. We must live with that policy decision, bearing in mind that litigants and legal practitioners have arranged their affairs in accordance with that decision. Unless we are therefore satisfied that there are good reasons for change, we should confirm the status quo.”

[40] In general the parol evidence rule is strictly applied. This would operate to exclude evidence of negotiations and the intention of the parties prior to the conclusion of the settlement. Rectification is the only way to override this

¹⁹ 2013 (6) SA 621 (SCA) paragraph 16; Also *PL v YL* 2013 (6) SA 28 (ECG) at 53C – 55D

impediment²⁰. But, as stated, this would assume that the particulars of claim contains a claim for rectification - it does not. Instead, the relief is for rescission or a setting aside or a striking out of declarations of invalidity, and that a trial be concluded *de novo*.

[41] But no matter the construction, the applicant simply fails to make out a case to overcome the very first hurdle for the relief he seeks.

[42] However, the SCA has put this entire issue to bed. In *Botha v Botha*²¹ the court stated:

“[13] On the facts of this case, there was no misrepresentation by the appellant. There were protracted negotiations between the parties which led to a settlement agreement. In consultation with his legal representatives, the respondent signed the settlement agreement which was made an order of court. The fact that several months later he had a change of heart and believed that he had overpaid his former wife does not translate into a mistake common to the parties. Even if he genuinely believed that the calculations were incorrect and that he should not have accepted the advice of his legal representatives, this does not qualify as a justus error. If the mistake is due to that party’s own fault, the error cannot be said to be justus and the mistaken party cannot escape liability for the agreement that he signed. At best for the respondent, this is a unilateral error. It does not lay the basis for a claim for the variation of the settlement agreement on the grounds of a common mistake.

[43] The facts of this case and that of *Botha v Botha* are virtually identical. As a result, it puts an end to any argument on the issue of a prima facie right issue.

Irreparable Harm

[44] Insofar as it is necessary to discuss the other elements that found the grant of

²⁰ *Tesven CC v SA Bank of Athens* 2000 (1) SA 268 (SCA)

²¹ (259/2023) [2024 ZASCA 116 (24 July 2024)]

an interim interdict, I am in any event of the view that the applicant has failed to make out a case.

[45] The applicant states that the irreparable harm lies therein that he faces what he terms “the very real and imminent risk” that his movables will be sold in execution which will prejudice him and the children and that, given that the sheriff's valuation was lower than the amount sought, the respondent will sell his immovable property.

[46] He also adds that the *nulla bona* return of service renders him susceptible to sequestration and that he will need to bring a damages claim against the respondent which will subject him to further legal costs “and years of litigation”.

[47] But the applicant's case on this issue is also an ever evolving one: on 7 October 2024 the applicant filed a supplementary affidavit which essentially confirmed that he had paid an amount of R1 009 700-50 into FVS's Trust account, that he entered into a deed of cession in terms of which he agreed to grant security in that amount for the indebtedness and that ceded his rights to said security to FVS pending the outcome of the action proceedings under case number 073340/2024.

[48] In my view, given that this amount is being held by the applicant's attorneys means that there is no irreparable harm to him at all: were the applicant to fail in this application, he clearly has sufficient means to discharge his debt to the respondent.

[49] The fact that any damages claim, which he may potentially institute against the respondent, may take time to resolve is also not a reason to grant this application - the applicant will be in the same position that thousands of litigants are. In any event, at this stage the respondent has a judgment in her favor and in my view any irreparable harm that exists is hers, especially given that the applicant not only is in possession of the immovable property, but also the R1 million he was legally obligated to pay her months ago.

Balance of convenience

[50] Given the above, the balance of convenience does not favour the applicant.

[51] The applicant alleges in his replying affidavit that the respondent “is a successful medical practitioner and does not need the money, nor does she attempt to make a case that she is in need of money.”

[52] This allegation is astounding – it exhibits a clear indication of the true motivation for this application and exhibits a profound misunderstanding of the fact that it is he who bears the onus in this application. Whether or not respondent “needs” the money is irrelevant – the applicant is legally obligated to pay it to her.

No other satisfactory remedy

[53] The fact is that given the fact that the applicant asserts that the respondent is successful and does not need the money also puts pay to the allegation that he has no other suitable remedy available as he fails to demonstrate that he will be unable to enforce any order for damages that may be given in his favour²².

Costs

[54] Mr Stadler²³ has urged me to grant an attorney client costs order given the manner in which the applicant has litigated. He argues that the applicant’s ever-evolving case demonstrates a lack of *bona fides*.

[55] I agree. The distinct impression left by these papers is that the applicant will, by any means, attempt to thwart the payment of the R1 009 700-50 to the respondent. This court cannot allow a litigant to circumvent its orders – to do flies in the face of the finality that orders bring to litigation, the facts that courts orders must be obeyed until set aside by a court of competent jurisdiction. Furthermore, it would open the floodgates and courts will be inundated with frivolous and vexatious litigation, the sole intention of which is to delay execution of a court order. This holds truer even truer where the action was settled and a settlement signed.

Order

[56] The order is the following:

The application is dismissed with costs on the attorney and client scale.

²² Paragraph 46 supra

²³ For the respondent

B NEUKIRCHER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

This judgment was prepared and authored by the judge whose name is reflected, and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 4 February 2025.

For the applicant	:	Adv GW Alberts SC with Adv L Hennop
Instructed by	:	Frik van Schalkwyk Attorneys Inc
For the respondent	:	Adv S Stadler
Instructed by	:	Adams and Adams Inc
Matter heard on	:	15 October 2024
Judgment date	:	4 February 2025