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

Case Number: 22224/2019

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: YES
23 February 2026	SIGNATURE
DATE	

In the matter between:

G[...] J[...] T[...]

Applicant

and

S[...] A[...] T[...]

First Respondent

G[...] J[...] T[...] N.O.

Second Respondent

STEPHEN LEE WETHERALL N.O.

Third Respondent

Section 173 of the Constitution — an order granted in terms of subrule 43(6) of the Uniform Rules of Court — order is alleged to be patently unjust and erroneous — where there are no changed circumstances as required by subrule 43(6) — where the order is not appealable by virtue of subsection 16(3)(b) of the Superior Courts Act 10 of 2013.

The High Court may, in exceptional circumstances, exercise its inherent power under section 173 of the Constitution to set aside a subrule 43(6) order that is patently unjust and erroneous — the remedy is not a "back door appeal" but a procedural mechanism to address a lacuna in the rules and do justice between the parties.

JUDGMENT

WANLESS J

Introduction

- [1] This matter has, as its genesis, an action for divorce (*“the divorce action”*) instituted in this Division by G[...] J[...] T[...] (*“G[...]”*) against S[...] A[...] T[...] (*“S[...]”*) on or about the 25th of June 2019, under case number 22224/2019. S[...] has defended the divorce action and instituted a counter-claim which is defended by G[...]. The parties are married to one another out of community of property with the accrual system.
- [2] Pursuant to extensive litigation between the parties (*at considerable expense*) involving, *inter alia*, various interlocutory applications, no less than three (3) further interlocutory applications were placed on this Court’s Family Court roll. In light of the fact that the said applications are inter-related to one another, they were heard, by this Court, at the same time.
- [3] The three (3) applications are a contempt application (*“the contempt application”*) instituted by S[...]; an application for a stay of proceedings (*“the stay application”*) and an application in terms of section 173 of the Constitution (*“the 173 application”*) both instituted by G[...]. Included in the contempt application is yet a further application by S[...] that Steve Merchank Attorneys (*“G[...]’s attorneys”*) be ordered to pay the costs of the contempt application *de bonis propriis*, on the scale of attorney and own client, jointly and severally with G[...], the one paying the other to be absolved. Not surprisingly, this application is opposed by G[...]'s attorneys.
- [4] Arising from the foregoing, this Court was ultimately required to determine no less than four (4) opposed interlocutory applications arising from the divorce action. The hearing took place virtually via MS Teams as a result of the fact that S[...]'s Counsel could not travel from Cape Town for health reasons.

Background

- [5] Following an order by Noko J (*“the Noko order”*) dated the 24th of January 2025 and amended on or about the 4th of February 2025, the first application to be instituted was the 173 application. This application was instituted by G[...] on or about the 14th of February 2025, in terms of which G[...] seeks an order, *inter alia*, in terms of section 173 of the Constitution, that the Noko order “*be set aside ab initio in its totality*”.
- [6] Thereafter, on or about the 26th of February 2025, S[...] instituted (*on an urgent basis*) the contempt application, in terms of which S[...] alleges that G[...]’s wilful and *mala fides* actions have resulted in him being in contempt of the Noko order. On or about the 3rd of March 2025, G[...] instituted the stay application wherein it was sought to suspend the operation and execution of the Noko order pending the final determination of the 173 application.
- [7] On or about the 12th of March 2025, Crutchfield J granted an order (*“the Crutchfield order”*) in terms of which, *inter alia*, both the contempt application and the stay application were stayed pending the parties undertaking and finalising mediation proceedings. These proceedings were carried out but were unsuccessful. Pursuant to the issuing of the Mediator’s certificate to this effect, S[...] once again enrolled the contempt application.

The Noko order

- [8] To properly understand the various applications to be determined by this Court, it is first necessary to (*briefly*) examine the Noko order. In terms thereof, it was ordered that G[...] pay to S[...] the sum of R 2 200 000.00 as a contribution towards legal costs. This amount was payable in three (3) equal monthly instalments, the first being payable within ten (10) days of the date of the order with the second and third instalments to be paid at the end of March and April 2025, respectively. G[...] was also ordered to pay the costs of that application for a contribution towards costs in terms of subrule 43(6).

The section 173 application

- [9] As set out above, in this application, G[...] seeks an order, *inter alia*, in terms of section 173 of the Constitution, that the Noko order “*be set aside ab initio in its totality*”.

The contempt application

- [10] S[...] seeks an order that, *inter alia*, G[...] be declared to be in contempt of court and committed to jail for a period of ninety (90) days, *alternatively*, for a period that this Court may deem fit, for failing to comply with the Noko order. The relief sought is subject to the proviso that incarceration be suspended subject to G[...] making payment, in full, of the sum of R 733 333.33 within three (3) days of the date of that order.

The stay application

- [11] As also set out earlier in this judgment, the purpose of this application, instituted by G[...], was to suspend the operation and execution of the Noko order pending the final determination of the 173 application.

The issues

- [12] In the event of this Court upholding the 173 application and setting aside the Noko order, then the contempt application must fail. Further, it would not be necessary for this Court to decide the stay application.
- [13] However, in the event of this Court dismissing the 173 application, it will be necessary for this Court to determine the merits of the contempt and stay applications.
- [14] Arising from the foregoing, it is self-explanatory that this Court should first consider the section 173 application.

The merits of the section 173 application

- [15] It is common cause in this matter that the Noko order, granted in terms of subrule 43(6), is not appealable. This is so, in light of the provisions of subsection 16(3)(b) of the Superior Courts Act 10 of 2013 (*“the Act”*), which states:

“Notwithstanding any other law, no appeal lies from any judgment or order in proceedings in connection with an application for contribution towards the costs of a pending matrimonial action.”

[16] Section 173 of the Constitution reads as follows:

“Inherent power – The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.”

[17] Subrule 43(6) states that a court *“may, on the same procedure, vary its decision in the event of a material change occurring.....”*.

G[...]’s case in respect of the section 173 application.

[18] In very broad terms, G[...] submits that the Noko order is patently and manifestly unjust and/or erroneous. No material change has occurred since the Noko order and, in the circumstances, the provisions of subrule 43(6) cannot be utilised by G[...]. The same order is not appealable. In the premises, it is submitted that the only procedure available to him is to bring an application in terms of section 173 of the Constitution to have the Noko order set aside.

[19] When submitting that section 173 of the Constitution is the appropriate remedy and that this Court should grant him the relief sought in this application, G[...] submits that various interlocutory applications instituted prior to the contempt and stay applications and the orders emanating therefrom, are relevant when this Court adjudicates the section 173 application.

Other interlocutory applications

The Rule 43 application

[20] On or about the 27th of July 2020, S[...] instituted an application in terms of Rule 43 where she sought, amongst other relief, interim maintenance that G[...] was to pay in respect of herself and the minor children, together with a contribution towards her legal costs in the amount of R 1 600 000.00 up to and including the first day of trial.

[21] On or about the 4th of November 2022, Wilson AJ (*as he then was*) handed down judgment in the Rule 43 application (*“the Wilson judgment”*) in terms of which, *inter alia*, S[...]’s application for a contribution towards costs was dismissed.

The first application in terms of subrule 43(6)

[22] On or about the 13th of November 2023, S[...] instituted an application in terms of subrule 43(6), seeking an order that G[...] pay her an amount of R 4 188 990.00 as a contribution towards her legal costs (*“the first subrule 43(6) application”*).

[23] On or about the 13th of December 2023, Wijnbeek AJ handed down judgment and an order (*“the Wijnbeek order”*) in terms of the first subrule 43(6) application. The relevant portions of that order are as follows:

23.1 G[...] was to contribute towards the legal costs of S[...] in the sum of R 800 000.00 to prepare for and present her case at the trial in the divorce action;

23.2 G[...] was to pay the costs of the first subrule 43(6) application;

23.3 the relief as set out in subparagraphs 23.1 and 23.2 above was suspended and would lapse on condition that it was not necessary for S[...] to launch, defend and/or prosecute the discovery application and/or substantive application for the postponement of the trial and/or any other interlocutory application before the trial. However, the said relief would become payable within 3 days of S[...] instituting an application for discovery and/or a substantive application to postpone the trial date for February 2024 and/or any other interlocutory application prior to the trial date and/or would be payable within 3 days from demand that G[...] would only agree to a postponement of the trial against payment or tender of his wasted costs; and

23.4 the Wijnbeek order is the subject of further litigation.

The application to compel

[24] On or about the 19th of January 2024, S[...] instituted an application seeking an order that Matthew Martino (*“Martino”*) and Amanda Woest (*“Woest”*), in their capacities as trustees of the GT Trust, together with G[...], deliver copies of certain documents (*“the application to compel”*).

[25] In relation to the application to compel, Martino and Woest instituted an application in terms of Rule 30, which was subsequently dismissed. It appears that Martino and Woest (*on behalf of the GT Trust*) have applied for leave to appeal such order. Until such application has been dispensed with, no steps can be taken in respect of the application to compel.

The first contempt application

[26] On or about the 8th of February 2024, S[...] instituted an application against G[...] (*“the first contempt application”*) in terms whereof she sought an order that:

- 26.1 G[...] be declared to be in contempt of the Wijnbeek order arising from the first subrule 43(6) application;
- 26.2 G[...] be incarcerated for 60 days, *alternatively*, for such period as the court deemed fit;
- 26.3 The order for G[...]’s incarceration be suspended, subject to him making payment, within 3 days of the granting of any order, of the full amount of R 800 000.00, as per the Wijnbeek order, into the trust account of S[...]’s attorneys together with interest thereon at the rate of 11.25% from 24 January 2024 to date of payment; and
- 26.4 G[...] make payment of the costs of the first contempt application on the scale as between attorney and own client.

[27] Following thereon, and on or about the 30th of May 2024, De Souza-Spagnoletti AJ dismissed the first contempt application, with costs (*“the De Souza-Spagnoletti order”*). On the 26th of June 2024, S[...] proceeded with an application for leave to appeal the De Souza-Spagnoletti order. This application for leave to appeal was dismissed with costs.

[28] S[...] thereafter proceeded with an application for leave to appeal the De Souza-Spagnoletti order to the Supreme Court of Appeal (*“the SCA”*). Despite the fact that it does not appear from the affidavits in the section 173 application, it is common cause that the application for leave to appeal to the SCA was dismissed. Pursuant thereto, S[...] instituted an application in terms of subsection 17(2)(f) of the Act to refer the relevant decision for reconsideration. This Court has no knowledge as to whether such reconsideration application is still pending or has been finalised at the time of the delivery of this judgment.

The rescission application

[29] On or about the 27th of May 2024, G[...] instituted an application (*“the rescission application”*) seeking, *inter alia*, the rescission of the Wijnbeek order on the basis that S[...] had committed fraud and thus had approached the court with *“dirty hands”* in the first subrule 43(6) application.

[30] The rescission application is still pending.

Submissions made on behalf of G[...] in respect of the merits of the 173 section application

[31] In the first instance, it was submitted that the prohibition in subsection 16(3)(b) of the Act, prohibiting appeals against orders granted in terms of Rule 43, does not leave a litigant, who faces a patently and manifestly unjust and/or erroneous order, without a remedy. It was further submitted that a litigant in this position does indeed have a remedy. In support of this submission, Counsel for G[...] relied upon the decision of the Constitutional Court in the matter of *S v S*¹ where the apex court foresaw a scenario where there *“may be exceptional cases where there is a need to remedy a patently unjust and erroneous order and no changed circumstances exist, however expansively interpreted.”*² It was further stated by the court³ that *“In those instances, where strict adherence to the rules is at variance with the interests of justice, a court may exercise its*

¹ 2019 (6) SA 1 (CC).

² At para [58].

³ At para [58].

inherent power in terms of section 173 of the Constitution to regulate its own process in the interests of justice.”

- [32] In light of the foregoing, it was submitted that if this Court adheres strictly to the provisions of subrule 43(6), it cannot come to the assistance of G[...] to vary the Noko order, as there are no changed circumstances. Moreover, subsection 16(3)(b) of the Act prohibits an appeal.
- [33] Counsel for G[...], in response to the argument placed before this Court on behalf of S[...], submitted that this Court should accept that the 173 application is not in fact an appeal against the Noko order. This is because, it was submitted, it is irrefutable that the Noko order is patently and manifestly unjust and/or erroneous. Once again, given the provisions of Rule 43 and subsection 16(3)(b) of the Act, Rule 43 does not afford a remedy to G[...].
- [34] Counsel for G[...] also drew the attention of this Court to the matter of *CT v MT*⁴ where Rogers J (*as he then was*) reaffirmed that the rules of court are the procedure by which substantive rights are enforced. The learned Judge⁵ stated that:

*“However, to the extent that the applicant intended to advance the case that the rule is invalid for violating one or more of the above sections of the Bill of Rights, I reject the argument. **I remind myself at the outset that the rules of court are concerned with the procedure by which substantive rights are enforced. They do not lay down substantive law** (United Reflective Converters (Pty) Ltd v Levine 1988 (4) SA 460 (W) at 463B – E; Prism Payment Technologies (Pty) Ltd v Altech Information Technologies (Pty) Ltd (t/a Altech Card Solutions) and Others 2012 (5) SA 267 (GSJ) para 21; Standard Bank of South Africa Ltd v Hendricks and Another and Related Cases 2019 (2) SA 620 (WCC) para 26). Specifically in relation to rule 43, Vos J in this division said in Harwood v Harwood 1976 (4) SA 586 (C) at 588E – F **that rule 43 governs procedure and does not affect the substantive law** (see also Jeanes v Jeanes and Another 1977 (2) SA 703 (W) at 706F – G).*

⁴ 2020 (3) SA 409 (WCC).

⁵ At para 19 - 20

The court's power to make pendente lite orders for maintenance, contribution to costs, and access to and custody of children, is a power which vests in it by virtue of substantive law. It is a power which was exercised for many decades before rule 43 was introduced. If rule 43 were abolished, the substantive power would not disappear. Only the procedure by which it is invoked would change (a spouse would seek pendente lite relief by way of an ordinary application)."
[Emphasis Added] "

[35] Rogers J further held, *inter alia*, that:⁶

*"One possible source of injustice is where the interim order is from the outset unjust. In such a case the problem is not one of absence of temporal limit, though of course the injustice would at least be contained if the order automatically lapsed after a specified period of time. **Unfortunately it is always possible that interim orders may be unjust (whether because of dishonest affidavits or poor decision-making) and that they may last longer than anticipated.** This danger applies to all forms of interim relief, not only interim matrimonial relief. The non-appealability of rule 43 orders, which is expressly decreed by statute, is in truth a general characteristic of all interim orders. **Rule 43(6) will not usually provide a solution since the complaint is that the judge made an unjust order, not that circumstances have materially changed.***

Nevertheless, where an order is from the outset manifestly unjust and erroneous, a court may exercise its inherent power in terms of s 173 of the Constitution to remedy the wrong (S v S supra para 58). Moreover, where an injustice is compounded by an undue protraction of the divorce proceedings, the delay may itself constitute a material change of circumstance as contemplated in rule 43(6).

The potential abuse of indeterminate interim orders could be avoided by including in the order a provision to the effect that it will lapse after a specified period of time, whereupon the spouse in whose favour it was made would need to renew his or her application. In many cases it ought to be possible to assess how long the divorce should take to come to trial if diligently conducted. Specifying a fixed period might encourage the benefited spouse to pursue the

⁶ At paras 33 - 36.

main case diligently. On the other hand, proceedings can be delayed for many unforeseen circumstances having nothing to do with abuse by the benefited spouse. Whether it is desirable to insist on the expense and inconvenience of a further application is debatable. Furthermore, if the interim order were as unduly parsimonious rather than unduly generous, there may be an incentive on the part of the obligated spouse, rather than the benefited spouse, to drag out the main case.

Be that as it may, if specifying a terminal date in the order were thought desirable, there is nothing at common law or in rule 43 which prevents its imposition. And even in the absence of such a term, the fact that the main case has been delayed significantly longer than could reasonably have been expected when the interim order was made would probably be a basis to ask for a fresh assessment in terms of rule 43(6).”⁷

[36] It was submitted that the problem G[...] faces is that the rule which governs the procedure, namely subrule 43(6), does not “*provide a solution since the complaint is that the judge made an unjust order, not that circumstances have materially changed*”. Counsel for G[...] also relied on the *dicta* of Rogers J, where the learned Judge stated, with reference to *S v S*, that “... *where an order is from the outset manifestly unjust and erroneous, a court may exercise its inherent power in terms of s 173 of the Constitution to remedy the wrong (S v S supra, para 58).*”⁸

[37] It was further submitted that the fact that the order is unjust and erroneous is compounded by the fact that the Noko order is final in effect in that, once G[...] has paid the R 2 200 000.00, he would never be able to recover those funds as they would immediately be utilised by S[...] and/or S[...]’s attorneys. Following thereon, it was submitted on behalf of G[...] that he must thus approach this Court in terms of section 173 of the Constitution, which affords this Court the inherent power to protect and regulate its own process considering the interests of justice.

⁷ *Emphasis added.*

⁸ *At para 34; see para [35] ibid.*

[38] On behalf of G[...], it was submitted that the factors which evidence that the Noko order is patently and manifestly unjust and/or erroneous are as follows:

38.1 Noko J ignored the separated issues given the following:

38.1.1 Noko J did not take cognizance of the fact that the separated issues, which relate only to the Wilson Trust, must first be determined at trial, with the remaining issues in dispute between the parties not, at this stage, being designated for trial. It is common cause in this matter that the trustees of the Wilson Trust are G[...] and Stephen Lee Wetherall and that the Wilson Trust has been joined, by S[...], as a party in the divorce action.

38.1.2 This is illustrated by the fact that Noko J did not:

38.1.2.1 refer to the fact that it is only the separated issues which will, at this stage, proceed to trial;

38.1.2.2 have regard to the fact that once the separated issues are decided, this could lead to the resolution of the remaining disputes and S[...] would not require a contribution of R 2 200 000.00 as no further disputes would be enrolled for trial;

38.1.3 any contribution towards costs ordered by Noko J should have been limited to such contribution necessary for S[...] to proceed to trial regarding only the separated issues;

38.1.4 the Noko order makes provision for a contribution towards costs to be paid to S[...] regarding issues that do not fall within the ambit of the separated issues but relate to a plethora of other issues, many of which were centred around the GT Trust, being a trust that G[...] founded during or about 2012, within a year or two of the marriage, which trust is *not* a party in the divorce

action and in respect of which S[...] seeks no relief in the divorce action;

38.1.5 this fact is illustrated by having regard to the Bill of Costs supporting S[...]’s claim for a contribution which shows that S[...] has claimed for, *inter alia*:

38.1.5.1 various aspects which relate to the application to compel, which concerns the GT Trust and not the Wilson Trust;

38.1.5.2 various aspects relating to the first contempt application, which was dismissed with costs and in respect of which S[...] has thus far not been granted leave to appeal; and

38.1.5.3 various aspects relating to the Rule 30 application which is in respect of the GT Trust only;

38.1.6 Noko J was confused and/or conflated the Wilson Trust, being the subject matter of the separated issues and the GT Trust, being the subject of certain of the interlocutory applications in respect whereof S[...] sought a contribution towards costs. It was submitted that this clearly appears from paragraph 2 of the learned Judge’s judgment where Noko J states that “*The applicant (being S[...]) subsequently launched an application for joinder of GT Trust...*”. As set out earlier in this judgment, this is not correct.

38.2 Noko J failed and/or erred in not upholding the point *in limine* of *res judicata* given the following:

38.2.1 as is clearly illustrated by the wording of the Wijnbeek order, said order was intended to make provision for the costs of any

interlocutory applications which may be instituted and/or defended by S[...] in connection with the trial in the divorce action including, but not limited to, any application to compel discovery and/or application for a postponement;

38.2.2 however, in the subrule 43(6) application which gave rise to the Noko order (*“the second subrule 43(6) application”*), S[...] sought a contribution towards costs primarily in respect of interlocutory applications. Thus, it is submitted, S[...] has now secured two orders in respect of the same *causa*;

38.2.3 the issue of S[...]’s entitlement to a contribution towards costs in respect of any interlocutory applications required to be instituted and/or defended by her in respect of the trial in the divorce action, was decided by Wijnbeek AJ and no further order should have been made in this regard by Noko J;

38.2.4 in this regard the error of Noko J is highlighted by the fact that S[...] may, in future, be entitled to payment of the amount of R 800 000.00 in terms of the Wijnbeek order in respect of the first subrule 43(6) application and payment in terms of the Noko order in respect of the second subrule 43 application, allowing her to essentially receive a *“double payment”*. Noko J did not consider such *“double payment”*;

38.3 Noko J failed to apply the law given the following:

38.3.1 a contribution towards costs in terms of Rule 43 may only be granted in respect of interlocutory applications that are necessary to advance the cause in the relevant matrimonial proceedings;

38.3.2 in support of the aforesaid submission, Counsel for G[...] relied upon the decision in the matter of *BJM v WRM*⁹ where Bezuidenhout AJ found, with reference to, *inter alia*, *S v S*, that the costs in respect of interlocutory applications may only be included if said costs are “*truly interlocutory to the divorce proceedings*”;

38.3.3 Bezuidenhout AJ held:¹⁰

“The appropriate test in my view therefore is whether the interlocutory application is truly interlocutory to the divorce proceedings, because in such an instance the interlocutory will necessarily be required to efficiently finalise the proceedings. This by its very nature would include interlocutory application premised on frivolous grounds. Ultimately, the inclusion should be just, equitable and fair in the context of the pending litigation.”

38.3.4 In the premises, it was submitted that, insofar as S[...] claimed costs which related to her launching interlocutory applications that relate to the GT Trust, said costs are not “*truly interlocutory to the divorce proceedings*” and should not have been allowed;

38.3.5 Further, any issues pertaining to the GT Trust are not part of the divorce action as this trust is not a party to the divorce action and S[...] seeks no relief in respect thereof. As was submitted earlier on G[...]’s behalf, the GT Trust is not a part of the separated issues;

38.3.6 Noko J ostensibly granted S[...] a contribution towards costs to initiate and/or defend several interlocutory applications not directly related to the prosecution of her cause in the divorce

⁹ [2023] ZAGPJHC 401 (26 April 2023).

¹⁰ At para 59.

action, including, but not limited to, applications for rescission, contempt and/or in terms of Rule 30;¹¹

38.4 Counsel for G[...] also submitted that Noko J had incorrectly accepted S[...]’s version as to the quantum of her legal costs given the following:

38.4.1 Noko J simply allowed S[...] to charge an amount that is double the tariff allowed for the recovery of legal fees as opposed to applying the trite test that such fees must be reasonable;

38.4.2 The said error is illustrated by the fact, which was also not appreciated by Noko J, that S[...] is litigating at an extremely lavish scale, incurring fees that far exceed those that G[...] has incurred;

38.5 It was also submitted that Noko J incorrectly made several credibility findings against G[...] given the following:

38.5.1 Noko J made several credibility findings against G[...] which, based on the facts, were not justified and, in any event, not appropriately made in the context of motion proceedings, in that Noko J found that:

38.5.1.1 G[...] appeared to be quite reticent about his financial capacity;

38.5.1.2 The findings of Wilson AJ (*as he then was*) and Wijnbeek AJ regarding G[...]’s honesty appear to have been received by G[...] without demur;

38.6 G[...]’s Counsel further submitted that Noko J misdirected himself as to G[...]’s financial position, given the following:

¹¹ *Id at paras 20 - 29.*

- 38.6.1 Noko J incorrectly relied on statements, supposedly made in the course of previous proceedings, that were not before the Court;
- 38.6.2 Noko J took out of context comments made by Wijnbeek AJ in the course of his judgment in the first subrule 43(6) application;
- 38.6.3 Wilson AJ (*as he then was*), when handing down the Wilson judgment in the Rule 43 application, made it clear that he was not in a position to decide that application with the same level of precision as one would be able to decide a matter in which oral evidence is led. Thus, it was submitted, any statements and/or findings made by Wilson AJ (*as he then was*) as to G[...]’s financial position, should not have been accorded the amount of weight as was given to them by Noko J;
- 38.6.4 it was also submitted on behalf of G[...] that Noko J had conflated G[...]’s financial position with that of the Wilson Trust; the GT Trust and Noliforce (Pty) Limited (*“Noliforce”*) under circumstances where, amongst other things, the learned Judge clearly regarded G[...] as having access to the sum of approximately R 9 000 000.00 which belongs to Noliforce. This appears from the latest bank statement of the account held by Noliforce which is a separate juristic entity;
- 38.6.5 it was submitted that G[...] had clearly demonstrated in the second subrule 43(6) application, both in his affidavits filed therein and in his Financial Disclosure Form, what his financial position was and that he could never afford the contribution that S[...] sought and was subsequently granted;
- 38.7 Noko J relied on the legal position to the effect that a beneficiary of a discretionary trust is not automatically entitled to and/or vested with, benefits but failed to apply the law to the facts *in casu* which clearly demonstrated that:

- 39.7.1 Smanatha had committed fraud in respect of the Second Lamont Family Trust (*“the SLFT”*);
- 39.7.2 S[...] was afforded millions of Rands in legal fees by the SLFT which was then conveniently described as a loan;
- 39.7.3 a wealth of evidence was presented to the effect that S[...] was entitled to further funds held in the SLFT;
- 39.7.4 Wijnbeek AJ, in his judgment in support of the first subrule 43(6) application, found that S[...] had access to funds in the SLFT despite it being *“discretionary”*. Noko J failed to rely on such *dicta*, preferring to only rely on those statements made by Wijnbeek AJ which were adverse to G[...].

Submissions made on behalf of S[...] in respect of the merits of the section 173 application

[39] On behalf of S[...], it was submitted that:

- 39.1 by instituting the section 173 application, G[...] is seeking to delay, obstruct and/or circumvent the Noko order;
- 39.2 such an application is ill-conceived, and the relief sought does not exist in our law;
- 39.3 section 173 of the Constitution is not designed to facilitate the Applicant’s non-compliance with an order by the High Court and avoid paying the contribution towards legal costs as ordered by Noko J; and
- 39.4 the application is nothing more than an attempted *“back door appeal”* by G[...] to avoid the obligations imposed upon him to pay maintenance as ordered by this Court.

- [40] It was submitted that it is clear that G[...] does not seek a declaration of constitutional invalidity insofar as Rule 43 is concerned (*where certain procedures and/or Rules may be lacking*) but seeks a discharge and/or setting aside and/or correction of the Noko order, on the basis that same is patently unjust and/or erroneous, purportedly as envisaged by section 173 of the Constitution and the judgment in *S v S*.
- [41] S[...]’s Counsel argued that, in essence, what G[...] is seeking, is to subjectively take issue with the findings of Noko J and to have this Court set same aside, in terms of section 173 of the Constitution, on the basis that this Court has the requisite power to do so, together with the fact that the Noko order is patently unjust and/or erroneous.
- [42] Further and in this regard, it was submitted that whilst G[...] seeks to dress this application up as an application in terms of section 173 of Constitution (*even though same is not competent*), it is clear that such application is merely an attempt at a “*back door appeal*”.
- [43] Counsel for S[...] submitted that G[...] knows full well and accepts that the Noko order, being an order in terms of subrule 43(6), cannot be appealed and thus seeks to essentially have this Court declare that Noko J was wrong and that his order should be set aside. That, it is submitted, constitutes an appeal against the order of a single Judge to another single Judge of the same Division, which is clearly impermissible.
- [44] Moreover, it was submitted that G[...] does not want to pay S[...] the R 2 200 000.00 as ordered by Noko J in order to deprive her of the necessary funds to litigate against him. In the premises, it was submitted that G[...] wishes to “*flout*” S[...]’s constitutional rights and seeks to circumvent the obligations imposed on him in terms of the Noko order, by launching this application which is unsustainable in law; misuses section 173 of the Constitution as a means to avoid complying with the Noko order and attempts to appeal a subrule 43(6) order when same is not appealable.

The submission that G[...] has no cause of action to institute the section 173 application

[45] With reference to section 173 of the Constitution, it was submitted that:

45.1 section 173 gives this Court the inherent powers to:

45.1.1 protect and regulate its own processes. In the present matter, it was submitted that there is no process that is being sought to be regulated by G[...] in his 173 Application; and

45.1.2 develop the common law. It was submitted that in the present matter there is no common law that is to be developed. In addition, it was submitted that Rule 43 has its own regulatory processes which specifically outline certain limited avenues which are available to litigants where there is a material change in the circumstances of a litigant, relating to a specific matter. Further, subrule 43(6) has been specifically inserted in the Rules of Court as a mechanism and process for addressing a material change in the circumstances of litigants in a matter.

[46] In developing this argument, Counsel for S[...] submitted that whilst G[...] takes issue with the Noko order based on his subjective perception of the interests of justice, his subjective perceptions are irrelevant when it comes to the objective findings of Noko J. This, it is submitted, is because section 173 of the Constitution can never interfere with the rights which S[...] enjoys in terms of the judgment handed down by Noko J.

[47] In support thereof, Counsel for S[...] relies on the decision in the matter of *Social Justice Coalition and Others v Minister of Police and Others*¹² where the Constitutional Court held:¹³

¹² [2022] ZACC 27.

¹³ At para 80.

“At the same time, section 173 does not provide the Court with unlimited powers to do as it pleases and, in Molaudzi, in paragraph 50, this Court located that power carefully in the overall power and jurisdiction of the Court when it said:

“This inherent power to regulate process does not apply to substantive rights but rather to adjectival or procedural rights. A court may exercise inherent jurisdiction to regulate its own process only when faced with inadequate procedures and rules in the sense that they do not provide a mechanism to deal with a particular scenario. A court will, in appropriate cases, be entitled to fashion a remedy to enable it to do justice between the parties.”

[48] S[...]’s Counsel also relied upon the decision in the matter of *Oosthuizen v Road Accident Fund*¹⁴ where the SCA held¹⁵ the following:

“It follows that a high court can only exercise its inherent jurisdiction in relation to the regulation of its own process when confronted with a case over which it already has jurisdiction and when faced with procedures and rules of the court which do not provide a mechanism to deal with an instant problem. A court will, in that case, be entitled to fashion the means to deal with the problem to enable it to do justice between the parties.”

Submissions made on behalf of S[...] in respect of S v S

[49] It was noted by S[...]’s Counsel that G[...] has placed great reliance on the Constitutional Court decision in *S v S*. Further, it was noted that Counsel for G[...] had cited paragraph [58] of that decision on the basis that the contents thereof support the contention that section 173 of the Constitution can be used as a mechanism to declare the Noko order *void ab initio*.

[50] In his Heads of Argument, Counsel for S[...] sets out the relevant paragraph which reads as follows:

“There may be exceptional cases where there is a need to remedy a patently unjust and erroneous order and no changed circumstances exist, however expansively interpreted. In those instances, where strict adherence to the rules is at variance with the interests of justice, a court may exercise its inherent power

¹⁴ 2011 (6) SA 31 (SCA).

¹⁵ At para 20.

*in terms of section 173 of the Constitution to regulate its own process in the interests of justice. **Fortunately for Mr S, rule 43(6) is an avenue open to him.** [Emphasis Added] “*

[51] Before this Court, Counsel for S[...] submitted that this Court should “*frown on the conduct of the Applicant (G[...])*” who has intentionally left out the last sentence of the above paragraph which states:

“Fortunately for Mr S, Rule 43(6) is an avenue open to him.”

[52] S[...]’s Counsel submitted that this important sentence was left out of G[...]’s Replying Affidavit with the clear intention to mislead this Court. This serious allegation is based on the premise that the “*all-important*” sentence of, “**“Fortunately for Mr S, Rule 43(6) is an avenue open to him”** demonstrates that the Constitutional Court has “*slammed the door shut*” on G[...]’s contentions that section 173 of the Constitution can be used to set aside an order in terms of subrule 43(6) by the High Court.

[53] It was submitted by Counsel for S[...] that in the matter of S v S the Constitutional Court recognised that:

53.1 there may be circumstances whereby a rule 43 order is patently unjust and/or erroneous, however;

53.2 a patently incorrect maintenance order can be rectified by a Rule 43(6) application (*as was found by the Constitutional Court in this very case*). In the majority of cases litigants in Rule 43 proceedings already have the procedural mechanism in terms of Rule 43 (6), should they wish to vary and/or rectify a Rule 43 order, which they believe to be unjust and/or erroneous.¹⁶

[54] Based on the foregoing, Counsel for S[...] submits that the legal representatives of G[...] have thus misquoted the judgment by the

¹⁶ S v S at para 57.

Constitutional Court and then have attempted to utilise this misquotation as the “*entire basis and legal precedent*” for the section 173 application. It was submitted that this argument on behalf of G[...] was bad in law. In this regard, it was submitted that when perusing the judgment of *S v S*, it is clear that the Constitutional Court recognised that Rule 43 has its own procedural mechanisms to deal with the rectification and/or varying of court orders granted in terms thereof. Further, it was submitted that such specific procedural mechanism is in terms of subrule 43 (6).

[55] In amplification of his argument, Counsel for S[...] stated that the Constitutional Court had clearly found, as dealt with above, that Rule 43 has a mechanism and procedure, in terms of Rule 43(6), which allows litigants the opportunity to vary court orders, where there is a material change in a litigant’s circumstances in the present matter, so Counsel for S[...] contended, there is no material change in G[...]’s circumstances and hence, if the Applicant seeks to vary the Noko order, this process must fail.¹⁷ In the premises, S[...]’s Counsel concludes that all of the arguments by G[...]’s legal representatives to the contrary are bad in law and are simply unsustainable.

[56] By way of what may best be described as “*a concluding summary*”, Counsel for S[...] submits that:

56.1 Section 173 does not provide any powers for the High Court to reconsider an order of the High Court which has already been granted. This, it is submitted, is very different to having an inherent power to protect and regulate its own process and to develop the common law. Section 173 does not provide the High Court with any powers to reconsider an order that has been granted.

56.2 Further, G[...] concedes that the section 173 application is not an appeal or a review and is not a constitutional matter;

56.3 it is now to be heard by a single Judge on the same basis that a court would hear a Rule 43(6) application, despite the Constitutional Court

¹⁷ *Emphasis added.*

having already ruled that Section 173 is not applicable where Rule 43 has its own process to be followed, namely Rule 43(6), subject to certain limitations, namely a material change in circumstances.

[57] Since it is common cause that a subrule 43(6) order cannot be appealed and cannot be reviewed, it was submitted that there is no basis for a single Judge in terms of section 173 to reconsider the judgment itself, where such an application, in terms of section 173 of the Constitution, does not deal with procedural issues. G[...]’s section 173 application, it was submitted, is a consideration of substantive issues which is not permissible in terms of section 173 of the Constitution.

[58] Accordingly, it was submitted that since there is no basis in fact and/or in law to proceed with an application in terms of section 173 of the Constitution on the basis sought by G[...], there is no legal basis to grant the relief sought.

Submissions made on behalf of S[...] based on the rationale as to why an order in terms of Rule 43 is not appealable

[59] It was submitted that one of the reasons why a Rule 43 order in respect of a contribution towards legal costs is not appealable, is to prevent the impecunious spouse to whom the contribution towards legal costs is awarded from being prejudiced by an economically far superior spouse, who can delay the payment of the contribution towards legal costs by a prolonged appeal process.

[60] It was pointed out that in the current matter, Noko J referred to G[...]’s alleged tactic of “*catch me if you can*” whereby G[...] seeks to “*out litigate*” S[...] at every turn and stymie her from receiving funds in order to defend herself and pursue the necessary litigation. Counsel for S[...] relied upon the fact that Noko J, in his judgment, highlighted this fact and found this to be the approach adopted by G[...].

- [61] Reliance was also placed on the decision in the matter of *S v S* where, it was submitted, the Constitutional Court¹⁸ recognised the aforementioned principles, stating that there is a rational connection between subsection 16(3)(b) of the Act and the legitimate governing purpose to deal with the issue speedily in order to prevent the incurrence of costs. In addition to the foregoing, it was once again submitted on S[...]’s behalf that subrule 43(6) provides litigants with an opportunity to approach a court for variation of a previous subrule 43(6) order, which provides access to courts and sufficiently enables a litigant to exercise such right.
- [62] Counsel for S[...] once again accused G[...] (*and by necessary implication, G[...]’s legal representatives*) of deliberately omitting such a ruling by the Constitutional Court from the arguments made by G[...]. Further, it was submitted that this principle has slammed the door shut on G[...]’s entire case and his arguments with regard thereto.
- [63] It was further submitted that G[...] cannot approach a single Judge of this Division for the relief which he seeks in terms of section 173 of the Constitution and that the argument in that regard, as set out in his Replying affidavit, is without merit.
- [64] Placing reliance once again upon *S v S*, Counsel for S[...] submits that the Constitutional Court has set out succinctly that if a party wishes to have a Rule 43 order rectified and/or varied then that party has the mechanism of doing so in terms of subrule 43(6). However, the Applicant knows full well that he cannot approach this Court in terms of this subrule, as there has been no material change in his circumstances. It is therefore submitted that G[...], on his own version, has not satisfied the specific requirements that the Constitutional Court has set out for a party to have a subrule 43(6) Order rectified and/or varied. In this regard, it was further submitted that G[...] “*is seeking to make the law up as he goes along*”, by alleging that he can now approach this Court and merely apply for an order (*already granted*) to be set aside by a single Judge. It is submitted that this attempt to circumvent and short-circuit the specific

¹⁸ *S v S* at para 43.

procedural mechanism for the variation and/or rectification of such order, namely subrule 43(6), is impermissible.

- [65] Counsel for S[...] submitted that this approach by G[...] flies in the face of the very reasoning the Constitutional Court found that rule 43 orders are not appealable. It was further submitted that when this Court has regard to G[...]’s Founding Affidavit, it is clear that he outlines various grounds, where he subjectively believes that Noko J was incorrect (*which is denied by S[...]*) and thus, it is argued, such an approach (*as detailed above*) is merely a “back door appeal”. In the premises, it is submitted that G[...] cannot rely indirectly on a subrule 43(6) application, by framing it as a section 173 application, as he has not satisfied the change of circumstances requirement imposed in terms of subrule 43(6).

The submission that G[...] lacks the requisite jurisdiction to institute the section 173 application

- [66] Counsel for S[...] once again relied on the earlier submission that it has been established by the Constitutional Court that section 173 of the Constitution does not apply to issues which are substantive in nature and only applies to issues whereby a court’s processes and procedures are lacking. Thus, it was submitted that G[...] cannot approach this Court in terms of section 173 of the Constitution asking this Court to set aside the Noko order on substantive grounds.
- [67] It was submitted that G[...] has conceded that his entire section 173 application is based on issues that are substantive in nature and not procedural. In the premises, it is submitted that this ultimately results in this Court not having any jurisdiction to hear this matter, as this matter is not procedural in nature.
- [68] In amplification of the foregoing submissions, it was further submitted that the appeal process, although not available in this instance, exists for a reason. That reason is that no single Judge in the High Court has the requisite authority to overturn the judgment of another single Judge of the High Court on the basis as sought by G[...] in terms of section 173 of the Constitution.

[69] It was further submitted that what G[...] is asking this Court to essentially do, is to intercede as an “*appeal court*”; delve into the merits of the subrule 43(6) application which was before Noko J and pronounce upon whether or not Noko J was correct in his ruling. Since the application is in terms of section 173 of the Constitution and not subrule 43(6), this Court does not have the necessary jurisdiction to do so. If this application is entertained by this Court, it was submitted that any litigant, feeling aggrieved by a ruling of a single Judge in the High Court, could merely approach another single Judge of the High Court to have such original decision overturned and/or set aside, in the manner in which the Applicant seeks to do in the present matter.

[70] As part of his reasoning, Counsel for S[...] also submitted that G[...] knows full well that if he were to embark on the “*ordinary*” appeal process, leave to appeal would be denied on the basis that it is trite that subrule 43(6) orders are not appealable. It was once again submitted that G[...] cannot overcome this hurdle by bringing this application in terms of section 173 of the Constitution, since section 173 of the Constitution can never be invoked to deal with issues that are substantive in nature.

[71] Further, it was submitted that this is not what was intended when section 173 of the Constitution was promulgated and that the authorities referenced by the Constitutional Court in *Social Justice Coalition and Others v Minister of Police and Others*¹⁹ set out specifically the manner in which section 173 of the Constitution is to be used, namely only with reference to procedural issues and not those that are substantive in nature.

The reliance placed by S[...] on the submissions in support of the fact that the 173 application is res judicata.

[72] In the first instance, Counsel for S[...] submits that G[...], in his Replying Affidavit, concedes that the subrule 43(6) application, which was before Noko J, is *res judicata*. It is therefore submitted that all the issues that G[...] raises in his Founding Affidavit, where he believes that Noko J. was incorrect, have already been dealt with and have been decided upon by Noko J. It is further submitted

¹⁹ 2022 (10) BCLR 1267 (CC). See the authorities dealt with at paras 71 to 95.

that there is no mechanism that allows G[...] to reopen and relitigate all of the issues that have been dealt with by Noko J in the Noko award.

[73] It is also submitted, on behalf of S[...], that section 173 of the Constitution does not, in any way, shape or form, allow a litigant the opportunity to approach a Court once again and have all the issues that have already been decided upon by a single Judge in the High Court to be re-considered by another single Judge in the High Court and set aside. What G[...] seeks, it is submitted, is for a single judge in the High Court (*this Court*) to hold that Noko J was wrong and that his order be set aside. This, it is further submitted, is impermissible in law.

S[...]’s reliance upon the fact that G[...] allegedly has “unclean hands”.

[74] It is submitted that it is abundantly clear that G[...] seeks to utilise the ill-conceived 173 application to avoid the obligations which have been imposed upon him by the Noko order. In this regard, it was submitted that G[...]’s 173 application is “*riddled*” with attempts by him to avoid complying with the Noko order. Further, it is submitted that G[...]’s true intent in launching this application, which S[...] submits is bad in law, is an ill-conceived attempt to re-invent trite legal principles.

[75] Based on the foregoing, Counsel for S[...] submits that G[...] must now be held fully accountable for relying on section 173 of the Constitution which is not relevant, at all, to what he is trying to achieve. In the premises, it is submitted that this Court ought not to entertain this application, where the relief sought by G[...] is incompetent, misguided and bad in law. Finally, it is submitted by Counsel on behalf of S[...], that being mindful of the foregoing and of G[...]’s alleged true motive for instituting this application the section 173 application should be dismissed with costs on a punitive scale.

The law (insofar as it pertains to applications in terms of section 173 of the Constitution)

- [76] Certain previously decided matters have already been dealt with, to one extent or another, in this judgment. Where necessary, those matters will be referred to once again. However, it is imperative that this Court examine the principles of law applicable to applications in terms of section 173 of the Constitution, both in general and in relation to Rule 43.
- [77] As already noted the Constitutional Court, in *S v S*, provided for instances where, although an order granted in terms of Rule 43 is not appealable there **“may be exceptional cases where there is a need to remedy a patently unjust and erroneous order”** and no changed circumstances exist as contemplated by subrule 43(6) [Emphasis Added].²⁰
- [78] Also, in *S v S*, the Constitutional Court held that in *“such instances, where strict adherence to the rules is at variance with the interests of justice, a court may exercise its inherent power in terms of section 173 of the Constitution to regulate its own process in the interests of justice.”* [Emphasis Added]²¹
- [79] In the matter of *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another*,²² Sutherland J (as he then was) dealt with what constitutes “exceptional circumstances”. To this end, Sutherland J observed²³:

*“What constitutes ‘exceptional circumstances’ has been addressed by Thring J in *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas and Another* 2002 (6) SA 150 (C), where a summation of the meaning of the phrase is given as follows at 156I – 157C:*

‘What does emerge from an examination of the authorities, however, seems to me to be the following:

1. *What is ordinarily contemplated by the words “exceptional circumstances” is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different; “besonder”, “seldsaam”, “uitsonderlik”, or “in hoë mate ongewoon”.*

²⁰ *S v S* at para 58.

²¹ *S v S* at para 58.

²² 2014 (3) SA 189 (GJ).

²³ At paras 17 – 20.

2. *To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.*

3. *Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.*

4. *Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.*

5. *Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional'*

Significantly, although it is accepted in that judgment that what is cognisable as 'exceptional circumstances' may be indefinable and difficult to articulate, the conclusion that such circumstances exist in a given case is not a product of a discretion, but a finding of fact.

The survey of the authorities addressed by Thring J included a broad range of circumstances, and his summation or compendium appears to be of universal application. Nevertheless, it seems to me, to be necessary to express caution about importing from one kind of enquiry into another kind of enquiry an understanding of a familiar phrase. It is important to appreciate that Thring J was not addressing the phrase in s 18 of the SC Act but in the provisions of s 5(a)(iv) of the Admiralty Regulation Act 105 of 1983, which confers a power upon a competent court to direct an examination of various things in order to procure evidence.

A given phrase in any statutory provision has a function specific to that provision and to that specific statute and the primary aim of the interpreter is to discover the function it performs in that specific context. It may perform a different function in another statute and one must avoid being seduced by beguiling similarities. "

[80] In the matter of *University of the Free State v Afriforum and Another*²⁴ the SCA referred to *Incubeta* with approval and held that:²⁵

"Whether or not 'exceptional circumstances' for the purposes of s 18(1) are present must necessarily depend on the peculiar facts of each case. In Incubeta Holdings supra [8] para 22 Sutherland J put it as follows:

'Necessarily, in my view, exceptionality must be fact-specific. The circumstances which are or may be exceptional must be derived from the actual predicaments in which the given litigants find themselves.'"²⁶

[81] Further, in the matter of *Phillips and Others v National Director of Public Prosecutions*²⁷ the Constitutional Court held:²⁸

"The Constitution requires that judicial authority must vest in the courts which must be independent and subject only to the Constitution and the law. Therefore courts derive their power from the Constitution itself. They do not enjoy original jurisdiction conferred by a source other than the Constitution. Moreover, in procedural matters, s 171 makes plain that '(a)ll courts function in terms of national legislation and their rules and procedures must be provided for in national legislation'. On the other hand, s 173 of the Constitution preserves the inherent power of the courts to protect and regulate their own process in the interests of justice.

In S v Pennington and Another, this Court held that:

'It is a power which has to be exercised with caution. It is not necessary to decide whether it is subject to the same constraints as the "inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice" which vested in the Appellate Division prior to the passing of the 1996 Constitution. Even if it is subject to such constraints, the present situation, in which there is a vacuum because the legislation and rules contemplated by

²⁴ 2018 (3) SA 428 (SCA).

²⁵ At para 13.

²⁶ See also *Road Accident Fund v Newnet Properties (Pty) Ltd t/a Sunshine Hospital and Another* 2023 (5) SA 289 (GP) at para 19.

²⁷ 2006 (1) SA 505 (CC).

²⁸ At paras 47 - 49.

the Constitution have not been passed, is an extraordinary one in which it would be appropriate to exercise the power.'

*In Parbhoo and Others v Getz NO and Another too, this Court turned to its 'inherent power' to meet an 'extraordinary' procedural situation pending enactment of relevant legislation and promulgation of rules of procedure. In both cases the points are **made that ordinarily the power in s 173 to protect and regulate relates to the process of court and arises when there is a legislative lacuna in the process.** The power must be exercised sparingly having taken into account interests of justice in a manner consistent with the Constitution.*

It may be that the High Court could legitimately claim inherent power of holding the scales of justice where no specific law directly provides for a given situation or where there is a need to supplement an otherwise limited statutory procedure such as the one in s 26 of the Act. This can wait for a decision in the future when such a case presents itself. "[Emphasis Added; Footnotes omitted]

[82] Also, in the matter of *S v Lubisi: In re S v Lubisi and Others*²⁹ Bertelsmann J held³⁰ that:

"Although the powers granted to the Court in terms of s 173 of the Constitution still have to be exercised with caution and circumspection, the Constitution has broadened the scope for judicial activism where such appears to be in the interests of justice."

[83] During the course of argument, this Court was referred to various matters where the court's application of section 173 of the Constitution was not limited to procedure only but also dealt with the substantive law. The first such decision was that of *T v T*³¹. In this matter the court did not only apply section 173 of the Constitution in relation to process but also took into account the best

²⁹ 2004 (3) SA 520 (T).

³⁰ At 532F.

³¹ 2015 JDR 1303 (GJ).

interests of minor children which, it was submitted by G[...]’s Counsel, is an enquiry into the merits of the case more than into the process.

[84] In *T v T*, Mokgoatlheng J³² held the following:

“Generally a court’s inherent jurisdiction cannot be exercised in conflict with a statute. In accordance to the dictates of the rule of law and the supremacy of the Constitution the source from which this court derives its inherent power is section 173 of The Constitution pursuant to which this court has the inherent power to regulate its own processes taking into account the interests of justice. In this particular case because it concerns the rescission of adoption orders, this court is enjoined to take into account the paramountcy of the best interests of the children in terms of section 28(2) of The Constitution which provides that: “[a] child’s best interests are of paramount importance in every matter concerning the child.” [Emphasis Added]

[85] Further and in this regard, this Court was also specifically referred to the decision in the matter of *Dynamic Sisters Trading (Pty) Limited v Nedbank Limited*³³ where the court applied section 173 of the Constitution to stay execution in the interests of justice. Adams J held:³⁴

“Moreover, this Court has, under s 173 of the Constitution, the inherent power to stay execution if it is in the interests of justice. So, for example, in Road Accident Fund v Legal Practice Council (supra), the Full Court invoked s 173 of the Constitution (and its common-law inherent power), and not rule 45A, to stay execution. In that matter, it was also held that, as a general rule, the court will grant a stay of execution where real and substantial justice requires such a stay or, put otherwise, where injustice will otherwise be done. Thus, the court will grant a stay of execution where the underlying causa of the judgment debt is being disputed or no longer exists, or when an attempt is made to

³² At para 9.

³³ 2023 JDR 3204 (GP).

³⁴ At para10.

use for ulterior purposes the machinery relating to the levying of execution.” [Emphasis added]

[86] *MM v RO*³⁵ involved, *inter alia*, an application for reconsideration and amendment of an order in terms of subrule 43(5) and relating to a subrule 43(6) application. The judgment in this matter underscored the court’s inherent power to protect and regulate its processes and develop the common law in the interests of justice.

S v S

[87] It is expedient for this Court to deal with the decision of the Constitutional Court in the matter of *S v S*. Not only have both G[...] and S[...] relied thereon but, in the opinion of this Court, the principles of law, as enunciated by the apex court, are largely dispositive of the issues in the present matter.

[88] Firstly, it is imperative to take cognisance of the fact that in this matter the sole issue to be decided by the Constitutional Court was whether subsection 16(3) of the Act infringes any constitutional rights of a party wishing to appeal a Rule 43 order. Or, as stated by the court itself:

*“In other words, is the prohibition on appeals constitutionally permissible ?”*³⁶

[89] The Constitutional Court was *not* asked to determine whether it is permissible to institute an application in terms of section 173 of the Constitution in respect of an order made pursuant to an application in terms of subrule 43(6) and where there are no changed circumstances. This issue is clearly a completely different issue to the constitutionality of subsection 16(3) of the Act. In the premises, the principles set out in *S v S* should be seen in this light.

³⁵ [2024] ZAWCHC 203 (13 August 2024).

³⁶ *S v S* at para 28.

- [90] However, in finding that subsection 16(3) of the Act is not in conflict with the provisions of the Constitution, the court held that the order of the High Court in terms of Rule 43 was manifestly unjust in that, *inter alia*, there was no basis for the amount of spousal maintenance which Mr S was ordered to pay Mrs S, *pendente lite*.³⁷ It was also held that the root of Mr S's problem lay with the provisions of Rule 43 and not with subsection 16(3) of the Act. As is the case in the present matter the constitutionality of Rule 43 was not before the Constitutional Court.³⁸
- [91] It is also important to draw a distinction between the facts as found to exist in *S v S* and the facts of the present matter. In *S v S*, changed circumstances existed, namely, Mrs S had found employment and she no longer lived at the premises Mr S had rented for her but was living with her new partner.³⁹ In stark contrast thereto, it is common cause in the present matter that no change of circumstances, as contemplated by the provisions of subrule 43(6), exist.
- [92] It is against this factual matrix that the all-important *dicta* of the Constitutional Court in paragraph [58] of the judgment in *S v S* needs to be considered. The contents of that paragraph have already been set out, in full, earlier in the present judgment.⁴⁰ This judgment will not be burdened unnecessarily by, once again, setting out the contents thereof.
- [93] Likewise, the submissions made on behalf of both G[...] and S[...] have been fully dealt with herein.⁴¹ From the foregoing, it is clear that the last sentence of that paragraph, namely "*Fortunately for Mr S, rule 43(6) is an avenue open to him*" is of no consequence whatsoever when deciding the present matter. This is simply because, as illustrated above, whilst in *S v S*, subrule 43(6) *was* an avenue available for Mr S to pursue, it is common cause that it is *not* a route that can be taken by G[...] in the present matter.
- [94] Following thereon, it does not matter a single *iota* that the legal representatives of S[...] omitted the last sentence of this paragraph from the judgment in *S v S*

³⁷ *S v S* at para 52.

³⁸ *S v S* at para 53.

³⁹ *S v S* at para 57.

⁴⁰ *Id* at para 50.

⁴¹ *Id* at paras 31; 49 - 55.

when preparing G[...]’s Replying Affidavit prior to G[...] deposing thereto. In fact, his legal representatives were fully justified in doing so. Not only is S[...] represented in this matter but the last sentence of paragraph [58] of the judgment by the Constitutional Court in *S v S* is superfluous, in that it is not applicable to the facts of the present matter. In the premises, all allegations made on behalf of S[...] that, by omitting this single sentence from G[...]’s Replying Affidavit and during the argument placed before this Court, G[...]’s legal representatives were somehow attempting to mislead this Court, are soundly rejected.⁴² The unjustified attack made by S[...]’s legal representatives upon the integrity and professional etiquette of G[...]’s legal representatives, is noted by this Court with regret.

[95] With regard to those principles of law as set out by the Constitutional Court in *S v S* which *are* applicable to the section 173 application in the present matter, it is clear that this decision is authority for the fact that where there are exceptional cases where there is a need to remedy an unjust or erroneous order and no changed circumstances exist but where strict adherence to the rules is at variance to the interests of justice, a court may exercise its inherent power in terms of section 173 of the Constitution to regulate its own process in the interests of justice.⁴³ In the premises, if G[...] is able to satisfy the necessary requirements, he is entitled to institute the section 173 application.

[96] The requirements that G[...] must satisfy before this Court will intervene in terms of section 173 of the Constitution are:

- 96.1 the Noko order must be unjust and erroneous;
- 96.2 exceptional circumstances must exist; and
- 96.3 any intervention by this Court must be in the interests of justice.

Is the Noko order unjust and erroneous?

⁴² *Id* at paras 49 - 55.

⁴³ *S v S* at para 58.

[97] The submissions made on behalf of G[...] in support of his contention that the Noko order is both unjust and erroneous, have been fully dealt with earlier in this judgment. This Court is in agreement therewith.

[98] It would appear to this Court that S[...] did not, either in her Answering Affidavit or through her Counsel during the course of argument before this Court, seriously oppose (*other than by way of a bare denial*) the factual basis relied upon by G[...] to support his case that the Noko order was unjust and erroneous. Rather, the case for S[...], as clearly set out above, was based primarily, if not solely, on the submissions that, regardless of whether or not the Noko order was unjust and erroneous, G[...] could not, as a matter of law, seek relief in terms of section 173 of the Constitution.

[99] In the opinion of this Court, such submissions are clearly wrong. This is so, since S[...]’s entire case is based upon a fundamental misunderstanding of both the case placed before this Court by G[...] and his reliance upon the principles of law in support thereof. Further and in this regard, S[...]’s opposition to the 173 application is based upon the incorrect premise that, simply put, since the provisions of subrule 43(6) exist, the remedy available to a litigant, dissatisfied with an order in terms of Rule 43, is restricted to instituting an application in terms of subrule 43(6) and that such a litigant, even where the Rule 43 order may be unjust or erroneous and no changed circumstances exist, is prohibited from instituting an application in terms of section 173 of the Constitution.

[100] These misunderstandings and reliance upon an incorrect premise, are fatal flaws which are consistently present throughout and permeate all of the arguments placed before this Court on behalf of S[...]. The submissions pertaining thereto have already been dealt with earlier in this judgment.

[101] In the first instance, the submission that, “*by instituting the section 173 application, G[...] is seeking to delay, obstruct and/or circumvent the Noko order*”, cannot be accepted by this Court. It is rejected on the basis that there are no proven facts to support such a finding. Further, in the event that this Court holds that G[...] has satisfied the requirements for the granting of the

section 173 application, it would be inconceivable to deny G[...] the relief sought based on such an (*incorrect*) inference.

[102] The further submission that “*a section 173 application is ill-conceived and the relief sought does not exist in our law*” is also rejected by this Court. As is abundantly clear from the decisions cited herein⁴⁴ not only does the relief sought by G[...] exist but the provisions of section 173 of the Constitution form an important part of our law.

[103] The submissions that “*section 173 of the Constitution is not designed to facilitate the Applicant’s (G[...]’s) non-compliance with an order by the High Court and avoid paying the contribution towards Legal Costs as ordered by Noko J*” and that “*the application is nothing more than an attempted back door appeal by G[...] to avoid the obligations imposed upon him to pay maintenance as ordered by this Court*” can therefore carry no weight. Whilst the effect of the 173 application may well give rise to the Noko order being set aside, this does not mean that G[...] will be able to avoid his obligation to comply with other past or future orders in terms of Rule 43, whereby he is ordered, by this Court, to make a contribution towards the costs of S[...] in the divorce action.

Do exceptional circumstances exist?

[104] This Court, having found that the Noko order is unjust and erroneous, now turns to deal with the question as to whether or not, in the present matter, exceptional circumstances exist. In this regard, both the submissions made by G[...] in support of why he should be granted the relief sought and what our courts have held to be “*exceptional circumstances*”⁴⁵ have already been dealt with earlier in this judgment.

[105] Having regard thereto and taking into account the facts of the present matter, this Court has grave difficulty in conceiving of a better case than the present matter which satisfies this requirement. This is particularly so having regard to, *inter alia*, the fact that this Court has found the Noko order to be unjust and

⁴⁴ See *S v S* at paras 77 and 78 ; *CT v MT* at paras 34 and 35; *Phillips* at para 81; *Lubisi* at para 82; *T v T* at paras 83 and 84; *Dynamic Sisters Trading* at para 85 and *MM v RO* at para 86.

⁴⁵ See *Incubeta* at para 79 and *University of Free State* at para 80.

erroneous, together with the fact that the said order is not appealable and the provisions of subrule 43(6) are not available to G[...] since there are no “*changed circumstances*” as contemplated by the provisions of that subrule. Further, in the opinion of this Court, the considerable amount awarded towards a contribution to costs in the Noko order (*R 2 200 000.00*), is a further factor which should be taken into account when considering whether exceptional circumstances exist in this matter.

Would it be in the interests of justice for this Court to intervene in terms of section 173 of the Constitution and to develop the common law?

[106] Having found that the Noko order is unjust and erroneous, together with the finding by this Court that exceptional circumstances exist in the present matter, it is incumbent upon this Court to decide whether it would be in the interests of justice to intervene in terms of section 173 of the Constitution and, if so, whether to grant to G[...] the relief that he seeks.

[107] In the event of this Court declining to intervene the effect thereof would be that G[...] would be obliged to pay to S[...] the sum of R 2 200 000.00 in respect of a contribution towards her legal costs in the divorce action. Further, the said amount would be payable regardless of this Court’s finding that the Noko order is unjust and erroneous and that exceptional circumstances exist. Also, in light of the fact that the court determining the divorce action at trial has a general discretion in respect of costs, it is uncertain whether G[...] would ever recover the amount (*or any part thereof*) of the sum paid by him to S[...] in terms of the Noko order.

[108] In addition to the foregoing, should this Court decline to intervene in this matter in terms of section 173 of the Constitution, this Court will have spurned the opportunity “*to develop the common law*” which, in terms of the Constitution, this Court is enjoined, even obliged, to do.

[109] In the premises, this Court has no hesitation in finding that it would be in the interests of justice for this Court to intervene in this matter in terms of section 173 of the Constitution, thereby developing the common law.

Conclusion

[110] For the sake of completeness, this Court will deal with, as briefly and succinctly as possible, other submissions made on behalf of S[...]. This is particularly so where these submissions may not fall strictly within the ambit of those dealt with earlier in this judgment.

[111] It was submitted by S[...]'s Counsel that the relief sought by G[...] in the section 173 application “*constitutes an appeal against the order of a single Judge to another single Judge of the same Division, which is clearly impermissible.*” This cannot be correct and misconceives the true nature and purpose of section 173 of the Constitution. That is, the provisions of section 173 of the Constitution were promulgated specifically to provide a court (*in the present matter the High Court*) with “*the inherent power to protect and regulate its own process, and to develop the common law, taking into account the interests of justice.*” As consistently held by our courts, this is to ensure that, in appropriate matters, where there is a *lacuna* in the rules which, in turn, results in an injustice, a court is entitled “*to fashion a remedy to enable it to do justice between the parties*”.⁴⁶

[112] In the present matter, there is no mechanism to deal with an unjust and erroneous Rule 43 order since there is no right of appeal and no changed circumstances. Arising therefrom, this Court is entitled to intervene, in terms of section 173 of the Constitution, acting in the interests of justice. This is, in the first instance, a matter of procedure. Any order made by this Court thereafter, which could conceivably range from dismissing the section 173 application to granting appropriate relief, would then deal with the substantive aspects of the said application. By acting in terms of the provisions of section 173 of the Constitution, this Court does not purport, in any manner whatsoever, to act as a court of appeal. The application and the decision reached by this Court in respect thereof, remain squarely within the provisions of section 173 of the Constitution.

⁴⁶ See *Social Justice Coalition and Others v Minister of Police and Others* at para 80; *S v Molaudzi* [2015] ZACC 20.

[113] As to the reliance by S[...]’s Counsel upon *Oosthuizen*,⁴⁷ it is the opinion of this Court that the finding by the SCA therein ultimately supports those findings made by this Court in the present matter. Having jurisdiction to hear the 173 application (*arising as it does from the second subrule 43(6) application*) and faced with procedures/rules which do not provide a mechanism to deal with the problem, this Court is “*entitled to fashion the means to deal with the problem to enable it to do justice between the parties.*”

[114] In support of S[...]’s opposition to the 173 application, it was submitted that the rationale behind the decision by the legislature to determine that a Rule 43 order is not appealable in terms of subsection 16(3)(b) of the Act, illustrates that the section 173 application should be dismissed. This Court accepts the rationale that one of the reasons why a Rule 43 order in respect of a contribution towards legal costs is not appealable, is to prevent the impecunious spouse to whom the contribution towards legal costs is awarded from being prejudiced by an economically far superior spouse, who can delay the payment of the contribution towards legal costs by a prolonged appeal process. However, this does *not* assist S[...] with her submission that the section 173 application should be dismissed. This is because (a) the rationale behind subsection 16(3)(b) of the Act is separate and distinct to that giving rise to section 173 of the Constitution and (b) the provisions of Rule 43 and subsection 16(3)(b) of the Act cannot prohibit a court from intervening, in the interests of justice, in terms of section 173 of the Constitution (*the supreme and governing legislation in the Republic of South Africa*).

[115] With regard to S[...]’s Counsel drawing this Court’s attention to the finding by Noko J, in his judgment, that G[...] seeks to “*out litigate*” S[...] at every turn and stymie her from receiving funds in order to defend herself and pursue the necessary litigation, together with the fact that the learned Judge found this to be the approach adopted by G[...], this Court has already accepted the submissions made on behalf of G[...] that Noko J was incorrect in making credibility findings within the context of application proceedings.

⁴⁷ Footnote 15 above; at para 20.

[116] S[...]’s reliance upon *Social Justice Coalition*, in support of the submission that G[...] cannot invoke section 173 of the Constitution in this matter on the basis that this section “*does not apply to substantive rights but rather to adjectival or procedural rights*”⁴⁸ is, in the opinion of this Court, misguided. This decision by the Constitutional Court must be seen in the context that the matter before the apex court, at a procedural level, raised the question whether, and in what circumstances, an appellate court may grant a declarator that an unreasonable delay constitutes a constructive refusal of a remedy in conflict with the right of access to court. This was in the context of a matter where the Equality Court (Western Cape) had failed to grant the applicants access to that court *but there had been no formal application by the applicants to the Equality Court to do so*. Leave was then sought from the Constitutional Court to declare that the Equality Court should be taken to have refused a substantive remedy to the applicants and that leave should be granted to those applicants to appeal directly to the Constitutional Court. In that matter, leave to appeal was refused.

[117] In the premises, it is clear, once again as was the position in *S v S*, that the applicants in *Social Justice Coalition* had a procedural remedy available to them, namely, to approach the Equality Court before seeking relief from the Constitutional Court. This is in stark contrast to the present matter where G[...] is left without a remedy. There is no procedure available to him to appeal the Noko order and he cannot institute an application in terms of subrule 43(6) in light of the fact that there are no changed circumstances within the meaning of the provisions of that subrule. At the end of the day, what this Court intends to do, acting in terms of section 173 of the Constitution, is precisely that as envisaged by the Constitutional Court in *Social Justice Coalition*. That is, the election by this Court to intervene in terms of section 173 of the Constitution does not violate the principles as set out in *Molaudzi* which was cited, with approval, in *Social Justice Coalition*. Faced with “*inadequate procedures and rules in the sense that they do not provide a mechanism to deal with a particular scenario*” this is an appropriate case where this Court is “*entitled to fashion a remedy to enable it to do justice between the parties.*”

⁴⁸ See *Social Justice Coalition and Others v Minister of Police and Others* at para 80.

[118] From the foregoing, it must follow that any remaining grounds of opposition to the section 173 application raised on S[...]’s behalf, such as G[...] lacking the requisite jurisdiction to institute the section 173 application; the section 173 application being *res judicate* and G[...] allegedly having “*unclean hands*” must also be rejected by this Court. This is simply because of, *inter alia*, the very nature of these motion proceedings, coupled with a fundamental misunderstanding by S[...] of both the case placed before this Court by G[...] and his reliance upon the principles of law in support thereof. Together therewith, as also dealt with earlier in this judgment, S[...]’s entire opposition to the section 173 application is based upon an incorrect premise. The said premise is that since the provisions of subrule 43(6) exist, the remedy available to a litigant, dissatisfied with an order in terms of Rule 43, is restricted to instituting an application in terms of subrule 43(6) and that such a litigant, even where the Rule 43 order may be unjust or erroneous and no changed circumstances exist, is prohibited from instituting an application in terms of section 173 of the Constitution.

[119] This Court finds that G[...] has satisfied all of the requirements entitling this Court to intervene in this matter in terms of section 173 of the Constitution. In that regard, it is my view that the Noko order is unjust and erroneous. Accordingly, exceptional circumstances exist for this court to intervene in the interests of justice.

[120] Intervention by this Court in this particular matter in terms of section 173 of the Constitution also clearly develops the common law. S[...]’s Counsel expressed a concern that this Court’s intervention in terms of section 173 of the Constitution would open the “*floodgates*” and result in a plethora of applications by dissatisfied litigants in respect of Rule 43 orders granted in the High Court.

[121] In the opinion of this Court, this “*concern*” is ill-founded. The finding of this Court is specific to the particular facts of the present matter. That is, in the first instance, G[...] has no remedy in terms of subrule 43(6). This is because, in the matter before this Court, it is common cause that there has been no material change in circumstances since the granting of the Noko order. Further, G[...] has shown that the Noko order is unjust and erroneous; exceptional

circumstances exist and the intervention by this Court would be in the interests of justice. Moreover, intervention by this Court would develop the common law.

[122] The said finding is not to be interpreted, in any manner whatsoever, to support a contention that a litigant who is ordered to make a contribution towards costs, in terms of subrule 43(6), is entitled, on the basis that the said litigant is simply dissatisfied by the terms of that order, to invoke the provisions of section 173 of the Constitution. Prior to doing so, such a litigant is obliged to show that he or she is without a remedy. In other words, that litigant must prove that the remedy available in terms of subrule 43(6), whereby the previous order may be varied due to changed circumstances, does not exist. If the facts of a matter support the finding that there are indeed no changed circumstances and that the remedy as contained in subrule 43(6) is not available, then the litigant would have overcome the “*first hurdle*”.

[123] Of course, that does not conclude the “*enquiry*”. In addition to the foregoing, it is incumbent upon a party wishing to seek relief in terms of the provisions of section 173 of the Constitution to prove that the relevant order is unjust and erroneous; exceptional circumstances exist and the intervention by the court would be in the interests of justice. In addition, it would be necessary for the court seized of the matter to find that intervention by that court would develop the common law. It is only upon satisfying the aforesaid requirements that a litigant would be entitled to any relief in terms of section 173 of the Constitution.

[124] It is clear from the foregoing that several “*safeguards*” exist which, when properly implemented, will ensure that parties in divorce actions do not attempt to abuse the provisions of section 173 of the Constitution. Also, these safeguards support the rationale underlying subsection 16(3)(b) of the Act. Section 173 of the Constitution is not to be construed as a manner by which a litigant may circumvent the fact that there is no right of appeal in respect of an order for a contribution towards costs in a pending matrimonial action.

[125] In addition to the foregoing and in order to avoid parties to an application in terms of subrule 43(6) attempting to invoke the provisions of section 173 of the Constitution in order to, *inter alia*, delay the finalisation of the divorce action and

attempts by one spouse to “*out-litigate*” the other, often impecunious, spouse, is for our courts to apply a fairly “*restrictive*” interpretation to the accepted principles of law when conducting the enquiry into whether or not the party wishing to invoke section 173 of the Constitution has properly fulfilled all of the applicable requirements. Further, when exercising its general discretion in respect of costs, it is open to a court to impose a punitive cost order upon a party seeking to perpetrate such an abuse. Such punitive cost orders could also, where applicable, be extended to the legal representatives of the offending party.

[126] Should our courts, with the possible assistance of the Rules Board and the Heads of Court in the various Divisions (*by the promulgation of suitable Rules of Court and Practice Directives*) apply the aforesaid “*checks and balances*”, this Court is confident that our common law may be developed to ensure that the provisions of subsection 16(3)(b) of the Act and subrule 43(6) are properly applied in conjunction with the provisions of section 173 of the Constitution.

[127] Having found in favour of G[...] in terms of the 173 application the contempt application instituted by S[...] stands to be dismissed. It is not necessary for this Court to decide the stay application, other than the issue of costs.

Costs

[128] It is trite that this Court has a general discretion, to be exercised judicially, in respect of costs. Further, it is trite that, unless unusual circumstances exist, costs should normally follow the result. No such circumstances have been brought to the attention of this Court.

[129] In respect of the 173 application, S[...] should pay G[...]’s costs. This is particularly so in light of, *inter alia*, the ill-conceived opposition by S[...] to the 173 application. It follows that in upholding the 173 application the contempt application was also without any merit. In the premises, S[...] should also be ordered to pay those costs. Finally, in light of the attitude adopted by S[...], with particular regard to the contempt application, it was necessary for G[...] to institute the stay application. It would therefore be just and equitable if S[...] was ordered to pay the costs in respect of that application.

[130] A further issue in respect of costs which requires determination by this Court, is the application on behalf of S[...] that G[...]’s attorneys be ordered to pay the costs of the contempt application *de bonis propriis*, on the scale of attorney and own client, jointly and severally with G [...], the one paying the other to be absolved. As was noted earlier in this judgment, this application is opposed by G[...]’s attorneys.

[131] The *causa* for S[...] seeking such a costs order was on the basis that, *inter alia*, G[...]’s attorneys had somehow “*influenced*” G[...] not to comply with the Noko order. According to S [...], the actions of G[...]’s attorneys had resulted in G[...]’s wilful and *mala fides* actions by failing to pay the contribution towards costs in terms of the Noko order. These actions gave rise to the contempt application. Hence, the said attorneys should also be liable to pay costs incurred by S[...] in respect of the contempt application.

[132] This Court has dismissed the contempt application and ordered that S[...] pay the costs of that application. It must follow that there are no grounds upon which this Court can make an order for costs against G[...]’s attorneys in relation to the same application. In addition, it is the opinion of this Court that there were never any real grounds upon which S[...] could have justified seeking a punitive order for costs against G[...]’s attorneys in the contempt application. Any advice given to G[...] by his attorneys to, *inter alia*, institute the 173 application and oppose the contempt application was, under the circumstances, correct. If this included advice not to comply with the Noko order, G[...]’s attorneys cannot be criticised therefor.

[133] It is trite that orders for costs *de bonis propriis* are not easily granted by our courts unless the requisite criteria are shown to exist. Further, it is trite that such cost orders should be pursued with caution. This is, *inter alia*, to ensure that legal representatives are not influenced in failing to prosecute their clients’ cases under threat of being punished with adverse cost orders. In the present matter, this Court finds that there was no justification whatsoever for S[...]’s application for a punitive costs order against G[...]’s attorneys. Accordingly, that application is dismissed. As an indication of this Court’s displeasure with the

conduct displayed by S[...] in this regard, S[...] is ordered to pay those costs on the attorney and client scale.

Order

[134] This Court makes the following order:

1. The order of Noko J dated 24 January 2025 and amended on 4 February 2025 under case number 22224/2019, is set aside.
2. S[...] A[...] T[...] (“S[...]”) is to pay the costs of the application by G[...] J[...] T[...] (“G[...]”) in terms of section 173 of the Constitution under case number 22224/2019 on the party and party scale (SCALE C), such to include the costs of two (2) counsel.
3. The contempt application by S[...] under case number 22224/2019 is dismissed.
4. S[...] is to pay the costs of the contempt application, on the party and party scale (SCALE C), such to include the costs of two (2) counsel.
5. S[...] is to pay the costs of the stay application under case number 22224/2019 on the party and party scale (SCALE C), such to include the costs of two (2) counsel.
6. The application by S[...] under case number 22224/2019 that Steve Merchak Attorneys be ordered to pay the costs of the contempt application *de bonis propriis*, on the scale of attorney and own client, jointly and severally with G[], the one paying the other to be absolved, is dismissed.
7. S[...] is to pay the costs of the application as set out in paragraph 6 hereof on the scale of attorney and client, such to include the costs of two (2) counsel.

**BC WANLESS
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

Date of Hearing: 5 June 2025

Date of Judgment: 23 February 2026

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