CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 337/21

In the matter between:

D[redacted] R[redacted] Applicant

and

R[redacted] R[redacted] Respondent

Neutral citation: *R[redacted] v R[redacted]* [2023] ZACC 5

Coram: Baqwa AJ, Kollapen J, Madlanga J; Majiedt J, Mathopo J, Mhlantla J, Rogers J and Tshiqi J.

Judgment: Tshiqi J (unanimous)

Heard on: 16 August 2022

Decided on: 1 February 2023

Summary: Contempt of Court — rule 42 of the Uniform Rules of Court — variation of court orders

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ORDER

On appeal from the High Court of South Africa, Gauteng Division, Pretoria, the following order is made:

1. The appeal is upheld.
2. Paragraphs 3 to 6 of the order of the High Court of South Africa, Gauteng Division, Pretoria are set aside and is substituted with the following:
   "3.1. The application to hold the respondent in contempt of the order dated 23 February 2018 is dismissed.
   3.2. Each party is ordered to pay its own costs."
3. Each party is ordered to pay its own costs in the Supreme Court of Appeal and this Court.

JUDGMENT

TSHIQI J (Baqwa AJ, Kollapen J, Madlanga J; Majiedt J, Mathopo J, Mhlantla J, Rogers J concurring):

Introduction

[1] This is an application for leave to appeal against part of the order of the High Court of South Africa, Gauteng Division, Pretoria. The order flowed from an application by the respondent, Mrs R[redacted] R[redacted], in terms of which she sought that the applicant, Mr D[redacted] R[redacted], be held in contempt of an earlier High Court order in divorce proceedings between the parties.

[2] Mr R[redacted] is now challenging the contempt order on two grounds. The first challenge is aimed at the fact that in paragraph 2.3 of the order in the divorce proceedings, the High Court had declared that Mr R[redacted] and Mrs R[redacted] remained as the joint owners of a property known as R[redacted] M[redacted], in Maputo, Mozambique and were equally entitled to whatever net rental income the property generated. In the contempt proceedings, the High Court held that Mr R[redacted] was in contempt of that order because

he had failed to pay over to Mrs R[redacted] her share of the net rentals earned from that property.

[3] The second challenge was aimed at the decision of the High Court to vary paragraphs 2.4 and 2.6 of its order in the divorce proceedings by invoking rule 42(1) of the Uniform Rules of Court. In terms of paragraph 2.4 of the order in the divorce proceedings, Mr R[redacted] had to transfer 40% of his shareholding in his business in Mozambique to Mrs R[redacted] within 60 days of the order, including the shareholding in certain specified Mozambican companies as well as in a specified South African company. In terms of paragraph 2.6, the High Court ordered the parties to retain the movable property in their possession at the time of the order, including half of the Dream Vacation Club points. In the contempt of court proceedings, the Court unilaterally varied the orders in both paragraphs 2.4 and 2.6 and made orders that none of the parties had prayed for. It substituted paragraph 2.4 with an order requiring Mr R[redacted] to pay Mrs R[redacted] an amount of $450 000 within 60 days. The High Court also varied paragraph 2.6 to the effect that if Mr R[redacted] paid Mrs R[redacted] an amount of R44 000, he would become the sole owner of the Dream Vacation Club points.

Factual background

[4] Mr and Mrs R[redacted] were married out of community of property in Zimbabwe after the birth of their first born child and then settled there in a small town. It seems that they came back to South Africa for a while before moving back to Zimbabwe. At the time of their marriage, they both had little to no assets. Mrs R[redacted] had a matric qualification coupled with a six month stable management course. Mr R[redacted] also had a matric qualification and was in the process of qualifying as an electrician. When they later moved back to Zimbabwe, Mrs R[redacted] worked for a well-known horse racing entity and thereafter as a bookkeeper, after having undergone a six month bookkeeping related training course. She later joined the successful electrical services company, which Mr R[redacted] had opened.

[5] In its early days the company was small, but it soon grew into a business which provided the parties with a comfortable standard of living. The parties conducted the business as a partnership and both held 50% shares of the company. Mrs R[redacted] dealt with the administration of the business, and Mr R[redacted] focused on the operations. Later on the company merged with another and at that point Mrs R[redacted] discontinued rendering her services to the company.

[6] Owing to the declining economy and other adverse factors prevailing in Zimbabwe at the time, Mr R[redacted] decided to explore business opportunities in Mozambique. This entailed frequent travelling and absence from his family in Zimbabwe. At some stage, the parties moved to an estate in White River, South Africa, and also acquired a house in Maputo, Mozambique, where they stayed for a short period of time. During the subsistence of the marriage, it was Mr R[redacted] who provided the funds for the acquisition of the parties' assets, movable and immovable, as well as for their maintenance. There is a dispute as to whether Mrs R[redacted] had been encouraged to become self-sufficient or whether Mr R[redacted] was content to have Mrs R[redacted] create and maintain a comfortable domestic environment for the sake of the family, primarily the children.

The divorce action

[7] The marriage relationship eventually broke down and in 2015 Mrs R[redacted] instituted a divorce action in the High Court. Despite the marriage being solemnised in Zimbabwe and in terms of the laws of that country, the parties agreed that the High Court had jurisdiction to determine the divorce proceedings and also agreed that the Court would apply the Matrimonial Causes Act of Zimbabwe[1] (the Act). What enjoyed the particular attention of the High Court, were the patrimonial consequences of the divorce. The parties were in agreement that the maintenance claimed by Mrs R[redacted] would stand over to be determined by a Maintenance Court as it could only be properly adjudicated once the consequences and extent of a redistribution order had

[1] 33 of 1985.

been determined. Because the dispute centred around the patrimonial consequences of the divorce, more particularly, whether a redistribution order should be granted and, if so, on what terms, the Court focused on the provisions of section 7 of the Act.

[8] Section 7 clothes an appropriate court with the authority to exercise its judicial discretion to make an order re-allocating matrimonial property upon granting a decree of divorce, judicial separation or nullity of marriage. It provides:

> "7 Division of assets and maintenance orders
>
> (1) Subject to this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, an appropriate court may make an order with regard to—
>
> (a) the division, apportionment or distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to the other;
>
> (b) . . .
>
> (2) An order made in terms of subsection (1) may contain such consequential and supplementary provisions as the appropriate court thinks necessary or expedient for the purpose of giving effect to the order or for the purpose of securing that the order operates fairly as between the spouses and may in particular, but without prejudice to the generality of this subsection—
>
> (a) order any person who holds any property which forms part of the property of one or other of the spouses to make such payment or transfer of such property as may be specified in the order;
>
> (b) . . .
>
> (3) . . .
>
> (4) In making an order in terms of subsection (1) an appropriate court shall have regard to all the circumstances of the case, including the following—
>
> (a) the income-earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future;
>
> (b) the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future;

> (c) the standard of living of the family, including the manner in which any child was being educated or trained or expected to be educated or trained;
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> (d) the age and physical and mental condition of each spouse and child;
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> (e) the direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and any other domestic duties;
>
> (f) the value to either of the spouses or to any child of any benefit, including a pension or gratuity, which such spouse or child will lose as a result of the dissolution of the marriage;
>
> (g) the duration of the marriage;
>
> and in so doing the court shall endeavour as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses."

[9] Mrs R[redacted] argued that it would be just if Mr R[redacted] were ordered to transfer to her one half of his assets, or such portion as the Court deemed just. Alternatively, if Mr R[redacted] were to be ordered to make payment to her, the payment that would be just would be an amount equal to half of the net value of his estate.

[10] The High Court considered the circumstances set out in section 7(4) of the Act. Regarding the earning capacity of the parties, it took into account the fact that Mrs R[redacted] had a limited income-generating capacity. This was, according to the High Court, due to the fact that the training courses she attended in the early years of their marriage had become outdated and of little use at the time of the divorce proceedings. It also considered that she had no recent work experience. It further took into account that her stable management abilities appeared to be limited. The High Court formed the view that even though Mrs R[redacted] was doing photographic work for local businesses, the nature and extent of those ventures and the income they generated appeared to be small.

[11] When dealing with Mr R[redacted]'s income-earning capacity, the High Court noted that he had progressed in his career and was a director on the board of a holding company in the engineering and construction field which had four subsidiaries. The Court highlighted that although there was a decline in the Mozambican economy, and the changes in its political landscape had led to the companies having to downsize due to loss of government contracts, Mr R[redacted] would still retain an income-generating capacity which far outweighed that of Mrs R[redacted]. The Court pointed out that whilst the properties in South Africa were all in the name of Mrs R[redacted], they had, save for one, been depleted and the only assets of real value were those in Mozambique.

[12] Regarding the asset position of each party, the Court took into account that Mr R[redacted] held 45% of the shares in the Mozambican group of companies and the fact that its property was worth $3 million. The High Court concluded that the group of companies had a net asset value of around $11 million. Mr R[redacted] also held, in joint ownership with Mrs R[redacted], Dream Vacation Club points worth R44 000. The High Court also considered that he had furniture worth approximately R70 000. It also took into account that Mr R[redacted] owned 15 stands in a prospective development in Mozambique, which only had a speculative value at the time of the divorce but would have real value once a development had taken place. It estimated that he had a debt of approximately R500 000. The Court noted that Mr R[redacted] estimated his net asset value at somewhere between $750 and $1 million. Mrs R[redacted]'s assets on the other hand included a registered immovable property outside White River which was valued between R1.9 million and R2.2 million. The High Court noted that the parties were the joint owners of the residential property in Maputo, Mozambique, which according to the Court was worth between $405 000 and $633 000.

[13] Regarding the parties' financial needs, obligations and responsibilities, the Court formed the view that Mr R[redacted] was able to maintain himself and his lifestyle, despite the large drop in his monthly income. Mrs R[redacted] on the other hand had very little income from which she could maintain herself and the property on which she lived, apart from a modest rental income. The High Court stated that it was clear that the parties' standard

of living had, to a certain extent, declined compared to the period when their businesses in Mozambique were flourishing. It noted that Mrs R[redacted]'s lifestyle had diminished primarily due to the separation, lack of maintenance from Mr R[redacted], and also as a result of Mr R[redacted]'s business woes.

[14] The Court found that there was no evidence relating to pensions, benefits or gratuities which either of the parties would lose as a result of the divorce. After taking into account the circumstances listed under section 7(4), it concluded that Mrs R[redacted] was entitled to an order distributing Mr R[redacted]'s assets as envisaged in section 7(1) of the Act. In determining the nature, extent and mode of the distribution, the Court took into account that Mr R[redacted] would proceed with his life in Mozambique for the foreseeable future as his businesses were there and he no longer had any link to White River, Mpumalanga.

[15] Regarding the maintenance claim and a final redistribution order, the High Court held that the issue of maintenance and redistribution were interrelated and that the former could only be assessed once the latter had been determined. It was concerned that in this case there were so many undetermined valuations in respect of Mr R[redacted]'s assets that it could not finally determine the impact of a redistribution order on Mrs R[redacted]'s ability to maintain herself. It decided to postpone the issue of maintenance. In regard to Mr R[redacted]'s shareholdings, the Court said that it would be "fraught with danger" to accord a monetary value to the shares. This, because of the uncertainties surrounding the value of the companies. Instead, the Court considered that a transfer of 40% of Mr R[redacted]'s shareholding to Mrs R[redacted] would be appropriate. On 23 February 2018 it granted the following order:

> "1. A decree of divorce is granted;
>
> 2. In terms of Section 7(1) of the Matrimonial Cause Act, of Zimbabwe, Act No. 33 of 1985 (as amended) it is ordered as follows:
>
> 2.1. [Mrs R[redacted]] shall retain as her sole property the immovable property known as Plot [redacted], T[redacted] Road, White River, Mpumalanga;

2.2. [Mr R[redacted]] shall remain liable for the bond over the property and shall pay the instalments due in respect thereof;

2.3. Both parties shall remain joint owners of the property known as [redacted] R[redacted] M[redacted], Maputo, Mozambique which may not be sold or encumbered without prior written consent of both parties and who shall equally be entitled to whatever net rental income the property generates;

2.4. [Mr R[redacted]] shall transfer 40% (forty per cent) of his shareholding in his businesses in Mozambique to [Mrs R[redacted]] within 60 days from date of this order, including but not limited to the shareholding in E[redacted] Group, E[redacted] Limitada, E[redacted] E[redacted] Limitada, F[redacted] Limitada, P[redacted] Limitada as well as in the South Africa company E[redacted] E[redacted] Services (Pty) Ltd with registration number [redacted];

2.5. [Mr R[redacted]] shall retain as his sole property the 15 vacant stands in Costa del Sol, Maputo;

2.6. The parties shall each retain the movable property in their possession at the time of this order as their own, including half of the Dream Vacation Club points each;

2.7. Pending the [finalisation] of the issue of [Mrs R[redacted]'s] claim for maintenance, [Mr R[redacted]] shall pay the amount of R10 000 per month with the first payment before or on 7 March 2018 and each successive payment before or on the 7th day of each month as well as the levies and costs due in respect of the Dream Vacation Club points of the parties and, if [Mrs R[redacted]] has already made payment for 2018, [Mr R[redacted]] is to reimburse her.

3. [Mrs R[redacted]'s] claim for maintenance for herself is postponed *sine die* and may be enrolled in this court or in a Magistrates or similar court with competent jurisdiction.

4. [Mr R[redacted]] shall pay 40% of [Mrs R[redacted]'s] costs of the divorce action including the costs of the Rule 43 application, the costs of which have previously been ordered to be costs in the causes."

Contempt proceedings

[16] Mrs R[redacted] brought an application before the High Court, seeking an order declaring Mr R[redacted] to be in contempt of the High Court order in the divorce proceedings. She alleged that Mr R[redacted] had wilfully failed to comply with the divorce order in that he failed to: (a) pay her the share of the rental income derived from the property in Mozambique; (b) transfer to her name 40% of his shareholding in his businesses in terms of the court order; (c) pay her the amount due for the points in the Dream Vacation Club for 2018; and (d) take any steps to ensure that the matter regarding her maintenance claim was set down in a Magistrates' court with competent jurisdiction. As a sanction for the contempt, Mrs R[redacted] sought the imposition of a sentence of two months' imprisonment on Mr R[redacted], to be suspended on condition that he complied with the terms of the divorce order within two weeks of the order.

[17] It seems that the contempt application did not initially come to the personal attention of Mr R[redacted]. On 10 July 2019, the High Court (per Mngqibisa-Thusi J) issued a rule nisi calling on him to show cause why it should not be finally ordered that he had failed to comply with the divorce order and why he should not be ordered to comply within two weeks, failing which he would be sentenced to two months' imprisonment. Subsequently, the matter became opposed and the return day was extended.

[18] In opposing the contempt application, Mr R[redacted] filed an application for leave to appeal against the divorce order and an application for condonation of the late filing of the application. He also filed a counter-application to vary the divorce order, particularly paragraphs 2.2, 2.3, and 2.6 and the deletion of paragraph 2.4 in its entirety. Mr R[redacted] sought an order to the effect that the property known as plot [redacted], T[redacted] Road, White River, Mpumalanga be sold and the net proceeds be paid to himself. He also sought to retain the sole ownership of the R[redacted] M[redacted] property in Mozambique and Mrs R[redacted]'s removal as a co-owner of the property. Mr R[redacted] also sought to retain as his sole property all the points in the Dream Vacation Club subscription and tendered to be solely liable for all its levies and expenses. He further sought an order deleting the entire paragraph relating to the transfer of the shares in his businesses to Mrs R[redacted].

[19] The matter was set down for hearing before Davis J on 1 February 2021. Before the matter was heard, the High Court, through the CaseLines platform,[2] requested the parties to furnish it with the total value of Mrs R[redacted]'s half share of the rental income of the property in Mozambique, from the date of divorce until the date of its enquiry. It requested that the amount be set out in South African as well as Mozambican currency. It also asked for the details of the account where the rental monies had been paid. Mr R[redacted] did not respond but Mrs R[redacted] did and indicated that the amount was R489 136.59, or MT2 106 311 (Mozambican meticals).

[20] All the applications were heard simultaneously and judgment was handed down on 10 February 2021. Regarding the application for condonation and the application for leave to appeal, the High Court held that Mr R[redacted] had, through his conduct, acquiesced in the divorce order for more than two years but later wilfully failed to comply with it. The Court held that Mr R[redacted]'s conduct through peremption of the appeal was inconsistent with an intention to appeal, and that he was thus precluded from subsequently applying for leave to appeal. It held that Mr R[redacted] had in any event not satisfactorily explained the lengthy delay in seeking leave to appeal. It held further that had the contempt application not been launched, Mr R[redacted] would not have launched the application for leave to appeal.

[21] The Court further held that even if Mr R[redacted] had not acquiesced in the order, and even if it were inclined to grant condonation for the late filing of the application for leave to appeal, there was another hurdle; the application had no reasonable prospects of success. The High Court reasoned that even if leave to appeal were to be granted, the problem would be that Mr R[redacted] had failed to place evidence before the Court on the monetary value of his shareholding in the companies. It highlighted that this was as a result of the fact that his evidence regarding the value of the shareholding in the Mozambican companies was vague, that the Court, in the divorce proceedings, decided

[2] CaseLines is a digital/electronic evidence management application platform utilised in the Gauteng Division of the High Court, Pretoria and Johannesburg as a case management and litigation system mechanism.

to make an order that Mrs R[redacted] was entitled to a percentage shareholding in the companies rather than awarding her a certain amount of money. Furthermore, the application for leave to appeal was not accompanied by an application to lead further evidence on appeal and did not state why the evidence was not adduced during the divorce proceedings. The Court highlighted that it was still in the dark regarding the true value of the shares and that all it had before it was the vague evidence led at the divorce proceedings. It dismissed the application for condonation and consequentially the application for leave to appeal and the counter-application.

[22] The Court considered the contempt application and said that the issues it had to determine concerned: (a) the rental income due in respect of the R[redacted] M[redacted] property, Mozambique; (b) the transfer of shares to Mrs R[redacted]; (c) the Dream Vacation Club points; and (d) the maintenance to be paid to Mrs R[redacted].

[23] Concerning the rental income, Mr R[redacted]'s defence was that Mozambican exchange control regulations prohibited him from remitting the money to Mrs R[redacted] in South Africa and that she had failed to furnish particulars of an operational Mozambican bank account into which he could pay her share of the rent. Paying her in South Africa, he said, would enable her to avoid her tax liabilities in Mozambique. The High Court found that nothing had prevented Mr R[redacted] from making payment in South Africa if necessary, out of resources he had in this country. Moreover, even though Mr R[redacted] was not expressly ordered to make payment of the rental income to Mrs R[redacted], it was common cause that he administered and received the rental income.

[24] Concerning the company shares, the High Court held that although there may have been adverse corporate consequences for Mr R[redacted] if he transferred a portion of his shares to Mrs R[redacted], he was not entitled to simply disregard the court order. The Court found that his disregard of the court order would have been ameliorated if he had promptly applied to have the order varied or if he had made proposals to pay a fair value to Mrs R[redacted] in lieu of the shares, instead of simply disregarding the order.

[25] Although the High Court had noted that Mr R[redacted] did not promptly apply for a variation of the order and although it lamented his disregard of the order, it nonetheless varied its earlier order regarding the shareholding. It substituted its order with a monetary amount which it believed would be equivalent to 40% of the company shares that Mr R[redacted] was required to transfer.

[26] The High Court granted an order which read in part:

> "3. The rule nisi dated 10 July 2019 is confirmed as follows: [Mr R[redacted]] is declared to be in contempt of the order of this court dated 23 February 2018 and is hereby sentenced to imprisonment of 60 (sixty days), which sentence is wholly suspended on condition that he makes payment, in South Africa, to Mrs R[redacted], into her bank account designated by her attorneys on 12 March 2018 of the amount of R489 136,59, within 30 days of this order.
>
> 4. Should Mr R[redacted] fail in future to ensure that Mrs R[redacted] is quarterly paid her half share of the net rental income from the property known as [redacted] R[redacted] M[redacted], Maputo, Mozambique (after adjustment for any taxation payable on such rental by Mrs R[redacted]), she shall be entitled to approach this court afresh on the same papers as supplemented.
>
> 5. The order of this court dated 23 February 2018 is amended by the substitution of paragraphs 2.4 and 2.6 thereof with the following:
>
> 2.4. [Mr R[redacted]] shall pay [Mrs R[redacted]] US $450 000,000 within 60 days from the date of this order, or within such extension of time as this court may on good cause grant.
>
> 2.6. The parties shall each retain the movable property in their possession at the time of the order as their own save that, upon payment of [Mrs R[redacted]] R44 000,00 [Mr R[redacted]] shall become the sole owner of the Dream Vacation Club points.
>
> 6. The date of 60 days referred to in the amended paragraph 2.4 of the initial order shall, for purposes of the payment mentioned herein, be calculated from date of this order.
>
> 7. Mr R[redacted] shall pay Mrs R[redacted]'s costs of these applications."

[27] Mr R[redacted] subsequently filed an application for leave to appeal against the order in the contempt proceedings. In its judgment refusing the application for leave to appeal, the Court stated the following regarding the rental income and the shareholding in the companies:

> "In [Mr R[redacted]y's] counter-application, he sought an order amending the redistribution order with the effect that, not only that he becomes the exclusive owner of the M[redacted] property and that the property in which [Mrs R[redacted]] is residing [the White River property] be sold and the proceeds paid to him, but that the order for the transfer of 40% shares in the named companies be deleted *in toto*. I interpose to add that [Mr R[redacted]] remained silent as to the current circumstances or values of the 15 'development stands' in Mozambique, also retained by him in terms of the distribution order.
>
> As already aforestated, the counter-application was refused but the order for transfer of shares was converted to an order for payment of a value based on [Mr R[redacted]'s] evidence in the trial."

[28] The above reasoning by the High Court shows clearly that it granted a variation of the order on its own terms, although it had dismissed Mr R[redacted]'s counter-application. It varied the order even though it had reasoned that Mr R[redacted] had acquiesced in its divorce order; that his application for condonation of the late filing of the application for leave to appeal and his application for leave to appeal were meritless; and that the evidence concerning the value of Mr R[redacted]'s shareholdings in the companies was vague. As will be explored further below, when the High Court varied the divorce order, it ordered that Mrs R[redacted] be paid an amount of money based on the same evidence it had rejected during the divorce proceedings on the basis that it was vague.

[29] Mr R[redacted]'s further application for leave to appeal to the Supreme Court of Appeal was dismissed by that Court, and so was an application to the President of the Supreme Court of Appeal for reconsideration in terms of section 17(2)(f) of the Superior Courts Act.[3]

[3] 10 of 2013.

This Court

Jurisdiction and leave to appeal

[30] The first issue to be determined is whether this Court has jurisdiction to entertain this application. The determination of jurisdiction is based on the parties pleadings.[4] Mr R[redacted]'s pleadings on the issue of jurisdiction are not a model of clarity. During oral submissions, Mr R[redacted]'s counsel clarified that this Court's jurisdiction is engaged on the basis of a breach of sections 12 and 34 of the Constitution. He submitted that Mr R[redacted]'s right to freedom and security under section 12 of the Constitution would be breached if paragraph 3 of the High Court order in the contempt proceedings is enforced. This was based on the fact that paragraph 3 imposed a conditional sentence of imprisonment if Mr R[redacted] failed to comply with it. Regarding section 34 of the Constitution, Mr R[redacted]'s counsel contended that his constitutional right was breached, because although the High Court had dismissed Mr R[redacted]'s counter-application, it unilaterally amended paragraph 2.4 and 2.6 of the divorce order and substituted it with an order that contained prayers that none of the parties had sought.

[31] Mr R[redacted]'s counsel further argued that the High Court should not have relied on rule 42 for the variation order, because none of the parties had raised the issue of a common mistake and there was in any event no evidence to that effect. Counsel also submitted that no evidence was adduced during the contempt proceedings regarding the value of the shares, and that the Court should not have valued the shares at the amount of $450 000 because it had initially rejected this amount during the divorce proceedings. Furthermore, the High Court did not enquire whether Mr R[redacted] could afford to pay the money in South Africa or at all. In doing so, Mr R[redacted]y's counsel contended that the High Court had breached the *audi alteram partem* principle (the duty to hear the other

[4] *TM obo MM v Member of the Executive Council for Health and Social Development, Gauteng* [2022] ZACC 18 at paras 44-7; *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 (8) BCLR 919 (CC) at paras 38-9; and *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 BCLR 35 (CC) at para 75.

side), which is a cornerstone of fairness in judicial proceedings. Mr R[redacted] also submitted that this application raises several arguable points of law of general public importance which are "cast in stone but which were entirely ignored in the Court a quo". Mrs R[redacted] did not seriously challenge the jurisdiction of this Court. The focus of her submissions were on leave to appeal.

[32] In *Tuta*,[5] this Court held that the jurisdiction of this Court would be engaged on the basis of an alleged error of law that is of such a serious nature that it implicates an applicant's right to liberty as entrenched in section 12(1) of the Constitution. The Court held:

> "An error of this kind, if left uncorrected, would render the applicant's trial unfair. It would also condemn the applicant to suffer a conviction and sentence of great consequence. . . . [G]reat prejudice to the applicant would occur if the error of law is shown to have been made, and remains uncorrected. In these circumstances, a constitutional issue arises that engages our jurisdiction."[6]

[33] I accept that most of the criticisms directed at how the High Court dealt with the contempt application are to a certain extent errors of established legal principles, but they implicate sections 12 and 34 of the Constitution and are so serious that they need the attention of this Court. A further issue that arises here is whether it is competent for a court to unilaterally substitute its order with terms that neither of the parties had prayed for. In varying the order, the High Court placed reliance on rule 42(1)(c) of the Uniform Rules of Court, which grants it, of its own accord, or upon application by any affected party, the power to vary or rescind its earlier order if it was granted as result of a mistake common to the parties. It has to be determined whether there was indeed a common mistake between the parties or whether the High Court incorrectly invoked rule 42(1)(c) simply because it was concerned about the difficulties experienced by Mrs R[redacted] in seeking to enforce the divorce order.

[5] *Tuta v The State* [2022] ZACC 19.

[6] Id at para 53.

[34] Mr R[redacted] submitted that the misdirection by the High Court deserves this Court's attention and that the application has reasonable prospects of success. Mrs R[redacted] denied that the High Court committed any errors of law in the matter and submitted that leave to appeal should be dismissed on the basis that the application had no merit.

[35] We know that the High Court in the divorce proceedings made an order declaring Mr and Mrs R[redacted] joint owners of the R[redacted] M[redacted] property in Maputo, Mozambique, and that they are equally entitled to rental income generated from the property. Paragraph 3 of the order in the contempt proceedings holds Mr R[redacted] in contempt of that order because he failed to pay the rental income generated from that property to Mrs R[redacted]. It effectively sentenced Mr R[redacted] to 60 days' direct imprisonment, which was suspended, provided he paid a certain amount of money to Mrs R[redacted]. It seems that the order of the High Court is not consistent with the decision of this Court in *Coetzee* where this Court held that imprisonment may not flow from a failure to pay an amount of money.[7] These sentiments were echoed by the Supreme Court of Appeal in *Jayiya* which held that, except in the case of an order for the payment of maintenance, a money judgment is not enforced by contempt proceedings but by execution.[8] The same position was confirmed by this Court in *Bannatyne.*[9] Paragraph 2.3 of the divorce order is not an order for the payment of maintenance but is concerned with the rights of the parties as co-owners of the M[redacted] property. It is also necessary to determine whether an order of contempt of court may flow from an order couched in declaratory terms. The application bears reasonable prospects of success. Leave to appeal is thus granted.

[7] *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer Port Elizabeth Prison* [1995] ZACC 7; 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) at para 13.

[8] *Compensation Solutions (Pty) Ltd v The Compensation Commissioner* [2016] ZASCA 59; (2016) 37 ILJ 1625 (SCA) at para 13. See also *Jayiya v Member of the Executive Council for Welfare, Eastern Cape* [2003] ZASCA 38*;* 2004 (2) SA 611 (SCA) at para 15.

[9] *Bannatyne v Bannatyne* [2002] ZACC 31; 2003 (2) SA 363 (CC); 2003 (2) BCLR 111 (CC) at para 18, where Mokgoro J said "[a]lthough money judgments cannot ordinarily be enforced by contempt proceedings, it is well established that maintenance orders are in the special category in which such relief is competent".

Merits

[36] The issues that have to be determined on the merits are first, whether Mr R[redacted] was in contempt of the order made by the High Court in the divorce proceedings which declared Mr and Mrs R[redacted] to be joint owners of the property in Maputo, Mozambique. Second, whether, having found Mr R[redacted] in contempt of the declaratory order, the High Court could impose a sentence of direct imprisonment, conditional upon payment of an amount of money, which according to the High Court was the equivalent of the arrear rental income. Third, whether the High Court could vary its earlier order granted in the divorce proceedings regarding the transfer of shares to Mrs R[redacted]. Here, the question is whether the Court could substitute its divorce order (to the effect that Mr R[redacted] should transfer 40% of his shareholding in his various companies listed in the order to Mrs R[redacted]) by ordering, in the contempt proceedings, that Mr R[redacted] should retain the shareholding in the companies and pay to Mrs R[redacted]y $450 000 within 60 days from the date of the order. Fourth, whether the High Court could invoke rule 42(1)(c) in order to vary its earlier order. Related to this, is whether there was a common mistake between Mr and Mrs R[redacted] regarding Mr R[redacted]'s shareholding in the various companies. Fifth, whether the High Court could amend its earlier order concerning the Dream Vacation Club points. In terms of the divorce order it had ordered that each party should retain the movable property in their possession at the time of the order as their own, including half of the Dream Vacation Club points. Here the question is whether the High Court could amend that order and substitute it with an order which provided that, once Mr R[redacted] had paid an amount of R44 000 to Mrs R[redacted], he would become the sole owner of the Dream Vacation Club points.

The Maputo property rental income

[37] The first question is whether Mr R[redacted] was in contempt of the court order in respect of the rental income. During the divorce proceedings, the High Court made the following order, at paragraph 2.3 of its order, in respect of the property in Maputo:

> "*Both parties shall remain joint owners of the property known as* [redacted] *R*[redacted] *M*[redacted], *Maputo, Mozambique* which may not be sold or encumbered without prior written

> consent of *both parties and who shall equally be entitled to whatever net rental income the property generates*."

The High Court order in respect of the property in Maputo was purely declaratory in nature and did not require Mr R[redacted] to do anything. The High Court itself in its judgment in the contempt proceedings acknowledged this but seemed to hold the view that because Mr R[redacted] administered and received the rental income, he ought to have paid Mrs R[redacted]y's share to her even though there was no express order to that effect. The High Court said that "[a]lthough Mr R[redacted] was not expressly ordered to make such payment, at all relevant times it was common cause that he administered and received the rent".

[38] The High Court also placed a lot of emphasis on the fact that Mr R[redacted] had initially tendered to pay the amount. In argument before this Court, Mrs R[redacted]'s counsel made reference to correspondence from Mr R[redacted] where he requested Mrs R[redacted] to furnish him with the details of her Mozambican bank account so that he could transfer her share of the monthly rental income from March 2018 onwards. It was argued that this shows that Mr R[redacted] understood that he had to pay the rental income to Mrs R[redacted].

[39] First, the fact that Mr R[redacted] administered the rental income generated by the property did not mean that the court order created a positive obligation on him to transfer and pay the amount to Mrs R[redacted]. At most he had the responsibility to ensure that Mrs R[redacted]'s share of the rental income was not utilised by him or any other person, as he was not entitled to it. One must distinguish between: (a) an obligation which might have arisen from co-ownership and an agreement for him to administer the property on the one hand; and (b) an obligation imposed by the Court. Perhaps it could be argued that he was under a contractual obligation to account to Mrs R[redacted] for her half-share of the rent, but this obligation, if it existed, was not translated into a court order. Second, the fact that he acknowledged, in correspondence, that the rental income was payable to Mrs R[redacted], does not mean that he was obliged in terms of the court order to effect payment. His failure to make the payment did not place him in contempt of

the court order. The fact that he could have paid her out of resources he had in South Africa is also of no consequence in the circumstances.

[40] Even if we were to assume, for the moment, that Mr R[redacted] was obliged, in terms of the order, to pay the amount to Mrs R[redacted], we would still have to find that the evidence before the High Court established wilfulness and mala fides. This Court in *Matjhabeng Local Municipality* listed as the fourth element of contempt that it must be established beyond reasonable doubt that the respondent was wilful and mala fide in his failure to comply with the order.[10] The High Court would have to be satisfied, beyond a reasonable doubt, that Mr R[redacted] wilfully and in bad faith failed to pay the amount.

[41] Mr R[redacted], in his defence, stated that he could not pay the amount representing Mrs R[redacted]'s share of the net rental income because Mozambican exchange control regulations prohibited him from remitting the money to Mrs R[redacted] in South Africa. He also alleged that she had failed to furnish particulars of an operative Mozambican bank account and that paying her in South Africa would enable her to avoid her tax liabilities in Mozambique. He throughout expressed a willingness to pay her half-share of the net rent to her in Mozambique.

[42] There was no evidence that Mrs R[redacted] had opened the account in Mozambique as requested by Mr R[redacted] and that he nonetheless failed to make payment. Mr R[redacted] indicated that paying the rental income into a bank account in South Africa would also have tax implications. In order to convict him, the Court would have to be satisfied beyond a reasonable doubt that Mr R[redacted] could lawfully pay Mrs R[redacted] in South Africa and that he knew that this option was available to him. I accept that he did not state that he could not offset the tax implications on the rental income due to her and provide her with a statement, but the High Court did not enquire about this. It concluded that Mr R[redacted] should have considered paying into a South African bank account. The

[10] *Matjhabeng Local Municipality v Eskom Holdings Limited; Mkhonto v Compensation Solutions (Pty) Limited* [2017] ZACC 35; 2018 (1) SA 1 (CC); 2017 (11) BCLR 1408 (CC) at para 73. See also Van Loggerenberg *Erasmus Superior Court Practice* 2 ed (Juta & Co Ltd, Cape Town 2015) Vol 1 at section 41 A2 169-70.

High Court also did not consider the tax implications and which party would have to bear them. The fact that there were options that Mr R[redacted] could have explored does not prove, beyond a reasonable doubt, that there was wilfulness or mala fides on his part.

[43] One option that could have been explored by Mrs R[redacted], instead of asking for a contempt of court order, was to apply for an order for Mr R[redacted] to provide a statement of account reflecting the rental income received. She could then claim payment of the amount in a separate action. When Mrs R[redacted]'s counsel was asked, during oral submissions before this Court, whether this option was available, he bemoaned the fact that this would burden Mrs R[redacted] with legal fees of a separate action. I accept that this may be so, but, it does not seem as if she has many options if Mr R[redacted] does not pay the amount to her voluntarily. I say so because the order as it stands simply declares her to be a joint owner and to be entitled to the net rental income. It does not oblige Mr R[redacted] to pay the rental income to her.

[44] The next enquiry is whether, having found Mr R[redacted] in contempt of the declaratory order, a sentence of direct imprisonment, conditional upon payment of an amount of money was in any event a competent order. The conditional sentence of imprisonment imposed on him by the High Court contradicts what was said by this Court in *Coetzee*. There this Court struck out certain provisions of the then Magistrates' Court Act[11] which provided for imprisonment of judgment debtors. It held that "to put someone in prison is a limitation of that person's right to freedom. To do so without any criminal charge being levelled or any trial being held is manifestly a radical encroachment upon such right."[12] This Court continued:

> "The fundamental reason why the means are not reasonable is because the provisions are overbroad. The sanction of imprisonment is ostensibly aimed at the debtor who will not pay. But it is unreasonable in that it also strikes at those who cannot pay and

[11] 32 of 1944.

[12] *Coetzee* above n 7 at para 10.

> simply fail to prove this at a hearing, often due to negative circumstances created by the provisions themselves."[13]

[45] It is thus established that imprisonment for failure to pay a debt is unconstitutional and that section 12(1) of the Constitution does not permit imprisonment of a judgment debtor against whom an order is made *ad solvendam pecuniam* (payment of money). However, this is a principle that existed long before the provisions of the then Magistrates' Court Act were declared invalid.[14] Furthermore, and on the assumption that paragraph 2.3 of the divorce order created an implied obligation on the part of Mr R[redacted] to pay the net rent to Mrs R[redacted], a failure to satisfy a judgment *ad solvendam pecuniam* cannot ordinarily support contempt proceedings, in the same way as would a judgment *ad factum praestandum* (performance of an act, alternatively refraining from performance of a certain act).[15]

[46] The amount which the High Court ordered Mr R[redacted] to pay was also not based on evidence led during the contempt proceedings. The High Court relied on evidence posted by Mrs R[redacted] on the CaseLines platform concerning the value of the rental income, after it had asked the parties to provide its value. In its judgment refusing Mr R[redacted]'s application for leave to appeal the contempt judgment, the High Court responded to Mr R[redacted]'s criticism of the High Court's reliance on the amount by stating that:

> "Adv Geyer argued in this application that I could not have regard to that amount as it was not presented in evidence and that 'Caselines notes have no relevance'. I find this stance, with respect astounding. Where the extent of withholding of rental is a relevant fact regarding the extent of breach or a contempt of a court order, a court is certainly entitled to enquire detail thereof from the parties. Such a question could surely have been raised in open court. The posing of the question on the electronic platform as opposed to in open court merely gave the parties advance warning and notice of the

[13] Id at para 13.

[14] See *Hankin v Hankin* 1931 WLD 265; *Taylor v Taylor* 1928 WLD 215; and *Swanepoel v Bovey* 1926 TPD 457.

[15] See *Coetzee* above n 7 and *Jayiya* above n 8.

> question in order to prepare or better to deal with it. Although no separate order was made in this regard, I find it contemptuous conduct of a party to ignore a query put to it by a presiding officer. The respondent can also hardly be heard to complain when it is common cause that he has retained the rental income and, in answer to a query by the court as to the extent of such retention, he remains silent when the applicant from the bar suggests an amount with some particularity, [that is] R489 136.59, of which he should himself have particular knowledge."

[47] The reasoning by the High Court shows that it accepted that the amount was not tendered as evidence, but laments the fact that Mr R[redacted] did not respond to its query regarding the value of the rental income. The High Court also seems to have held the view that because Mr R[redacted] had not responded, it was entitled to simply accept the amount specifically because Mr R[redacted], who is the one who received the monthly rentals, decided not to respond. The High Court also formed an erroneous view that the failure to respond to its query was contemptuous, although it did not make an order requiring compliance with this query. What the High Court also overlooked was that the amount posted was not tendered as evidence. It was also not properly assessed by it and there was no reasoning in its contempt judgment that explained why it accepted the amount as a realistic or reasonable value of the rental income. No questions were posed to Mrs R[redacted] on how she computed the amount and there was no enquiry by the High Court directed at Mr R[redacted] for the reason why he did not respond to the query. Accordingly, that evidence was not properly before the Court and should not have been considered.

Shareholding in the Mozambican companies and the variation of the divorce order

[48] Mr R[redacted] argues that the High Court unilaterally varied the divorce order initially issued by it regarding the Mozambican shares, although it was *functus officio* and lacked jurisdiction to vary or amend the order on its own terms and of its own accord. Mrs R[redacted] submits that the High Court acted within its jurisdiction and was not *functus officio* when it varied the divorce order in terms of rule 42(1)(c), alternatively the common law. Mrs R[redacted] further submits that the High Court rightfully dismissed the argument that there was no variation application before the Court because

rule 42(1)(c) allows a court to *mero motu* vary its own order. This order was varied because there were third party interests that had to be taken into account in relation to the shares and the Court had to determine the value of the shares. She submits that even though the applicant is correct that a court cannot ordinarily vary its own orders, rule 42(1)(c) as well as the common law provides for exceptions to this rule. According to Mrs R[redacted] there were exceptional circumstances which justified the variation of the order so as to provide for the true intention of the court order and for its implementation.

[49] Rule 42(1)(c) regulates the variation and rescission of orders in the High Court and states that:

> "(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary—
>
> . . .
>
> (c) an order or judgment granted as the result of a mistake common to the parties."

[50] In *Tshivhase*,[16] the Supreme Court of Appeal dealt with the requirements that must be satisfied before rule 42(1)(c) is invoked and said:

> "In relation to sub-rule (c) thereof, *two broad requirements must be satisfied*. *One is that there must have been a 'mistake common to both parties'*. I conceive the meaning of this expression to be what is termed, in the field of contract, a common mistake. This occurs where both parties are of one mind and share the same mistake; they are, in this regard, ad idem . . . . A mistake of fact would be the usual type relied on. Whether a mistake of law and of motive will suffice and whether possibly the mistake must be reasonable are not questions which, on the facts of our matter, arise. *Secondly, there must be a causative link between the mistake and the grant of the order or judgment*; the latter must have been 'as a result of' the mistake. This requires . . . that the mistake relate to and be based on something relevant to the question to be decided by the Court at the time. . . . The principle is that cannot subsequently create a retrospective mistake by means of fresh evidence which was not relevant to any issue

[16] *Tshivhase Royal Council v Tshivase, Tshivase v Tshivase* [1992] ZASCA 185; 1992 (4) SA 852 (A).

> which had to be determined when the original order was made. The reason is obvious: the Court would at that time have had before it no evidence and thus no wrong evidence on the point; hence there would have been no mistake. Contrast this with the case where the subsequent evidence is aimed at showing that the factual material which led the Court to make its original order was, contrary to the parties' assumption as to its correctness, incorrect."[17]

[51] In *Zuma*,[18] this Court held that rule 42 operates only in specific and limited circumstances. Additionally, the interests of justice require the grounds available for rescission (or variation) to remain carefully defined.[19] The Court reiterated what the Supreme Court of Appeal held in *Colyn*,[20] that "the guiding principle of the common law is certainty of judgments".[21] Therefore, a court should only allow a rescission or variation of an order in exceptional circumstances. Furthermore, a court does not have a discretion to set aside an order in terms of rule 42 where one of the jurisdictional facts contained in rule 42(1)(a)-(c) do not exist.

Was there a common mistake as envisaged in rule 42(1)(c)?

[52] The High Court stated that there was a common mistake between the parties because Mr R[redacted] had treated the shareholding of the various companies as his own. Even his legal representatives at the divorce proceedings were under the mistaken belief that the shareholding could simply be transferred. The High Court stated further that, at that stage (that is, during the divorce hearing), the submission from Mr R[redacted]'s counsel was that the transfer must be limited to 20% of the shares. This, according to the High Court, was indicative of the fact that the transfer was envisaged to be possible, but that when the counter-application was sought by Mr R[redacted], he submitted that the transfer of the shares was no longer possible.

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[17] Id at 863.

[18] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* [2021] ZACC 28; 2021 (5) SA 327; 2021 (11) BCLR 1263 (CC).

[19] Id at para 98.

[20] *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* [2003] ZASCA 36; 2003 (6) SA 1 (SCA).

[21] Id at para 4.

[53] The High Court held that, had the parties and the Court known that the transfer of the shares would not have been possible, a monetary judgment equivalent to the value of the shares would have been granted at inception. This, according to the Court, would have been possible under the Act.

[54] During argument in this Court, Mrs R[redacted]'s counsel submitted that another factor that supports a finding that there was a common mistake is that initially, during and after the divorce proceedings, Mr R[redacted] intended to transfer the shareholding to Mrs R[redacted] but that after a while he had what counsel referred to as a "change of heart" and did not make the transfer. To illustrate this point, we were referred to an email dated 27 February 2018 from Mr R[redacted] to Mrs R[redacted] wherein Mr R[redacted] states that:

> "I[redacted] [a co shareholder] and I have spoken about the [transfer of the shares] and both have no objections to the Court Order and would like to comply as of the date of the Court Order."

[55] The problem with placing reliance on this correspondence is that it does not show that Mr R[redacted] was mistaken about anything. It only illustrates that at the time he probably intended to comply with the court order. As Mrs R[redacted]'s counsel argued, the probabilities are that he changed his mind.

[56] At the divorce proceedings Mrs R[redacted] testified that she did not know the identity of the directors in the South African company and did not suggest that Mr R[redacted] was a shareholder thereof. At the commencement of his evidence, Mr R[redacted] spoke about there being a holding company. In respect of the other companies, reference was made to him owning 45% "of the company". Nobody bothered to probe this. But the reference to a "holding company" clearly shows that nobody could have thought that he held shares directly in each of the companies. So the "company" he was referring to in his evidence was almost certainly the holding company.

[57] The evidence in the contempt proceedings dealt more specifically with how the shares in the various companies were held. This included evidence that Mr R[redacted] personally holds 45% of E[redacted] Limitada (the holding company) and 10% of P[redacted] Mozambique Limitada. Although Mr R[redacted] does not hold shares directly in the other companies, the aforesaid personal shareholding give him an indirect shareholding of each of the other companies.[22] The divorce order in its original form could notionally have been implemented by Mr R[redacted] transferring 40% of his direct shareholdings to Mrs R[redacted], which would have given her 40% of his 45% direct and indirect shareholdings in all the companies. Of course, if the articles of association of E[redacted] or P[redacted] Mozambique Limitada would entitle the other main shareholder, Mr I[redacted] F[redacted], to "expropriate" Mr R[redacted]'s shares or exercise a right of pre-emption in the event of a proposed transfer to Mrs R[redacted], this would have made compliance with the order unattractive for both Mr and Mrs R[redacted], in which event they could negotiate a variation.

[58] The companies are registered and incorporated in Mozambique and they conduct business there. Prior to the contempt proceedings, and on 31 July 2018, Mr R[redacted]'s previous attorneys notified Mrs R[redacted]'s attorneys that in order to give effect to the transfer of shares, Mrs R[redacted] was required to comply with the provisions of the Mozambican Commercial Code which, amongst others, required her to attend in Mozambique to take transfer of any shares before a notary public. It is improbable that Mr R[redacted] was mistaken or ignorant of the Mozambican Commercial Code. The fact that Mr R[redacted]'s co-shareholder may have been unhappy about how Mrs R[redacted] would handle the shares after the transfer does not establish any mistake by any of the parties. The fact that Mr R[redacted] was also concerned that the transfer would result in him being a minority shareholder does not mean he was mistaken about anything.

[22] His economic interest in E[redacted] E[redacted] is 44.775%, in P[redacted] Limitada is 36%, in E[redacted] Investments Limitada is 36%, and in P[redacted] M[redacted] Limitada is 4.5%, which in turn holds 80% and in the South African company.

[59] Could the Court in varying its divorce order *mero motu* make an order which differs materially from the prayers sought by the parties? The principle of *functus officio* is interlinked with the principle of *res judicata.* Once a judgment has been handed-down, the Judge is *functus officio*; he or she has no power to make, alter or amend, in any material terms, his or her decision or order, except in the exceptional circumstances envisaged under rule 42. The principal judgment or order may also be supplemented in respect of accessory or consequential matters, for example, costs or interest on a judgment debt, which the Court overlooked or inadvertently omitted to grant. The court may clarify its judgment or order if, on a proper interpretation, its meaning remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "the sense and substance" of the judgment or order.[23] There was no evidence of any of these exceptional circumstances here, and none of the parties alleged any of the above exceptional circumstances. As illustrated in his counter-application, Mr R[redacted] merely sought leave to appeal and a variation in order to allow him to retain the exclusive ownership of the immovable and movable properties and the shareholding in the companies. However, the counter-application was dismissed.

[60] Although the High Court dismissed all the prayers sought by Mr R[redacted] in the counter-application, it stated that the counter-application was partially successful. It is not clear what the High Court meant by this. Mr R[redacted] had prayed for an order that he should retain the sole ownership of the property in Mozambique and remove Mrs R[redacted] as a co-owner of the property. The High Court instead granted an order holding Mr R[redacted] in contempt of its divorce order pertaining to the rental income from the property in Mozambique, and sentenced Mr R[redacted] to a period of direct imprisonment conditional upon him paying a certain amount to Mrs R[redacted].

[61] Regarding the shareholding of the Mozambican companies, Mr R[redacted] had sought an order deleting the entire paragraph 2.4 relating to the transfer of the shares in his

[23] See *Thompson v South African Broadcasting Corporation* [2001] ZASCA 7; 2001 (3) SA 746 (SCA) at 748H-749C and *S v Wells* [1989] ZASCA 154; 1990 (1) SA 816 (A) at 820E and 820B–C.

businesses to Mrs R[redacted]. The High Court instead amended its earlier divorce order and substituted it with an order requiring Mr R[redacted] to pay Mrs R[redacted] an amount of $450 000 within 60 days, or within such extension of time as the Court might grant, on good cause shown. Concerning the Dream Vacation Club points, Mr R[redacted] had sought an order that he retain as his sole property all the points in the Dream Vacation Club subscription, and he also tendered to be solely liable for all its levies and expenses. The High Court instead ordered that each party should retain the movable property in their possession at the time of the order as their own, save that upon payment to Mrs R[redacted] of an amount of R44 000, Mr R[redacted] would be the sole owner of the Dream Vacation Club points.

[62] The difference between the prayers sought by Mr R[redacted] and the order granted in the contempt application show that there was no basis for the Court to hold that the counter-application was partially successful. It did not grant any of the prayers sought by Mr R[redacted]. It appears that the Court thought that because there was a counter-application before it, it could amend the terms of its divorce order unilaterally and substitute it with an order on terms that were not sought by any of the parties. The High Court's unstated premise was that somehow there was a legal entitlement to vary the order because Mr R[redacted] had asked for variation in the counter-application. As stated, this did not follow, because Mr R[redacted] failed to make out any grounds for variation within the scope of rule 42(1) or the common law, as the High Court correctly found.

[63] Another concerning feature of the High Court's variation order in the contempt application is the value attached by the Court to the shareholding in the Mozambican companies. When the High Court ordered Mr R[redacted] to pay $450 000 to Mrs R[redacted] in lieu of 40% of the shareholding in the companies, it attached a value to them based on figures the Court had rejected as vague and unreliable in the divorce hearing. In varying its divorce order, the High Court stated that, at the time of the divorce, its concern regarding the value of the shareholding in the Mozambican companies had been whether a monetary amount determined at that stage would actually amount to 40% of the value of the shareholding. It also had the concern that Mrs R[redacted] might be short-changed by a monetary award, hence the order to the effect that a certain

percentage of the shares themselves had to be transferred. The High Court also highlighted that Mr R[redacted] had not, as at that date of the order in the contempt proceedings, provided any proper valuations or financial statements of the companies.

[64] Despite highlighting these shortcomings, the High Court nonetheless awarded Mrs R[redacted] a cash amount based on an assumed value of the shareholding. During the divorce proceedings, the net asset value of the companies on paper was $11.3 million. This included, as an asset, claims against the Mozambique government of $17 million. Mr R[redacted] doubted the recoverability of these claims, and his rough estimate of the net asset value was between $750 000 and $1 million. The High Court, in its contempt judgment, said that in the divorce judgment it had given Mr R[redacted] a 50/50 impairment on the claims against the government, thus reducing the net asset value from $11.3 million to $2.5 million. The High Court continued that one could assume, in the absence of evidence to the contrary, that none of the feared bad debt or impairment had come to pass, otherwise one would have expected this to feature in Mr R[redacted]'s affidavits. On this basis, the High Court treated the net asset value of the companies as $2.5 million, with Mr R[redacted]'s 45% share being $1.125 million. The sum the High Court awarded to Mrs R[redacted], $450 000, is 40% of this amount.

[65] The High Court thus accepted figures which it had rejected in the divorce proceedings. There was no evidence led afresh in the contempt proceedings concerning the value of the shareholding. The Court took evidence it had rejected earlier in divorce proceedings in which it was already *functus officio*, to vary its own order. Mr R[redacted] cannot be criticised for not having dealt with the value of the shareholding in his affidavits, because there was no application before the High Court to substitute paragraph 2.4 of the divorce order with a monetary amount. There was simply no justification for the High Court to regard vague and unsubstantiated figures bandied about three years earlier as a reliable guide to the value of the shareholding in February 2021. One of Mr R[redacted]'s central complaints, in his founding affidavit in this Court, is that he was not given the opportunity to give evidence about the current

value of the shareholding or whether he could afford to pay $450 000. He alleges that he is unable to do so in view of the impecunious position of the Mozambican companies.

[66] In order to illustrate the unacceptable nature of the High Court's conduct, Mr R[redacted]'s counsel invited this Court to ask whether what the High Court did would have occurred if the contempt application had been allocated to a different Judge, who was not acquainted with the evidence led at the divorce proceedings. The question is whether a different Judge would have re-opened the divorce proceedings by looking at the evidence rejected at the divorce proceedings by another Judge and then relied on it in order to award an amount in a contempt of court order. The fact that both the divorce proceedings and the contempt application were allocated to the same Judge in this matter did not permit this.

[67] In *Molaudzi*,[24] this Court explained the principle of *res judicata* as the legal doctrine that bars continued litigation of the same case, on the same issues, between the parties.[25] It held that:

> "*Res judicata* is the legal doctrine that bars continued litigation of the same case, on the same issues, between the same parties. *Claassen* defines res judicata as—
>
> > '(a) case or matter is decided. Because of the authority with which in the public interest, judicial decisions are invested, effect must be given to a final judgment, even if it is erroneous. In regard to res judicata the enquiry is not whether the judgment is right or wrong, but simply whether there is a judgment.'"[26]

One reason for the rule is that uncertainty is to be eliminated so that persons whose interests are affected by the decision can safely rely or act upon it until or unless it is set aside by a court of appeal.

[24] *Molaudzi v S* [2015] ZACC 20; 2015 (2) SACR 341 (CC); 2015 (8) BCLR 904 (CC).

[25] Id at para 14.

[26] Id at para 16.

[68] The High Court was correct in holding that it was not open to Mr R[redacted] to unilaterally decide not to comply with the court order, but this did not give the High Court the competency to unilaterally vary the order materially on terms not sought by any of the parties. In any event, there was no evidence to substantiate a variation order. If the High Court held a view that there was a common mistake and was minded to vary the order *mero motu*, it should have given the parties an opportunity to address it on what it considered to be the common mistake. This could either be in the form of further affidavits or submissions.

[69] It is also worth mentioning that rule 42(3) was also available to the High Court. Rule 42(3) states that "[t]he court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed". When the High Court decided to vary the divorce order, it did not give notice of the proposed order to the parties. In varying its earlier order without affording the parties an opportunity to deal with its view, it followed an unfair process.

The Dream Vacation Club points

[70] For the same reasons, articulated above, the Court should not have altered its divorce order regarding the Dream Vacation Club points. In holding that once Mr R[redacted] had paid an amount of R44 000 to Mrs R[redacted], he would become the sole owner of the Dream Vacation Club points, the Court altered its earlier order to the effect that each party should retain the movable property in their possession, including half of the Dream Vacation Club points.

[71] It follows that the appeal should be upheld and the order of the High Court stands to be set aside.

Costs

[72] Generally, there would have been no basis to deviate from the default position that the costs follow the result. But this matter has peculiar nuances. Although Mrs R[redacted] was legally represented during the divorce proceedings, it is clear from the facts that she cannot get her share of the rental income from the property known as R[redacted] M[redacted], Maputo, Mozambique, unless she either reaches consensus with Mr R[redacted] or obtains an order directing Mr R[redacted] to pay it over to her. That is a duplication of legal resources. The divorce order could have been framed in a way so as to enable this to be possible, but the reality is that this did not happen. Another consideration is that Mr R[redacted] had given her the impression that he would pay the amount, but then changed his mind. Up until now, Mrs R[redacted] has not received the rental income even though she is entitled to it.

[73] Regarding the shareholding, Mr R[redacted] has not complied with the High Court order. It was not Mrs R[redacted] who sought the substitution of paragraph 2.4 of the divorce order. This was something done by the High Court *mero motu*, and one must feel some sympathy for Mrs R[redacted] in trying to defend what the High Court had done, given that she has to date not received a transfer of any shares. It is clear from the affidavits filed in the contempt of court application that Mrs R[redacted] is struggling financially, whilst Mr R[redacted]'s life has not been materially affected financially, as a result of the divorce action. A fair order of costs in this matter is that each party pays its own costs. Regarding the costs order in the High Court, it bears highlighting again that the High Court order holding Mr R[redacted] in contempt was not competent for the reasons stated above, and that Mrs R[redacted] did not prove malice and wilfulness beyond a reasonable doubt on Mr R[redacted]'s part. So, although the order seems to have favoured Mrs R[redacted], we know that the High Court erred in making such an order. An appropriate costs order, bearing in mind the inconvenience suffered by Mrs R[redacted], is that each party pays its own costs in the High Court as well.

[74] Paragraphs 1 and 2 of the High Court's order in the contempt application were orders dismissing Mr R[redacted]'s application to condone the late lodging of his application

for leave to appeal and dismissing his application for leave to appeal. These orders must stand. The remaining orders will be set aside to give effect to the terms of this judgment.

[75] I make the following order:

1. The appeal is upheld.
2. Paragraphs 3 to 6 of the order of the High Court of South Africa, Gauteng Division, Pretoria are set aside and substituted with the following:
   "3.1. The application to hold the respondent in contempt of the order dated 23 February 2018 is dismissed.
   3.2. Each party is ordered to pay its own costs."
3. Each party is ordered to pay its own costs in the Supreme Court of Appeal and this Court

For the Applicant:	A R G Mundell SC, H F Geyer and K Magagula instructed by Grohovaz Attorneys Incorporated
For the Respondent:	F W Botes SC and A M Raymond instructed by Macintosh Crossand and Farquharson