

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 56563/2021

- (1) REPORTABLE: Yes ☐ / No ☒  
(2) OF INTEREST TO OTHER JUDGES: Yes ☐ / No ☒  
(3) REVISED: Yes ☐ / No ☒

Date: 27 June 2022

*edn plessis*  
WJ du Plessis

In the matter between:

**K M**

**APPLICANT/DEFENDANT**

and

**G K**

**RESPONDENT/PLAINTIFF**

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JUDGMENT

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**DU PLESSIS AJ**

[1] This is a rule 43<sup>1</sup> application for maintenance *pendente lite* in the amount of R15 000 and an R100 000 contribution to costs. The respondent opposes the application.

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<sup>1</sup> Of the Uniform Rules of Court.

- [2] The parties were married in terms of customary law on the 2nd of December 2017. The marriage was not registered, but this does not affect the validity of the marriage.<sup>2</sup> In terms of section 7(2) of the Recognition of Customary Marriages Act,<sup>3</sup> it is a marriage in community of property. No children were born from the marriage. This is common cause between the parties.
- [3] The respondent instituted divorce proceedings on the 10th of November 2021. The particular of claims for the marriage lists various reasons for the breakdown of the marriage. The name-calling and various charges laid against one another in between are evidence of a bitter divorce. The applicant (defendant) filed a notice of intention to defend in the divorce action, together with a plea and counterclaim. The pleadings are closed.
- [4] The issues in dispute in the divorce action that might be relevant in the rule 43 application are the fact that the respondent chose to institute the divorce action in the High Court, as opposed to the regional court in Kempton Park, which leads to a more costly divorce. The respondent is in control of the joint estate, of which immovable property inherited from his previous wife is in dispute. There is disagreement about spousal maintenance post-divorce and the payment of the legal costs of the divorce action.
- [5] On the 7th of March 2022, the applicant launched a rule 43 application, which was set down for a hearing on the 14th of June 2022. The issues in front of this court, however, are mainly the questions:
- i. Whether the applicant established a need for maintenance;
  - ii. Whether there is a case made out for contribution to costs;
  - iii. Whether the respondent can afford the maintenance/contribution to costs;
  - iv. Whether the applicant abused the court process, as the respondent alleges,

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<sup>2</sup> Section 4(9) of the Recognition of Customary Marriages Act 120 of 1998.

<sup>3</sup> 120 of 1998.

- v. The cost of this application.

### **The applicants claim**

[6] In her supporting affidavit, the applicant makes the following statements:<sup>4</sup>

- i. She is currently unemployed. The defendant is a taxi owner.
- ii. She requires maintenance *pendente lite* of R15 000 pm; and contribution to costs of R100 000.
- iii. They were married in terms of customary law, a marriage in community of property. No children were born from this marriage. She has a daughter from a previous marriage, and the respondent has his own children from a previous relationship.
- iv. She was employed when she met the respondent and took care of herself. When the respondent asked her to marry him, he made it clear that she must quit her job to take care of the family as he could take financial care of her and the children.
- v. When she refused to quit her job, the respondent called her former employer and told her boss that he is a racist, which led to her dismissal. She found other employment, but it lasted only 11 months because the respondent told her to quit. She eventually resigned because he stated that she was disrespecting him by not being at home where he wanted her to be.
- vi. She was thus a housewife and financial dependent during the subsistence of the marriage. She devoted her time to the upkeep of the family home, his grandmother and mother, and his three children.
- vii. She was arrested for a case the respondent opened against her for malicious damage to property. The respondent obtained an interim protection order against her. When she was at the Magistrate's Court (presumably on the

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<sup>4</sup> I only list those of relevance to the rule 43 application, in other words those speaking to the lifestyle of the parties, whether the applicant indeed have a need for maintenance, and whether the respondent can afford it.

return date for the interim protection order), the respondent presented a settlement agreement and told her that he would drop the charges if she signed the document. She was not happy about the division of the joint estate asked for and therefore refused. The charges were eventually withdrawn because of insufficient evidence.

- viii. When she asked the respondent about the proceeds of the sale of the matrimonial home that she saw online was sold for R1 400 000, the respondent became angry, saying it had nothing to do with her.
- ix. She has started looking for employment but could find none "due to the economic climate in our country".<sup>5</sup> Thus, she has no income and relies on her parents to financially support her daughter. She owes R20 850 in school fees for her daughter.
- x. She is renting a two-bedroom townhouse under her friend's name (because she has no source of income) at R6 000pm. She can only pay the rent and survive with the help of her friend and family "while the Respondent is enjoying and squandering the joint estate's assets alone".<sup>6</sup>
- xi. She lists the following as her monthly expenditure:

Item	Description	Amount
1	Rent	R6,000.00
2	Transport / Fuel	R1,300.00
3	Groceries	R2,500.00
4	Municipal rates and taxes	R0.00
5	Insurance / life cover	R1,600.00
6	Telephone	R700.00
7	Medical expenses	R500.00
8	Recreation and sundry	R250.00
9	Clothing self	R0.00

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<sup>5</sup> Par 5.30 of the supporting affidavit.

<sup>6</sup> Par 5.33 of the supporting affidavit.

<b>10</b>	Clothing child	R100.00
<b>11</b>	Toiletries for household	R800.00
<b>12</b>	School fees for daughter	R2,100.00
<b>13</b>	Pocket money for daughter	R1,000.00
<b>14</b>	Funeral policy	R450.00
<b>15</b>	Pre-paid water and electricity	R1,200.00
<b>16</b>	Legal costs (downpayment)	R1,000.00
<b>Total</b>		<b>R19,500.00</b>

- xii. As for asking for a contribution to costs in the litigation, the applicant notes the respondent "controls the purse strings" and is thus able to deploy financial resources (also from the joint estate) to afford good attorneys. She notes that the divorce action was instituted in the high court, which forces her to employ and advocate to represent the matter in court. She has sought free legal assistance but was told that the availability of lawyers is limited. She currently pays R1 000 pm for her legal representative.
- xiii. She claims that the respondent earns R80 000 per month from various income sources (not listed). She states that he paid the common household expenses of R25 000pm.
- xiv. She lists various assets of the respondent:
- a. Three Toyota Quantum vehicles used for his business – an estimated value of R2 200 000;
  - b. An S Class Mercedes Benz; an AMG Mercedes Benz; a Chevrolet Bakkie; a Polo; a Hummer; a BMW 3 series; a black Mercedes Benz – an estimated value of R5 200 000.
  - c. An FNB investment to the value of R3 000 000.

## Respondent's reply

[7] The respondent replies as follows:<sup>7</sup>

- i. He moved back to his parental home due to his desperate financial position.
- ii. He denies that the applicant is entitled to maintenance *pendente lite*, or any other relief claimed in terms of the rule. Instead, the applicant abuses the court process, and her application should be dismissed with punitive costs.
- iii. He denies any legal duty to the maintenance of the applicant's daughter. He states that she is adequately provided for under her biological father's estate.
- iv. He denies that the applicant was asked to quit her employment or that he caused her to be dismissed. He states, and attached annexure as proof, that the applicant was dismissed for misconduct from her first job, she terminated her employment from her second job claiming constructive dismissal and is in a labour dispute with her last employer.
- v. He denies that she was a housewife for the duration of their cohabitation. He attaches her CV as annexures as proof that she worked during this time.
- vi. He denies coercion of the settlement agreement.
- vii. As for the immovable property, he states that it belonged to his late wife, and it was always understood that the property would go to the benefit of the children. He attaches a copy of the Deed indicating that it was his late wife's property.
- viii. He states that the applicant and her daughter reside at her parental home. He does not understand why an unemployed person would rent an upmarket townhouse and incur expenses that she knows she cannot meet.
- ix. He states his income as R11 145 (pension from late wife) + R3000 from taxis (only one running), thus R14 145.

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<sup>7</sup> Again I only highlight the allegations relevant to the rule 43 application.

- x. His expenses are as follows:

FNB loan	R981.00
FNB credit card	R1,375.00
Groceries	R1,500.00
School fees	R1,000.00
Clothes (self and children)	R1,000.00
Transport and fuel	R800.00
Medical aid	R1,050.00
MAKRO	R1,573.00
Telephone and internet	R1,076.00
Hollard	R598.00
1Life	R542.00
Matrix	R1,101.00
B3 Funeral	R270.00
FNB connect	R407.00
King Price	R2,663.00
<b>Total</b>	<b>R15,936.00</b>

- xi. His expenses thus exceed his income.
- xii. The applicant could support herself since November 2021 and has not shown that she is indebted (except for the school fees). She thus does not have a need, and he can also not afford it.
- xiii. As for contribution to costs, he states it is only justified if the litigants are financially resourced differently. He also does not know how she gets to the amount of R100 000.
- xiv. He denies being an affluent person or that they lived in luxury. His late wife's death benefits and monies enabled him to acquire some assets. He does not earn R80 000 per month.
- xv. As for his assets:

- a. He only has one minibus taxi running at the moment, the other two are extensively damaged. The combined value of the three taxis is R250 000.
  - b. The son's Mercedes Benz is not his property; the only vehicles registered in his name are a Chevrolet bakkie and a Geely motor. Their combined value is R100 000. He sold the Hummer sold in 2020 (no amount listed), and the Polo in November 2021 for R150 000.
  - c. He does not have an FNB investment of R3 000 000.
- xvi. He denies that she made a case as in her Notice of Motion.

### **The law on maintenance and rule 43 in general**

- [8] There is a reciprocal duty of support between spouses, also in a customary marriage. The requirement is that both spouses share the financial responsibilities *pro rata* according to their means. Maintenance relates not only to the bare necessities but also to the couple's standing in the community and their standard of living.
- [9] Rule 43 provides a *sui generis* remedy, in terms of which a spouse can approach the court in respect of interim maintenance, interim child custody or access to a child, and contribution to costs of the divorce action. The purpose of this rule is to deal with matters expeditiously and cheaply.<sup>8</sup> The rule allows for a short founding affidavit, followed by an answering affidavit. In general, this process should not be abused by filing lengthy affidavits and annexures.

### **Rule 43(1)(a)**

- [10] Subrule (1)(a) deals with maintenance, and each case must depend on its own particular facts. That said, there are certain principles that are applicable, namely: that it is interim and temporary and cannot be determined with the same degree and

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<sup>8</sup> *Colman v Colman* 1967 (1) SA 291 (C); *Zaphiriou v Zaphiriou* 1967 (1) SA 342 (W); *Varkel v Varkel* 1967; (4) SA 129 (C); *Mather v Mather* 1970 (4) SA 582 (O); *Henning v Henning* 1975 (2) SA 787 (O); *Verster v Verster* 1975 (3) SA 493 (W); *Andrade v Andrade* 1982 (4) SA 854 (O); *Grauman v Grauman* 1984 (3) SA 477 (W); *Greenspan v Greenspan* 2000 (2) SA 283 (C); *Baadjies v Matubela* 2002 (3) SA 427 (W).



precision as is possible during a trial.<sup>9</sup> There are essentially two questions to answer: what is the reasonable maintenance (with reference to the marital standard of living of the parties) that the applicant is entitled to and; does the respondent have the capacity to meet the maintenance from his income (although inroads to capital may be justified).<sup>10</sup>

[11] The court will attach more weight to a claim supported by reasonable and moderate details, than one with extravagant or extortionate demands. Likewise, the affidavit of a respondent that shows a willingness to adhere to his lawful obligations will weigh more than a respondent that seeks to evade them.<sup>11</sup>

### **Rule 43(1)(b)**

[12] Litigation costs are part of the duty of support that spouses owe one another.<sup>12</sup> The contribution towards costs is towards the cost of the action, and excludes the cost of the interim application.<sup>13</sup> The amount claimed should enable the applicant to adequately put her case before the court, but the applicant is not entitled to all her anticipated costs.<sup>14</sup>

[13] To be successful with such an application, the applicant must show she has:<sup>15</sup>

- i.* a *prima facie* case or a *bona fide* defence;<sup>16</sup>
- ii.* an inability to fund litigation;
- iii.* the quantum of contribution sought.

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<sup>9</sup> *Grauman v Grauman* 1984 (3) SA 477 (W) at 479F.

<sup>10</sup> *Botha v Botha* 2009 (3) SA 89 (W) at 105C.

<sup>11</sup> *Taute v Taute* 1974 (2) SA 675 (E) at 676H.

<sup>12</sup> *AF v MF* 2019 (6) SA 422 (WCC) at 428E–F.

<sup>13</sup> *Micklem v Micklem* 1988 (3) SA 259 (C) at 263B.

<sup>14</sup> *AF v MF* 2019 (6) SA 422 (WCC) at 434E.

<sup>15</sup> See Van Niekerk, P. A. 1999. *A practical guide to patrimonial litigation in divorce actions*. Durban: LexisNexis paragraph 6.3.

<sup>16</sup> This is based on a principle that the court will not lightly award contribution of costs to an applicant who has clearly embarked on frivolous litigation, *Smallberger v Smallberger* 1948 (2) SA 309 (O).

[14] As far as the quantum is concerned, the following factors will guide a court in awarding the contribution to costs:

- i. The applicant must be placed in a position to adequately present her case, and she is entitled to litigate on a scale that commensurate the means of the parties;<sup>17</sup>
- ii. The nature of the litigation;
- iii. The scale upon which the other party is litigating (with due regard to the respondent's financial position);<sup>18</sup>
- iv. An amount needed up to the first day of trial;<sup>19</sup>
- v. As a rule the applicant is not entitled to attorney client costs, but the attorney's fees may be included;<sup>20</sup>

[15] As for the fees – there should be sufficient evidence in front of the court to enable the court to make an order.

### **Marriage in community of property**

[16] I also wish to highlight a few points on the implications of a marriage in community of property. At the moment of the conclusion of a marriage in community of property, the estates merge into one joint estate that takes place for the duration of the marriage.<sup>21</sup> Spouses then as an undivided and indivisible half share of the joint estate. This means that no asset can physically be divided, and no rights belong to one of the spouses

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<sup>17</sup> *Dodo v Dodo* 1990 (2) SA 77 (W).

<sup>18</sup> If the respondent is litigating on a luxurious scale, the applicant should be entitled to the same scale, *Nicolson v Nicolson* 1998 (1) SA 48 (W).

<sup>19</sup> *Maas v Maas* 1993 (3) SA 885 (O) at 888B and 890E–I.

<sup>20</sup> Generally only essential disbursements is covered in preparation for the trial, *Dodo v Dodo* 1990 (2) SA 77 (W).

<sup>21</sup> *Estate Sayle v CIR* 1945 AD 388.

exclusively.<sup>22</sup> Neither of the spouses can alienate his or her share in the joint estate independently from the other.

[17] This also means that assets belonging to the spouses before and during the marriage, fall into the joint estate. There are a few exceptions.<sup>23</sup> The remedy to protect assets in divorce action lies in the Matrimonial Property Act<sup>24</sup> or the common law (eg. Interdict).

[18] In terms of section 14 of the Matrimonial Property Act, a wife in a marriage in community of property has the same powers with regard to the disposal of assets of the joint estate, the contracting of debts which lie against the joint estate, and the management of the joint estate, as those which a husband in such a marriage has. This is a system of equal control. In terms of section 7(3) of the Recognition of Customary Marriages Act 120 of 1998, these sections are applicable to a customary marriage in community of property.

[19] Having canvassed the most important legal principles, I can now turn to my findings.

### **The request for maintenance**

[20] From the outset, it should be noted that, on the papers, it is clear that both parties are fuelling the divorce conflict. I feel compelled to ask the parties to reflect on how much of the joint estate will be left after the lawyers have been paid, should they continue on this path. I have endeavoured to raise the red flags (specifically those relating to the joint estate) that might arise in the divorce action in this application, and I hope that the

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<sup>22</sup> Sonia Human, et al. *Family Law in South Africa*. Oxford University Press Southern Africa, 2010.

<sup>23</sup> For example assets excluded in a will or in an antenuptial contract; a *fideicommissum* or *usufructus* and small engagement gifts between spouses (*jocalia*); non-patrimonial compensation; patrimonial compensation.

<sup>24</sup> 88 of 1984. For instance, section 15(2) of the Matrimonial Property Act prohibits a party from entering into an agreement in terms of which immovable property which falls in the joint estate is sold, without the written consent of the other party. Section 20 allows for an immediate division of the joint estate while parties are still married. Whether or not this is the route to follow before the divorce action is heard and whether the applicant can comply with the requirements to succeed, I will leave for the legal representatives to decide.

legal representatives take head and inform their clients responsibly to enable them to come to some sort of settlement.

[21] That leaves me to determine whether the applicant has proven a need for maintenance, the request for contribution to costs and whether the respondent can afford it.

(i) The applicant's need for maintenance

[22] The applicant's CV and the various disciplinary hearings, CCMA documents and labour dispute notices show that she was employed until somewhere in 2021. On the papers, the applicant was dismissed for non-performance and using company resources for private matters, and not for the reasons she claims. Her CV also shows that she was employed during the marriage.

[23] It is further unclear whether the applicant found employment since she launched this application. On the financial disclosure form, there is an entry on the 27<sup>th</sup> of March 2022 with the reference "salary" with a payment of R9 380.<sup>25</sup> Again, on the 28<sup>th</sup> of May 2022, there is an entry reference "salary" and an amount of R12 982.<sup>26</sup>

[24] The applicant does not explain why the respondent must pay maintenance for her minor child. The respondent states that the child is benefiting from her late (biological) father's estate. The respondent cannot be held liable for the maintenance of her child or the child's outstanding school fees.

[25] In the table below I indicate what I regard as the applicant's expenses (excluding the expenses for the minor child) in the last column. I have also done so with reference to the maintenance requirements set out in the financial disclosure forms.<sup>27</sup>

Item	Description	Amount asked	Amount awarded
1	Rent	R6,000.00	R 3 000
2	Transport / Fuel	R1,300.00	R 1 300
3	Groceries	R2,500.00	R 1 500

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<sup>25</sup> CaseLines 010-63.

<sup>26</sup> CaseLines 010-65.

<sup>27</sup> CaseLines 010-17.

<b>4</b>	Municipal rates and taxes	R0.00	
<b>5</b>	Insurance / life cover	R1,600.00	R 1 600
<b>6</b>	Telephone	R700.00	R 400
<b>7</b>	Medical expenses	R500.00	R 250
<b>8</b>	Recreation and sundry	R250.00	R 125
<b>9</b>	Clothing self	R0.00	R 0
<b>10</b>	Clothing child	R100.00	R 0
<b>11</b>	Toiletries for household	R800	R 500
<b>12</b>	School fees for daughter	R2,100.00	R 0
<b>13</b>	Pocket money for daughter	R1,000.00	R 0
<b>14</b>	Funeral policy	R450.00	R 450
<b>15</b>	Pre-paid water and electricity	R1,200.00	R 600
<b>16</b>	Legal costs (down payment)	R1,000.00	R 0
<b>Total</b>		<b>R19,500.00</b>	<b>R 9 725</b>

[26] If the applicant receives a salary as set out above, she earns enough to cover her expenses. In court, the "salary" was not adequately explained. The legal representative stated that at the time of the launch of the application, the applicant was unemployed, not earning an income, but looking for employment. I will therefore presume, judging from the statements, that she has since found employment that covers her expenses and has thus not made a case for the need for maintenance.

(ii) Contribution towards costs

[27] The respondent lists that the high court has general jurisdiction in Gauteng as the reason for launching the divorce action in this court and not a regional court. He also states the applicant's reluctance to try and settle the matter as the reason for the escalating costs. I have already noted that it seems clear that both parties are equally to blame for the ongoing conflict in settling this matter. I have also warned that the parties' litigation is diminishing the joint estate at a rapid rate, leaving less to share. This includes choosing to litigate in a high court rather than a regional court.

[28] In her request for a contribution to costs, the applicant lists the daily fees for an advocate in court. This seems to go beyond just the preparation for the trial.

Contribution to costs can only be claimed on the first day of trial, as the court still hopes that parties will settle the matter before going to trial. She offers no evidence or explanation on how she gets to the amount she claims – for instance, attaching a draft bill of costs. It is thus difficult for the court to quantify the contribution to costs.

[29] However, I still deem it necessary to order a contribution, since the parties are married in community of property, which means that the applicant can claim part of the joint estate upon divorce. She is thus entitled to a contribution towards the cost to enable her to pursue her claim in respect of the joint estate.<sup>28</sup> It was already stated that she is only entitled to costs until the first day of litigation and not the cost of the litigation itself. The cost of the action will be dealt with in the action itself.

[30] However, in the absence of proof, the amount of R100 000 seems exaggerated and unsubstantiated. I deem an amount of R50 000 as a fair amount that will enable the applicant to prepare for the divorce action.

(iii) The respondent's ability to pay

[31] From the respondent's financial disclosure forms, the pension income is evident, and other cash amounts are deposited in his account. Other than the respondent's affidavit and some of the statements, there is no other evidence of the respondent's income. The respondent did not disclose what he did with the proceeds of the sale of the house or the motor vehicles.

[32] It is clear from the facts that the house was sold, likely, for R1 400 000.<sup>29</sup> In his particulars of claim, the respondent acknowledges that the immovable property forms part of the joint estate.<sup>30</sup> He asks for forfeiture of the property. Until the court orders forfeiture in the divorce action, this court must assume that it is still part of the joint estate.

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<sup>28</sup> *Carstens v Carstens* 1985 (2) SA 351 (SE); *Dodo v Dodo* 1990 (2) SA 77 (W); *SP v HP* 2009 (5) SA 223 (O).

<sup>29</sup> Respondent admits as much in his financial disclosure form at CaseLines 010-20.

<sup>30</sup> Particulars of claim paragraph 7.1.

[33] The ownership of the Mercedes Benz is not clear. The registration of a motor vehicle is not an indication of ownership, as ownership passes on the delivery of the car and not its registration. Even if it indicated ownership or a presumption of ownership, the car is registered in the name of "Marais". Added to this, in the particulars of claim, the respondent states that the applicant maliciously damaged a Mercedes Benz that belongs to the respondent (plaintiff), referring to the same Mercedes.<sup>31</sup> There is thus no clarity on whom this car belongs to, and if it was transferred to the son, whether it was done against payment, or whether it was a donation. In both instances, this has an impact on the joint estate.

[34] As for the other vehicles sold: the cars (or the proceeds of the sale), until the contrary is proven, the court assumes form part of the joint estate.

[35] Thus, while the above is not income in the conventional sense of a salary, it indicates that the respondent recently sold some assets (that probably fall in the joint estate) and should therefore have access to the proceeds. The respondent should consequently be able to contribute to the costs from these proceeds.

*(iv) Abuse of court processes*

[36] The applicant has a valid concern regarding the alienation of the immovable and other property. While on the facts, she seems to be able to take care of her own maintenance needs, it is clear that she does not have access to the funds necessary to defend the divorce action with the same rigour as the respondent, unless she receives a contribution. I, therefore, do not deem the application as an abuse of the court process.

*(v) Costs*

[37] I see no compelling reason to deviate from the usual order as to cost, that costs of this application should be costs in the trial.

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<sup>31</sup> Particular of claim, paragraph 6.3.

## The order

### In the result, the following order is made:

1. The respondent is ordered to contribute R50 000 (fifty thousand rands) of the legal costs *pendente lite* to the applicant within twenty days of this order.
2. Costs of this application will be costs in the trial.

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WJ du Plessis

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the applicant:

Mr MP Zwane

Instructed by:

Tshabalala A attorneys

For the for respondent:

Mr Seabi

Instructed by:

Mr KP Seabi & Associates

Date of the hearing:

14 June 2022

Date of judgment:

27 June 2022