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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 2024-033724

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED: YES / NO
DATE: 31 August 2026
SIGNATURE: _____

In the matter between:

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

Applicant

and

E[...] R[...]
MAGISTRATE D STIGLING
KINEIL MUTHRAY

First Respondent
Second Respondent
Third Respondent

JUDGMENT

VAN DER WESTHUIZEN AJ

Introduction

- [1] This is an application to review and set aside a ruling and an order made by the second respondent, a magistrate presiding in the Domestic Violence Court, Pretoria, in proceedings under the Domestic Violence Act 116 of 1998

(the DV Act) between the first respondent, as applicant, and the applicant, as respondent, under case number DV959/2022 (the DV proceedings). The ruling is that of 15 March 2023, by which the magistrate directed that an objection to the admissibility of certain documents be disposed of by way of argument on the question of legal professional privilege before any application for leave to file a further affidavit would be entertained. The order is that delivered on 7 December 2023 and made available in writing on 12 December 2023, by which the magistrate upheld the objection "based on legal professional privilege and private and confidential information" and directed the applicant to launch a formal application in terms of rule 55 of the Magistrates' Courts Rules for the filing of a further affidavit "which would exclude information covered by privilege as ruled".¹

- [2] The application is brought under Section 22(1)(c) and (d) of the Superior Courts Act 10 of 2013, read with section 16 of the DV Act, which renders the review provisions of the Magistrates' Courts Act 32 of 1944 and the Superior Courts Act applicable to proceedings under the DV Act. The grounds relied upon are gross irregularity in the proceedings and the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.
- [3] The applicant, who is himself a practising attorney, was represented by Mr Woodrow SC and Ms Odendaal. The first respondent, the applicant in the DV proceedings, initially gave notice of intention to oppose but withdrew her opposition and abides the decision of this Court.² The second respondent did not oppose the merits. She delivered a written "response to review application" dated 21 May 2024 in which she explains her reasoning, records that she abides the decision of this Court on the merits, and opposes only the costs orders sought against her personally.³ The third respondent, Mr Kineil Muthray, is the attorney who represented the first respondent in the DV proceedings. He was cited because the applicant seeks an order that he pay the costs of this application *de bonis propriis* on the scale as between attorney and client. He delivered an answering affidavit and heads of argument and was represented at the hearing by Mr Van As.

¹Caselines 02-95 (annexure FA1) and 02-97 to 02-102 (annexure FA2), paras 61 to 63.

²Caselines 11-1 to 11-3.

³Caselines 10-1 to 10-8.

- [4] The issues narrowed at the hearing. Mr Woodrow confirmed that the applicant no longer persists in any costs order against the second respondent; costs are sought against the third respondent alone.⁴ For his part Mr Van As, having handed up a draft order confined to the costs issue, informed me that the third respondent does not persist in any opposition to the review on its merits, that he "does not have a horse in that race", and that his participation is confined to resisting the personal costs order sought against him and to seeking costs against the applicant on a punitive scale.⁵ The concession was properly made, but it came late: the third respondent's answering affidavit opposed the review root and branch, characterised it as a "hopeless case" and an abuse of process, and asked that it be dismissed with punitive costs, and his heads of argument, delivered in January 2026, maintained that stance. Its significance will appear when I come to costs.
- [5] The issues that remain for decision are therefore: (a) whether this Court should entertain a review of proceedings that have not yet run their course in the court below; (b) whether the ruling and order are reviewable under section 22(1)(c) or (d); (c) if so, what relief is appropriate; and (d) costs, in particular whether the third respondent should be ordered to pay the costs of the review personally and, if so, on what scale.

The background

- [6] The applicant and the first respondent were married in 2009 and divorced in 2013. Two daughters were born of the marriage. From 2011 until 2020 the applicant was in a relationship with Ms E[...] D[...] L[...], a practising advocate, and a son was born of that relationship in 2017. In March 2022 the applicant launched an application in this Court against Ms D[...] L[...] concerning his parental rights in respect of that child. On 6 April 2022, shortly before Ms D[...] L[...]’s answering affidavit in that application fell due, the first respondent obtained an interim protection order against the applicant ex parte in the Domestic Violence Court on the basis of alleged economic abuse.⁶ The applicant opposed the confirmation of the interim order. His case in the DV proceedings has throughout been that the application was not brought because of any act of domestic violence but for an ulterior purpose, namely to

⁴Recording of the hearing of 9 June 2026, 11:33 segment.

⁵Recording of the hearing of 9 June 2026, 11:33 to 11:36 segments.

⁶Founding affidavit, Caselines 02-14 to 02-15, paras 27 to 33.

assist Ms D[...] L[...] in the pending High Court litigation, and that Ms D[...] L[...] was, as he put it, the "silent party" to the DV proceedings. The first respondent denied under oath that Ms D[...] L[...] had any involvement.⁷

- [7] The DV proceedings became protracted. Affidavits were exchanged beyond the usual three sets. On 10 March 2023, shortly before a hearing set down for 15 March 2023, the applicant's erstwhile attorneys filed and served a further supplementary affidavit, without leave, in response to what the applicant contended were new facts raised by the first respondent. Some thirty annexures were attached to it (annexures RR1 to RR30). Among them were screenshots and email cover pages which, on the applicant's case, show that Ms D[...] L[...] drafted affidavits for the first respondent in the DV proceedings and corresponded with her and with the third respondent about them, including emails of 12, 14, 16 and 17 October 2022 addressed by the first respondent to the third respondent and Ms D[...] L[...] under the subject line "Answers E[...] R[...] Domestic Violence".⁸ The magistrate, on discovering that the affidavit had been placed on the file without leave, directed the clerk to remove it, without herself reading it. On 14 March 2023 the applicant's attorneys wrote to the third respondent recording that the affidavit would be removed from the file and that a formal application for leave to file it would be brought.⁹

What happened on 15 March 2023

- [8] The transcript of 15 March 2023 is the foundation of the applicant's complaints, and I have read it with care.¹⁰ Ms Haupt, who then appeared for the applicant, informed the magistrate of the applicant's intention to bring a substantive application for leave to file the further affidavit, drew attention to section 6(2)(b) of the DV Act, and asked for a postponement for that purpose. The third respondent objected. He did so, however, not merely by raising a point of law. He addressed the magistrate at length, and from the bar, on matters of fact of which he could have had no personal knowledge and which were not on affidavit: that the applicant had "unlawfully accessed" the first

⁷Caselines 02-16 to 02-17, paras 35 to 39; 02-18, para 45.

⁸The annexures are tabulated in the founding affidavit at Caselines 02-48 to 02-54, para 173.

⁹Caselines 02-19, paras 46 to 48 and annexure FA5.

¹⁰The transcript forms part of the third respondent's answering affidavit as annexure KM4, Caselines 09-67 to 09-132, and of the Rule 53 record in section 13 of the bundle.

respondent's email account; that "it appears that the respondent accessed my client's email from her daughter's phone", had "opened all the mails and forwarded those mails to himself" and thereafter to his receptionist; that the first respondent "could not understand how it is possible that emails that she received were already been opened"; that the applicant had been "sitting with this information from 7 February"; and that the annexures comprised privileged correspondence between himself and his client and between his client and another attorney, Ms Uys, including a mandate and draft litigation documents.¹¹ He went on to accuse the applicant and his legal team of "gross criminality and misconduct", described the forum as one which opposing counsel treated as a "Mickey Mouse" forum, said that the applicant's erstwhile attorney had been reported to the Legal Practice Council and that counsel would be reported to the Deputy Judge President, contended that the applicant's legal representatives had "painted themselves with this tainted brush of criminality" and should be disqualified from acting, and concluded that counsel had chosen "to take a sip of the devil's cup".¹²

- [9] The magistrate herself cautioned the third respondent early in that address. Having stopped him, she said: "I do not know if whatever you are going to tell me is going to have any influence or undue influence on this Court and whether it should not be. So, if that should be then I will be reluctant to hear that. Just be careful, I do not want this proceedings to be tainted."¹³ The caution had no discernible effect on what followed.
- [10] Ms Haupt's response is important because the third respondent's central answer in this Court is that no complaint was ever made about his conduct at the time. She placed on record that the proceedings would be transcribed and that the applicant would ask for an opportunity "to properly deal with the issues raised by Mr Muthray which is not under oath"; that "Mr Muthray must decide either he is legal representative who forwards arguments based on the papers as they are before the Court ... or whether he wants to be a witness in this matter, because he keeps on making submissions that are not under oath attempting to persuade the Court, influence the Court"; that she appeared in a professional capacity, had no personal interest and "was not a witness in this matter"; that the applicant was entitled to a fair hearing "where matters are properly placed under oath so that he can respond thereto in the correct

¹¹Caselines 09-89 to 09-90; 09-101 to 09-102.

¹²Caselines 09-89; 09-91; 09-101 to 09-105; 09-117 to 09-118.

¹³Caselines 09-87.

fashion"; and, later, that "again my colleague must decide whether he is a witness in this matter, or whether he is going to argue this matter on the papers as they are before this Court". She asked, in terms, that the applicant "be afforded the opportunity to deal with the new issues raised by the applicant in her further affidavit ... including with the issues raised as per the record of today's proceedings, because again Mr Muthray refers to things that his client came to her attention that her emails are open. I do not know whether that is under oath. Give her the opportunity then to deal with that under oath."¹⁴ She also proposed that the parties exchange heads of argument.

- [11] The magistrate, after expressing her displeasure at the manner in which the further affidavit had been filed, ruled as follows: "the only postponement I will grant is for you to prepare fully on that argument of privileged. I will allow for the transcription of the records. So what I am saying ... I did not say for the application. [I] must first make a sort of ruling whether I will allow the application, whether I will hear the application once I have comprehensive arguments ... Then I am in a position to rule, yes I will hear or no, no more hearings we are proceeding ..." The matter was postponed to 30 May 2023 "for heads of arguments relating to the privileged issue that was raised".¹⁵ The request to deal with the third respondent's factual assertions on affidavit was thus not granted. The scope of the postponed hearing was confined to privilege.

The subsequent hearings

- [12] On 30 May 2023 Mr Botha, who then appeared for the applicant, submitted that privilege could not be adjudicated without the context that only an application on affidavit could supply, and asked for leave to bring such an application. The third respondent opposed this and asked the magistrate "to reinforce the ruling that the issue of privilege be argued as a legal point, before any other interlocutory application can be brought". Mr Botha objected that the third respondent's heads of argument contained factual allegations unsupported by any evidence. The magistrate adhered to her ruling, indicating

¹⁴Caselines 09-105 to 09-107; 09-110 to 09-112.

¹⁵Caselines 09-126 to 09-127; 09-132.

that "if the court is satisfied that whatever is in the heads should not have been argued, the court will leave it out".¹⁶

- [13] On 29 June 2023 Mr Woodrow appeared. The magistrate confirmed that the hearing concerned privilege alone.¹⁷ Mr Woodrow argued, with reference to authority, that the party asserting privilege bears the onus, that privilege "cannot be claimed without jurisdictional facts being placed before the Court", and that the third respondent's difficulty was "that he did not place jurisdictional facts before the Court. There is no affidavit setting out those jurisdictional facts. And as it has been pointed out to him in previous arguments, his submissions are not evidence." He added that a large part of the third respondent's heads of argument was "not supported by any affidavit before you" and asked that, when the third respondent made factual submissions, he refer the court to the page of the record on which the fact appeared, failing which he would not interrupt but would deal with the point in reply.¹⁸
- [14] In reply the third respondent said that Ms D[...] L[...] was "in no way involved in this matter"; that his colleague had "conveniently sidestepped the issue of confidential and private documents"; that the emails had been intercepted "without the applicant's permission. That is common cause"; that "we must emphatically argue that he unlawfully accessed a private account"; and, after stating that he had the supplementary affidavit with him but had deliberately not placed it before the court, that "what we can do like we have done in our heads of argument [is] to give the Court sufficient information to determine whether or not those documents can be considered privileged, confidential and private".¹⁹ When Mr Woodrow objected to the first of the references to unlawful access, the magistrate told him to note it and deal with it in reply, which he did: "there was not one reference to any page number, or to any affidavit, or to any fact in his address to you. Not once."²⁰ He explained that he had not addressed privacy and confidentiality because to do so "would be

¹⁶Founding affidavit, Caselines 02-24 to 02-25, paras 70 to 76; replying affidavit, Caselines 15-21 to 15-22, para 78, quoting the transcript of 30 May 2023 at p 16. These allegations are admitted by the third respondent "to the extent that they accord with the facts according to transcripts" (answering affidavit, Caselines 09-49, para 94).

¹⁷Caselines 09-137 to 09-138.

¹⁸Caselines 09-141 to 09-142; 09-145.

¹⁹Caselines 09-154 to 09-155; 09-157; 09-161 to 09-162.

²⁰Caselines 09-153; 09-166.

acting in contravention of what your order was", and because "there is no evidence of interception".²¹

[15] The exchange that followed is, in my view, the pivot of the case. Prompted by the third respondent's invitation that Mr Woodrow explain how the documents had been obtained, the magistrate put to Mr Woodrow that "three counsel" had appeared and "never once" denied the submissions about interception: "Is that because it is common cause? Should the Court accept it?" Mr Woodrow answered that it was not common cause, that it was not on the papers, and that neither party could properly make submissions of fact that were not on the papers. The magistrate responded that it was "the first time that I hear it is not common cause"; that she had "accepted it all along and there is no dispute about it"; that "my thought was that it was unlawfully interception"; and asked why the point was raised "only now". Mr Woodrow pointed out that Ms Haupt had objected on 15 March 2023 that the third respondent could not lead evidence from the bar. The magistrate then recorded: "So, I can record here now respondent is subject to submissions ... of the interception. So at this stage ... what I understand now is that there are allegations under the interception without the evidence" and "Now I know there is an objection. What I am going to do with that information, I will see at this point."²² The third respondent's rejoinder was that this was "an inquisitorial forum", that the applicant had been asked how he accessed the emails and had not answered, that "we do not have an affidavit that we need to try and respond to. That already speaks volumes", and that he asked the court "to draw an inference from it". Mr Woodrow replied: "there is no inference to draw whatsoever. We have asked to file an affidavit and we were told that we will argue on privilege."²³

[16] On 30 August 2023, the date set for judgment, the magistrate indicated that she could not decide privilege without seeing the documents. The third respondent undertook to place them before her, but at the same time reminded her that "it was not only a legal privilege that we relied on. There was confidential information, private privilege, and then of course the legal privilege", and pressed the point that the applicant had been invited to explain how the documents were obtained and had "conveniently sidestepped" the

²¹Caselines 09-168 to 09-169.

²²Caselines 09-173 to 09-181.

²³Caselines 09-179 to 09-180.

invitation.²⁴ The applicant, who appeared in person that day with a candidate attorney, again asked that the admissibility questions be dealt with on affidavit so that "the basis of how that documents were obtained will be set out in that affidavit". The magistrate's answer was: "And I dismissed it. ... My ruling was, once we laid to rest the privilege issue, once I made a ruling ... then I am open to that request and then I will consider that. So I cannot go back to that."²⁵ It is the applicant's case, not answered on affidavit by the third respondent, that the third respondent thereafter placed only seven of the thirty annexures before the magistrate and that the remainder, including the October 2022 emails addressed to the third respondent and Ms D[...] L[...], were supplied by the applicant's attorneys.²⁶ On 24 October 2023 the applicant's legal team delivered written argument dealing with each annexure individually; the third respondent objected to its reception, and it was admitted only after further argument.²⁷ Judgment was delivered on 7 December 2023.

The judgment of the Domestic Violence Court

[17] The written judgment records, under the heading "evaluation of the law and facts", that "when Mr Muthray first raised the issue of legal professional privilege he never mentioned private and confidential privilege", that "the court was taken by surprise" when private and confidential information became an issue, and that "it is clear the respondent was also not aware that this was an issue, hence they never addressed same".²⁸ It then records the third respondent's submission that the emails "was unlawfully obtained, breaching his client's right to privacy"; that "throughout the proceedings the respondent has never denied the emails referred to were unlawfully obtained up to the point the court directly asked if it was denied"; and that "no explanation of how it was obtained was placed before this court. The only conclusion the court can come to is that such information was indeed illegally obtained."²⁹ Under the heading "finding" the magistrate held that "the only inference the court can draw is that the emails were irregularly accessed. The applicant's consent to access these emails was not obtained. I hence cannot turn a blind eye to the

²⁴Caselines 09-394 to 09-399.

²⁵Caselines 09-421 to 09-423.

²⁶Founding affidavit, Caselines 02-31, para 107 and 02-65 to 02-66, paras 209 to 213.

²⁷Caselines 09-311 to 09-390; founding affidavit, Caselines 02-32, paras 108 to 109.

²⁸Caselines 02-99, para 23.

²⁹Caselines 02-99, paras 31 to 33.

fact that the applicant's right to privacy was infringed"; that "the court is at liberty to relax certain rules" because the proceedings are quasi-judicial and sui generis; that the withdrawal of the applicant's erstwhile attorney "speaks volumes. Had there been no irregularity with retrieving the emails, why the withdrawal?"; that counsel's failure to counter the interception allegation could only be because "if it was countered, the manner in which the emails were accessed was to be revealed"; and that "the court initially only ordered arguments on legal professional privilege and on the insistence of applicant's attorney the court did also order the arguments to cover confidential information. This seems to have gone past the respondent's counsel."³⁰ She found the communications between the first respondent, the third respondent, Ms Uys and Mr Claasen, and those between Ms D[...] L[...] and the first respondent "regarding other legal matters", to be protected by legal professional privilege, and held that "the other communications which do not fall under legal professional privilege is also not allowed as it was unlawfully obtained. Nothing is placed before this court to show the contrary."³¹

- [18] In her written response to this application the magistrate confirms the basis of her reasoning. She states that "the submissions by the respondent 3 that the emails were retrieved via the respondent's daughter's cell phone was never denied"; that "the court could draw no other inference in the absence of an explanation that the information was unlawfully obtained, albeit intercepted or not"; and, of the applicant and his representatives, that "one would expect them to argue a point of law or fact thrown at them ... Were they silent on that because they had no defence?"³² She accepts that "initially it was understood that the issue was only relating to legal professional privilege" and that it was "later" that issue was taken on privacy and confidentiality.³³

The third respondent's preliminary objections

- [19] The third respondent raised a number of objections in limine in his answering affidavit. Although he did not press the merits at the hearing, he persisted in those that bear on the competence of the costs relief, and it is convenient to deal with all of them briefly.

³⁰Caselines 02-100 to 02-102, paras 39 to 49 and 57.

³¹Caselines 02-102, paras 59 to 60.

³²Caselines 10-4 to 10-5, paras 4 to 6.

³³Caselines 10-5, para 5.

- [20] Joinder. The third respondent contends that, not having been a party to the DV proceedings, he could not competently be joined to the review. The objection is misconceived. He was joined because a costs order is sought against him personally. A person against whom personal relief is sought has a direct and substantial interest in the proceedings and must be joined so that he may be heard. Far from being irregular, his joinder was necessary; a personal costs order made without affording the practitioner a proper opportunity to answer cannot stand.³⁴ The third respondent has answered fully, on affidavit and in argument, and the audi principle is satisfied.
- [21] "New relief". The third respondent contends that a court sitting on review under Section 22 of the Superior Courts Act may only set aside and remit, and may not grant "new relief" in the form of a costs order against a person who was not a party below. This confuses the costs of the proceedings in the court below with the costs of the proceedings in this Court. The applicant no longer seeks any order in respect of costs in the Domestic Violence Court. What he seeks is an order as to the costs of this application. The award of those costs lies within the ordinary discretion of this Court, which exists independently of section 22 and extends to every party properly before it. The third respondent is such a party. Whether his conduct in the court below is a legitimate consideration in the exercise of that discretion is a different question, to which I return.
- [22] Disguised appeal. It is trite that a review is directed at the regularity of the proceedings and an appeal at the correctness of the result. The applicant's complaints are that he was refused the opportunity to place evidence before the court; that findings of fact were made against him on no evidence; that unsworn submissions from the bar were treated as established facts; and that issues he was told would not be decided were decided against him. Those are complaints about the manner in which the decision was reached. That the same facts might also have founded an appeal does not render the review incompetent. The objection fails.
- [23] Mootness. The contention that the relief is moot because the magistrate "allowed" a Rule 55 application misreads her order. The order directs that any Rule 55 application be for an affidavit "which would exclude information covered by privilege as ruled above". The very material the applicant wishes

³⁴CB and Another v HB 2021 (6) SA 332 (SCA) para 21; Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC) paras 220 to 226.

to place before the court has been excluded in advance. The relief is not moot.

Review of uncompleted proceedings

- [24] The most substantial threshold point is that the DV proceedings are pending and that this Court should not intervene mid-stream. The principle is settled. A superior court has the power to review the proceedings of a lower court before they have terminated, but it will exercise that power sparingly and only in rare cases "where grave injustice might otherwise result or where justice might not by other means be attained".³⁵ The rationale is the undesirability of piecemeal adjudication and the ordinary sufficiency of the remedies available once the proceedings are complete. Each case must, however, be judged on its own circumstances, and no precise limits to the power can be prescribed.
- [25] In my view this is one of those rare cases. I say so for the following reasons, which must be weighed together rather than each on its own.
- [26] First, the impugned order is not a provisional evidentiary ruling which the magistrate might revisit as the case unfolds. The magistrate said in terms on 30 August 2023 that, having dismissed the request to deal with the matter on affidavit, "I cannot go back to that". Her order determines, finally and for the purposes of the DV proceedings, that the applicant may not rely on any of the annexures, whether privileged or not, and it confines any future Rule 55 application accordingly. It is, in substance, final in its effect on the evidence the applicant may adduce in his defence. Mr Van As did not seriously contend otherwise.
- [27] Secondly, the order carries findings of fact of a grave kind, namely that the applicant "irregularly accessed" and "unlawfully obtained" the first respondent's emails without her consent and infringed her constitutional right to privacy, conduct which, on the third respondent's own submissions below, would constitute a criminal offence under section 2 of the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002. Those findings were made, on the magistrate's own account, on the strength of an unsworn assertion and an inference from

³⁵Wahlhaus and Others v Additional Magistrate, Johannesburg and Another 1959 (3) SA 113 (A) at 119H to 120E.

silence, after the applicant had three times asked for, and been refused, the opportunity to deal with the allegation on oath. Findings of that character, made in that manner, against a litigant who is himself an officer of this Court, are not the kind of irregularity that can sensibly be left to be corrected, if at all, after the interim protection order has been confirmed or discharged on a record from which his evidence has been excluded.

[28] Thirdly, the excluded material goes to the heart of the applicant's defence. His case is that the DV application was brought for an ulterior purpose in collusion with Ms D[...] L[...], whose involvement the first respondent denied under oath. The annexures are said to demonstrate that involvement. Whether they do, and what weight they deserve, is for the Domestic Violence Court. But to require the applicant to litigate the confirmation of the protection order to finality without them, and then to seek to have the whole process set aside and repeated, would be to compel an exercise that is, on the applicant's case, foredoomed to be abortive. The interim order has been in place since April 2022. The interests of both parties, and of the children whose welfare underlies proceedings of this kind, are better served by correcting the process now.

[29] Fourthly, and unlike the typical case in which a magistrate's interlocutory ruling is challenged, the irregularity here is not a disputed exercise of discretion on which reasonable judicial officers might differ, but a failure of the most basic kind: the making of findings of fact without evidence and without hearing the party against whom they were made. The third respondent's submission that the applicant has an adequate alternative remedy in the form of a future appeal or review rings hollow when the magistrate has expressly foreclosed the route by which the applicant sought to place his evidence before her.

[30] The review is accordingly properly before this Court.

Whether the proceedings were grossly irregular

[31] A gross irregularity for the purposes of Section 22(1)(c) is an irregularity in the conduct of the proceedings, as opposed to the result, of such a nature that it prevented a fair trial of the issues. It need not involve bad faith or high-

handedness; conduct that is well-intentioned but mistaken may qualify. The crucial question is whether the party complaining was denied a fair hearing.³⁶

- [32] Measured against that standard, the proceedings below were, in my judgment, vitiated by gross irregularity in at least four respects, each of which fed into the next.
- [33] Findings of fact on no evidence. The magistrate found that the emails had been "irregularly accessed" and "unlawfully obtained", that the first respondent's consent had not been obtained, and that her right to privacy had been infringed. There was no evidence before the court on any of those matters. The assertions originated in the third respondent's address from the bar on 15 March 2023 and were repeated in his heads of argument. An attorney's submissions are not evidence, and the magistrate's own remark that the court would "leave out" whatever in the heads should not have been there shows that she knew as much. A finding of fact that rests on no evidence at all is not an erroneous finding; it is an irregularity in the proceedings, because the party against whom it is made has had no opportunity to meet a case that was never properly put.
- [34] Refusal to receive evidence, followed by an adverse inference from its absence. The irregularity was compounded by the sequence of events. On 15 March 2023 Ms Haupt asked, in terms, that the applicant be given the opportunity to deal with the interception allegation under oath. The request was refused; the magistrate confined the postponed hearing to argument on privilege. The request was renewed on 30 May and 29 June 2023 and again on 30 August 2023, and was refused on each occasion. The magistrate then reasoned that, because the applicant had not explained how he came by the emails, the only inference was that he had obtained them unlawfully, and that his silence could only be because the truth "was to be revealed". A court cannot fairly refuse a party leave to place evidence before it and then hold his failure to do so against him. The magistrate's reliance in her response on the "inquisitorial" nature of DV proceedings does not assist her. Section 6(2)(b) of the DV Act empowers the court to consider "such further affidavits or oral evidence as it may direct"; it does not empower the court to substitute

³⁶Goldfields Investment Ltd and Another v City Council of Johannesburg and Another 1938 TPD 551 at 560 to 561; Building Improvements Finance Co (Pty) Ltd v Additional Magistrate, Johannesburg, and Another 1978 (4) SA 790 (T) at 792G to H; Eimco (South Africa) (Pty) Ltd v Magistrate, Wynberg, and Others 1967 (3) SA 715 (C) at 721A to C.

submissions for evidence, and it was precisely the receipt of evidence that the applicant was asking for and the court declined.

- [35] Deciding issues outside the scope the court had itself defined. The magistrate ruled on 15 March 2023 that the parties were to address her on privilege, and she confirmed that ruling on 30 May and 29 June 2023. The applicant's counsel prepared and argued accordingly, and when the third respondent strayed into confidentiality and unlawful access Mr Woodrow explained why he would not follow: to do so would contravene the court's own order, and there was no evidence on which to do so. The magistrate recorded in her judgment that she herself had been "taken by surprise" when private and confidential information became an issue and that the applicant's side "was also not aware that this was an issue, hence they never addressed same". She nevertheless decided those issues against him, and in doing so stated that she had "also order[ed] the arguments to cover confidential information" at the instance of the first respondent's attorney. No such order appears anywhere in the record, and the magistrate's own response to this application accepts that the issue arose "later". To decide a case against a party on an issue he was told would not be decided, without warning him that the position had changed, is a breach of the *audi alteram partem* rule in its most elementary form.
- [36] Inversion of the onus and the absence of jurisdictional facts for privilege. The party asserting privilege bears the onus of establishing it, and a claim of legal professional privilege requires proof, ordinarily on affidavit, that the communication was made to a legal adviser acting in a professional capacity, in confidence, for the purpose of obtaining legal advice, and not in furtherance of a crime or fraud.³⁷ Mr Woodrow made precisely this submission on 29 June 2023. No affidavit was ever filed in support of the objection. The magistrate saw the documents, which was necessary but not sufficient; the circumstances in which each communication was made, and whether the crime-fraud exception on which the applicant relied was engaged, could not be determined from the face of email cover pages. By holding that "nothing is placed before this court to show the contrary", the magistrate placed on the applicant an onus that lay on the first respondent.

³⁷A Company and Others v Commissioner, South African Revenue Service 2014 (4) SA 549 (WCC) paras 23, 33 and 35; as to the crime-fraud exception, Waste Products Utilisation (Pty) Ltd v Wilkes and Another 2003 (2) SA 515 (W) at 551, on which the magistrate herself relied.

- [37] I do not overlook that the applicant's erstwhile attorneys precipitated the difficulty by filing the further affidavit without leave, nor that a magistrate presiding in a busy Domestic Violence Court is entitled to regulate her own procedure and to be impatient of delay. Nor do I decide whether any of the annexures are in truth privileged, confidential or unlawfully obtained, or whether they are relevant and should be admitted. Those are matters for the Domestic Violence Court, on proper evidence. What I decide is that the manner in which those questions were determined denied the applicant a fair hearing of the issues. That is a gross irregularity within the meaning of section 22(1)(c). In so far as the magistrate received and acted upon the third respondent's unsworn factual assertions as if they were evidence, while refusing to receive the applicant's evidence on the same question, the proceedings are in the alternative reviewable under Section 22(1)(d).
- [38] Although the second respondent is not a party to this review in the ordinary sense and abides its outcome, I record that nothing in this judgment implies that she acted other than in good faith. Her response makes plain that she believed the interception allegation to be common cause because it had gone unanswered, and the transcript shows how that belief came about. The irregularity lies in the process, not in any want of integrity.

Relief

- [39] The review succeeds. The order of 7 December 2023 cannot stand. The ruling of 15 March 2023, by which the magistrate declined to entertain an application for leave to file the further affidavit until privilege had been decided as a point of law, was the procedural root of what followed and falls to be set aside with it, so that the admissibility questions may be approached afresh and on evidence.
- [40] The applicant asks that the matter be remitted for hearing before a magistrate other than the second respondent. Ordinarily a matter is remitted to the same presiding officer. Two considerations persuade me that a different magistrate should deal with the rule 55 application and the admissibility questions. The first is that the second respondent has expressed firm views, in her judgment and again in her response to this application, about the applicant's conduct, the reasons for his erstwhile attorney's withdrawal and the "antics" of his legal team, on the very questions that must now be decided on evidence; a

reasonable litigant in the applicant's position would apprehend that those views would be difficult to set aside. The second is practical: I was informed from the bar, on instructions, that the second respondent has since been transferred to Kimberley and that two magistrates presently preside in the Pretoria Domestic Violence Court.³⁸ Remittal to a different magistrate is therefore both appropriate and feasible. I make no order as to which magistrate should hear the matter; that is for the Chief Magistrate.

- [41] The applicant also asks that the issues of privilege, confidentiality and privacy be determined in the Rule 55 application. That is, in my view, the correct approach and is consistent with what the applicant's representatives asked for from the outset: the applicant must, in an application for leave to file the further affidavit with its annexures, set out on oath the circumstances in which the annexures came into his possession and the basis on which he contends they are admissible; the first respondent may answer on oath, including on any claim of privilege, confidentiality or unlawful acquisition; and the Domestic Violence Court will then decide, on evidence and after hearing both parties, whether and to what extent the affidavit and annexures should be received. Whether the rule 55 procedure or some less formal procedure under section 6(2)(b) of the DV Act is employed is a matter for the magistrate seized of the matter; what is required is that the questions be decided on evidence. The question of costs in the DV proceedings, including any costs under Section 15 of the DV Act, remains for that court.

Costs

- [42] The costs of this application are where the real contest lay. The applicant asks that the third respondent pay them *de bonis propriis* and on the attorney and client scale. The third respondent asks that the application as against him be dismissed and that the applicant pay his costs on the attorney and client scale.
- [43] The principles are not in dispute. Costs are in the discretion of the Court, exercised judicially on the facts. A costs order against a legal practitioner personally is an extraordinary remedy, reserved for conduct that "substantially and materially deviates from the standard expected of legal practitioners, such that their clients, the actual parties to the litigation, cannot be expected to bear

³⁸Recording of the hearing of 9 June 2026, 12:00 segment.

the costs, or because the court feels compelled to mark its profound displeasure"; the recognised instances include dishonesty, obstruction of the interests of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, and misleading the court. Errors of law, lapses in compliance with the rules, and robust advocacy do not qualify; practitioners must be free to present their clients' cases fearlessly and vigorously, but always within the ethical rules that bind them.³⁹ Such an order is not made lightly and must be grounded in facts that plainly support it and in reasons that are articulated; the practitioner must have had a proper opportunity to be heard.⁴⁰ An order on the attorney and client scale is a further and separate punitive measure that requires its own justification, classically conduct that is vexatious, reckless or such as to put the other side to unnecessary trouble and expense.⁴¹

- [44] The enquiry must be framed with some care. To begin with, the third respondent is not before this Court merely as a practitioner who represented a party; he is himself a party, cited in his own name, who elected to oppose. The label *de bonis propriis*, which properly describes an order that a representative pay from his own pocket rather than from the estate or client he represents, is therefore something of a misnomer: any costs order against the third respondent in this application is necessarily one that he pays personally. The real question is whether he should bear the applicant's costs of the review at all and, if so, on what scale.
- [45] A further distinction must be kept in mind. The costs of the review fall into two categories: the costs of bringing it, which the applicant would have incurred whether or not anyone opposed it, and the costs occasioned by the third respondent's opposition. They rest on different footings.
- [46] The costs occasioned by the opposition. The third respondent delivered an answering affidavit of some 436 pages. In it he opposed the review on the merits comprehensively: he contended that the review was incompetent, premature, moot and a disguised appeal, that the magistrate's process was "beyond reproach", that the application was a "hopeless case" and an abuse

³⁹Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd 2014 (3) SA 265 (GP) paras 34 to 35; Thunder Cats Investments 49 (Pty) Ltd v Fenton 2009 (4) SA 138 (C) para 30; Kekana v Society of Advocates of South Africa 1998 (4) SA 649 (SCA).

⁴⁰Economic Freedom Fighters v Gordhan and Others 2020 (6) SA 325 (CC) para 92; Public Protector v South African Reserve Bank (above) paras 220 to 226; CB v HB (above) para 21.

⁴¹In re Alluvial Creek Ltd 1929 CPD 532 at 535; Public Protector v South African Reserve Bank (above) para 220.

of process, and he asked that it be dismissed with costs on the attorney and client scale, including the costs of two counsel. The first respondent, his client, who had withdrawn her opposition, deposed to a confirmatory affidavit confirming his affidavit "to the extent it applies to her in resisting the review". His heads of argument, delivered in January 2026, maintained the opposition. Only at the hearing, and only after his client's abidance had been placed squarely before the Court, did Mr Van As abandon the merits. That opposition was unsuccessful, and it was, as the third respondent's own affidavit acknowledges, opposition by a person who had no interest of his own in the outcome of the review on its merits. A party who opposes relief unsuccessfully ordinarily pays the costs occasioned by his opposition. I see no reason to depart from that rule. Nor was the opposition on the merits a restrained holding position. It was advanced in intemperate terms, largely in the form of legal argument rather than evidence, and it materially lengthened and complicated a matter in which the actual party to the DV proceedings had chosen not to resist. The wasted costs of the unopposed roll of 9 April 2025, on which the matter was struck off after the late delivery of the answering affidavit, stand on the same footing.

- [47] The costs of bringing the review. Whether the third respondent should also bear the costs which the applicant would have incurred in any event depends on whether his conduct in the Domestic Violence Court was such that those costs can fairly be said to have been occasioned by it, and whether it was of a character that warrants the Court marking its displeasure. This requires me to make findings on the two matters on which the parties were most sharply divided: whether the third respondent's conduct was objected to at the time, and whether it caused the irregularity.
- [48] On the first, the third respondent's position, on affidavit and in his heads, is that "at no point during those proceedings did the applicant or his counsel object to the third respondent's conduct or accuse him of impropriety in court", that "no complaint was ever raised against him in the trial court, not by the second respondent, who did not caution or rebuke him, and not by the applicant's legal representatives", and that the allegations "surfaced for the first time in this review".⁴² That is not correct, and the third respondent, who attached the transcript to his own affidavit, must have known it was not correct. Ms Haupt objected on 15 March 2023, in the terms I have quoted, to

⁴²Third respondent's heads of argument, Caselines 16-7, para 5; 16-17 to 16-18, paras 42 to 43; 16-23, para 67; answering affidavit, Caselines 09-39, para 79 and 09-41, para 92.2.

his making submissions not under oath and to his straddling the roles of advocate and witness, and asked for the opportunity to meet his allegations on oath. Mr Botha objected on 30 May 2023 to the factual content of his heads. Mr Woodrow objected on 29 June 2023, both when the allegation of unlawful access was first repeated and in reply. The magistrate herself cautioned him on 15 March 2023 about tainting the proceedings. The contention that no contemporaneous objection was taken is rejected.

- [49] On the second, the magistrate's response establishes the causal link more directly than is usual in matters of this kind. She says in terms that her finding of unlawful acquisition rested on the third respondent's submission that the emails were retrieved via the daughter's cellphone, which "was never denied", and on the absence of an explanation. The submission was his; it was never on oath; he persisted in it after objection and after the court's caution; he invited the magistrate, in terms, to draw an inference from the applicant's silence when he knew that the applicant had asked to answer on oath and had been refused; and on 30 August 2023, when the magistrate was minded to confine herself to privilege, he reminded her of the "private privilege" and of the applicant's supposed evasion. But for that course of conduct the evidentiary vacuum in which the magistrate made her findings would not have existed in the form it did, and this review, in all probability, would not have been necessary.
- [50] The third respondent's answer is that the decision was the magistrate's, that she was an independent judicial officer who gave both sides a full hearing and delivered a reasoned judgment, and that if she erred the error is hers. There is force in this, and it is the consideration that has given me most pause. A court that makes findings on no evidence is responsible for its own irregularity, and I have found that the magistrate was. But the existence of a judicial error does not absolve the practitioner whose conduct induced it. An attorney is an officer of the court. He may not give evidence from the bar; he may not, after objection, persist in placing before a court factual assertions of which he has no personal knowledge and which are not on oath; and he may not invite a court to draw an inference from an opponent's silence on a matter the court has itself excluded from the enquiry. The duty not to mislead the court, which is owed regardless of the client's instructions, includes the duty not to induce it to treat submission as proof. That the magistrate ought to have resisted the invitation does not make the invitation proper.

[51] I have also considered the further allegations of misconduct on which the applicant relies: that the third respondent's denial of Ms D[...] L[...]s involvement was false to his knowledge, given that he was an addressee of the October 2022 emails; that he discovered only seven of the thirty annexures and described them misleadingly; and that his heads of argument in the Domestic Violence Court were recycled from the first respondent's urgent application in this Court and referred to affidavits not before the magistrate. These allegations are made in detail in the founding affidavit at paragraphs 197 to 246.⁴³ The third respondent did not answer them. His affidavit proceeds seriatim to paragraph 189 of the founding affidavit and then passes directly to a four-paragraph section on costs in which he says only that he complied with the court's directions, conducted himself within the rules, was never cautioned, and regards the request as vexatious and intended to intimidate. A litigant who faces specific, documented allegations of misconduct and elects not to deal with them cannot complain if the court approaches his bare denial with scepticism. I nonetheless refrain from making a finding that the third respondent deliberately misled the Domestic Violence Court. Such a finding would carry grave professional consequences, the allegations were not tested in oral evidence, and it is not necessary to the disposal of this application. The question whether his conduct calls for disciplinary scrutiny is one for the Legal Practice Council, and I say no more about it than that a copy of this judgment should be made available to that body.

[52] What I do find is this. The third respondent, an attorney of some nineteen years' standing, repeatedly placed unsworn factual allegations of criminal conduct before a court, persisted in doing so after his opponents had objected and the presiding officer had cautioned him, invited the court to found its decision on those allegations and on an inference from a silence he knew to have been judicially imposed, pressed the court to decide issues outside the scope of its own ruling, and accompanied all of this with personal attacks on opposing counsel of a kind that have no place in a courtroom. That conduct was, at the least, irresponsible and grossly unreasonable, and it was in disregard of his duties as an officer of the court. It was a material cause of the irregularity that has made this review necessary. In this Court he then opposed the review, in his own name and against his client's wishes, on grounds he ultimately abandoned, and declined to answer the case made

⁴³Caselines 02-61 to 02-92.

against him personally. He has, however, had a proper opportunity to meet it: the personal costs order was sought in terms in the notice of motion, he delivered an answering affidavit and heads of argument directed to it, and he was represented by counsel at the hearing. The requirement that a practitioner against whom a personal costs order is sought be afforded a proper opportunity to be heard is accordingly satisfied. In my judgment this is one of the exceptional cases in which it would be unjust for the applicant, who has been put to the expense of a review occasioned in material part by the misconduct of his opponent's attorney, to bear those costs himself, and in which the Court should mark its displeasure. The third respondent must pay the costs of the review, and the conduct I have described justifies the attorney and client scale.

- [53] I should make plain what the order is not. It is not a sanction for the third respondent having raised privilege, or unlawful acquisition, or privacy, on his client's behalf. Each of those was a point he was entitled, and perhaps obliged, to take. It is a sanction for the manner in which he took them. An attorney who wished to place before the Domestic Violence Court the facts on which those objections depended had a simple and proper course open to him: to ask that the objection be dealt with on affidavit, which is precisely what the applicant's representatives were asking for. He chose instead to argue that no affidavit was needed and to supply the facts himself from the bar.
- [54] Three matters remain. The first is condonation: the third respondent's answering affidavit was delivered late and was accompanied by an application for condonation, which the applicant did not oppose. Condonation is granted, and no order as to the costs of that application is called for. The second is the third respondent's own prayer that the applicant pay his costs on the attorney and client scale, which rested on the contentions that the review was hopeless and the personal costs claim baseless, falls away with the findings I have made. It is refused. The third is the first respondent. Opposition is a matter of substance rather than form, and a party who abides while lending support to another's resistance is not for that reason immune from a costs order. But she filed no opposition of her own, she took no part in the hearing, and her conduct is best weighed in the Domestic Violence Court, where the costs of those proceedings have been reserved. Fairness does not require an order against her. I make no order as to costs in respect of the first or second respondents.

[55] As to counsel's fees, the applicant asked that the fees of senior counsel be allowed on Scale C and those of junior counsel on Scale B. The scales introduced by Rule 67A(3), read with Rule 69(7), regulate the taxation of counsel's fees only where costs are awarded as between party and party; they find no application to an award on the attorney and client scale, and it is not competent to attach a scale to such an award (*Mashavha v Enaex Africa (Pty) Ltd* 2025 (1) SA 466 (GJ) paras 3 and 5; *DM v DM* 2025 (4) SA 183 (GJ) para 60; *Honey Fashion Accessories (Pty) Ltd v Wiese* [2024] ZAGPJHC 902 para 56). As the costs awarded are on the attorney and client scale, no scale is specified. Should any portion of the costs nonetheless fall to be taxed as between party and party, I record that the fees of senior counsel would be allowed on Scale C and those of junior counsel on Scale B, having regard to the volume of the record, the difficulty of the questions concerning the competence of the review and the personal liability of a practitioner, and the seriousness of what was alleged. The employment of two counsel, including senior counsel, was warranted.

Order

[56] In the result the following order is made:

1. The late delivery of the third respondent's answering affidavit is condoned.
2. The ruling of the second respondent of 15 March 2023 and the order of the second respondent delivered on 7 December 2023 (made available in writing on 12 December 2023) in the proceedings under case number DV959/2022 in the Domestic Violence Court, Pretoria, are reviewed and set aside.
3. The matter is remitted to the Domestic Violence Court, Pretoria, to be dealt with by a magistrate other than the second respondent, to be designated by the Chief Magistrate.
4. The applicant is granted leave to deliver, within 20 days of the date of this order, an application in terms of Rule 55 of the Magistrates' Courts Rules for leave to file his further supplementary affidavit of 10 March 2023, together with its annexures, in the proceedings under case

number DV959/2022, the ordinary time periods for the exchange of affidavits in terms of Rule 55 to apply thereafter.

5. All questions concerning the admissibility of the said affidavit and its annexures, including any question of legal professional privilege, confidentiality, privacy or the lawfulness of the manner in which the annexures were obtained, are to be determined in the said application on the evidence placed before the court, after hearing the parties.
6. The question of costs in the proceedings under case number DV959/2022, including any costs under Section 15 of the Domestic Violence Act 116 of 1998, is reserved for determination by the magistrate seized of those proceedings.
7. The third respondent is ordered to pay the applicant's costs of this application, including the wasted costs of 9 April 2025, on the scale as between attorney and client, such costs to include the costs of two counsel where so employed; in the event that any portion of such costs falls to be taxed as between party and party, the fees of senior counsel shall be allowed on Scale C and those of junior counsel on Scale B as contemplated in Rule 67A(3) read with Rule 69(7).
8. The third respondent's application for an order of costs against the applicant is dismissed.
9. There is no order as to costs in respect of the first and second respondents.
10. The Registrar is directed to forward a copy of this judgment to the Legal Practice Council, Gauteng Provincial Office, for such attention as it may consider appropriate.

A VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 9 June 2026
Date of judgment: 31 August 2026

For the Applicant: Adv C Woodrow SC with Adv T Odendaal

Instructed by: Hills Incorporated, Pretoria

For the First Respondent: No appearance (abides)

For the Second Respondent: No appearance (abides)

For the Third Respondent: Adv E van As

Instructed by: Muthray and Associates Incorporated, Centurion