

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

**CASE NO: D2271/2019**

In the matter between:

**S M**

**Applicant**

and

**K N**

**First Respondent**

**THE SHERIFF INANDA DISTRICT TWO**

**Second Respondent**

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**JUDGMENT**

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**Nicholson AJ**

[1] This is an interlocutory application where the Defendant in the action, is the Applicant in this application and the First Respondent in this application is the plaintiff in the action. For convenience, I shall refer to the parties in this application by their surnames.

[2] On 22 February 2023, Mr M brought an urgent application before me where he sought interim relief directing the Second Respondent to hold in trust, all funds that were attached in terms of a writ of execution. I duly granted that order together with a rule nisi wherein Mr M seeks the said monies be returned to his bank account within seven days of the confirmation of the rule nisi.

[3] The parties are before me today for the confirmation of the rule nisi.

[4] The genesis of this matter is in or about June 2016, when Mr M and Ms N married each other in terms of Hindu rights. In light of the person conducting the ceremony not being a recognised marriage officer in terms of s 3 of the Marriage Act 25 of 1961, the marriage was not solemnized in terms of s 11(1) of the Marriage Act. In the circumstances, the marriage is not a valid marriage for the purposes of the Marriage Act.

[5] On or about 15 March 2019, Ms N instituted divorce proceedings against Mr M and on the same day, she filed a Rule 43 application. In that matter a consent order was granted on 14 August 2019 directing Mr M to pay Ms N spousal maintenance *pendente lite* in the amount of R40 000 per month. For reasons stated below, the said order is still in operation three years and five months later.

[6] Due to Mr M and Ms N's marriage not been recognised in terms of the Marriage Act, in addition to a decree of divorce, Ms N also seeks an order that the marriage be recognised in terms of the Marriage Act; accordingly, she cites the Minister of Justice and Constitutional Development, and Minister of Home Affairs as the Second and Third Defendants in the action.

[7] Considering the order sought against the Second and Third Defendants, both Second and Third Defendants filed an exception against Ms N's particulars of claim annexed to the divorce summons.

[8] That exception which is a *lis* between Ms N and the Second and Third Defendants has to date not been prosecuted some three years later. The inability to prosecute the divorce has a ripple effect as follows: the divorce cannot be set down for hearing, which in turn means that the order in place in terms of the Rule 43 remains in place, and Mr M is obliged to continue the payments *pendente lite*.

[9] It is convenient to mention that Ms N has since withdrawn her opposition to the notice of exception; accordingly, all that stands is for the exception to be set down and heard.

[10] On 7 December 2022, Ms N caused a writ of execution for an amount of R 180 000 and legal costs to be issued by attachment of Mr M's bank account.

[11] On 12 January 2023, the writ was executed and an amount of R114 142.14 was removed from Mr M's account and placed in the Sheriff Inanda District Two's trust account.

[12] As mentioned hereinabove, Mr M had obtained interim relief freezing the said amount in the Sheriff's trust account.

[13] Mr M argues that the writ of execution issued in terms of Uniform rule 45(12)(a) should be set aside because the purpose of that Rule is directed at satisfying legal costs in terms of a cost order, and not payment in terms of Rule 43 orders, where a defaulting party has failed to make payment. Additionally, Mr M argues further that even if Rule 45 was competent to satisfy errant Rule 43 orders, in terms of Rule 45(3), the Sheriff failed to first proceed to his dwelling house or place of employment or business to demand satisfaction in terms of the writ before issuing the writ.

[14] It is instructive at this point to have regard to the wording of the notice in terms of Rule 45(12)(a) and (b)<sup>1</sup> issued to Mr M, which reads:

'2: ...

*WHEREAS it has been brought to my knowledge that there are debts which are subject to attachment and owing and/or accruing (now and in the future) or will accrue from you to the Respondent/Defendant and whereas the Applicant/Plaintiff has obtained judgment in the above Honourable Court against the Respondent/Defendant on the [blank] for R180 000.00 plus interest at [blank]% p.a. from [blank] to date of payment plus costs.*

...

*AND WHEREAS I have been requested by the Plaintiff to attach an amount equivalent to a R180 000.00 plus costs and my costs from any monies comprising of the above debts or becoming due in the future from your company to the Defendant/Respondent and I have caused such amount to be attached.*

*Now therefore you are required to make payment of the said debt as may be sufficient to satisfy the writ and costs for which receipt will be given and shall be a discharge pro tanto of the debt so attached in your hand....'*

[15] It is apparent from the notice, that while there is a Court order in terms of Uniform rule 43 to pay spousal maintenance in the amount of R40 000 per month, there is no judgment in the amount of R180 000. Accordingly, the notice is plainly wrong. Further, Mr M denies that he owes Ms N an amount of R180 000, which is an issue for the court, not the Sheriff to decide.

[16] In the circumstances, the notice of attachment is clearly wrong because there is no judgment amount for the Sheriff to act upon.

[17] Faced with the averment that the writ of execution was not proper on the basis laid out by Mr M, Ms N simply responds that the writ was justified in

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<sup>1</sup> Indexed papers, page 58, annexure "G11" to the founding affidavit.

the circumstances.<sup>2</sup> Accordingly, neither a basis for the submission above nor the denial that the writ was not proper has been advanced by Ms N.

[18] In his heads of argument, Mr *Narandas* on behalf of Mr M asserts that the doctrine known as substance over form<sup>3</sup> allows the Court to ignore the form of a disguised transaction and examine the true nature of the transaction, and attach adequate legal implications to it. Accordingly, the writ of execution issued by Ms N on 7 December 2022 should be set aside.

[19] In Ms N's heads of argument, which was drafted by Ms Lushaba but argued by Mr *Houston*, the issues in the summons regarding the recognition of the marriage are dealt with but, the issue of the writ, which is the subject of this application, is not dealt with.

[20] In oral argument, Mr *Houston* submitted that it is common cause that there is a Rule 43 order that has been granted where Mr M is directed to pay Ms N an amount of R40 000 per month and that order still stands. Mr M has failed to make payments which resulted in significant arrears, and while Ms N in her answering affidavit, has put up a schedule which demonstrates that the arrears, after the R114 142.14 has been paid, now stands at R95 857.86,<sup>4</sup> Mr M has not put up any evidence that he has been making payments in terms of the Rule 43 order.

[21] From the Bar, Mr *Narandas* conceded that there are arrears, but the arrears are less than the amount asserted by Ms N. Further, in the replying affidavit, Mr M has put up a schedule of payments from 2 May 2021 until 4 August 2022 of various amounts. The table does not have a total.<sup>5</sup> At pages 96 to 99 are various proofs of payment which appear to evidence the payments in the table at page 95. On a mere comparison of the two tables,

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<sup>2</sup> Paragraph 27 at page 79 of the papers.

<sup>3</sup> *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 at 547; *Bozzone and Others v Secretary for Inland Revenue* 1975 (4) SA 579 (A).

<sup>4</sup> Indexed page 83.

<sup>5</sup> Page 95 of the papers, annexure "B" to the replying affidavit.

there does appear to be a significant amount of payments, which Mr M asserts, but has not found its way into Ms N's table at page 83 of the papers.

[22] I pause to mention that the two tables lists the information in different formats. For instance, Ms N lists in her table the arrears and payments as a result of the attachments while Mr M simply lists the payments he has made. Accordingly, the two tables are irreconcilable without the parties sitting together to explain these tables.

[23] The arrears or lack thereof is not relevant to this matter because the gravamen is whether Rule 45(12)(a) is competent to collect the arrears of a Rule 43 order.

[24] Considering the wording of the writ of execution, and the notice of attachment, together with the wording of Rule 45, and the fact that Ms N did not dispute that the writ of execution and notice of attachment were procedurally incorrect, the application must succeed.

[25] I pause to add here that I agree with Mr *Narandas*' contention from the bar, that a contempt of Court application is the correct remedy, where an errant party fails to obey a court order. In that way, Mr M would have been given the opportunity to dispute the arrears and Ms N would be given the opportunity to prove the arrears.

### **Order**

[26] In the circumstances, I make the following order:

- (a) The rule nisi dated 22 February 2023 is confirmed.
- (b) The first respondent is directed to pay the costs of the application.

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**Nicholson AJ**

Date heard: 22 March 2023

Date handed down: 14 April 2023

Appearances:

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