IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

REPORTABLE

Case no: 2630/2024
96/2025

In the matter between:

ALEXANDER DONALD MACPHAIL	Applicant
and	
SANDRA LYNNE MACPHAIL	Respondent
In re: the matter between:	
SANDRA LYNNE MACPHAIL	Applicant / Defendant
and	
ALEXANDER DONALD MACPHAIL	Respondent / Plaintiff

JUDGMENT

Govindjee J

Background

[1] The parties are embroiled in divorce proceedings and there are three inextricably linked applications that require determination. Firstly, the court must adjudicate a contempt of court application. Mrs Macphail (the defendant / the applicant) initiated contempt proceedings pursuant to an order of this court, per Nobatana AJ, dated 23 July 2024 (the order). In terms of the order, Mr Macphail (the plaintiff / the respondent) was directed, inter alia, to pay increased maintenance and has failed to do so. Secondly, and as a defence to the contempt proceedings, the plaintiff applies in terms of Uniform Rule 42(1)(*a*), alternatively the common law, for rescission, alternatively variation, of the order. Finally, the defendant seeks to vary an order of court dated 13 February 2025 pertaining to the obligations of the parties in respect of school fees (the school fees order).

Rescission

[2] It is convenient to consider the rescission application first. The plaintiff initiated divorce proceedings in the Western Cape Division. On 18 October 2023, Francis J ordered the plaintiff to pay maintenance, educational costs and legal costs, following an application in terms of Uniform Rule 43. The defendant subsequently brought an urgent application in terms of this rule before Nobatana AJ in this court, alleging a material change in the plaintiff's financial circumstances and that she was unable to maintain the minor children on the sum ordered by Francis J. At that stage, the divorce proceedings were still pending in the Western Cape Division and the plaintiff was resident in the United Arab Emirates.[1] The subsequent order varied the Uniform Rule 43 order granted by Francis J in certain respects, mainly by increasing the maintenance payable from R26 000,00 to R55 000,00 from 1 July 2024.[2] It is apparent

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[1] The divorce action was transferred to this court on 24 March 2025.

[2] The order was expressed as follows:

'It is ordered that:

In terms of the provisions of rule 43, claiming the following from you, pending the final determination of the divorce proceedings instituted in the High Court of South Africa, Western Cape Division, Cape Town, under case number 16454/2022 of the Honourable Court:

1. Directing the Respondent to increase the maintenance amount of R26 000.00 to R55 000.00 from the 1st of July 2024 onwards;

from the face of the order that it was granted 'in terms of the provisions of Rule 43 … pending the final determination of the divorce proceedings instituted in the High Court of South Africa, Western Cape Division, Cape Town …'.

Jurisdiction

[3] Did the court have jurisdiction to grant the order? In *JS v WF*,[3] Van der Schyff J noted that jurisdictional questions concerning children necessitate a *sui generis* approach. Depending on the nature of the relief sought, a court would be required to navigate between applicable provisions contained, *inter alia*, in the Superior Courts Act, 2013, the Children's Act, the Divorce Act, 1979 and applicable international law principles to determine whether it possessed the necessary jurisdiction to adjudicate the matter. To that list may be added reference to rule 43, given that the rule regulates interim care of any child and interim contact with any child.

[4] Rule 43(1) reads as follows:

'This rule shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters:

(a) Maintenance *pendente lite*;

(b) A contribution towards the costs of a matrimonial action, pending or about to be instituted;

(c) Interim care of any chid;

(d) Interim contact with any child.'

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2. Directing that the remaining obligations of the Respondent as set out in paragraph 1.1, 1.2, 1.3, and 1.4 in the Order dated the 11th of October 2023 in case number 10675/2023 remain the same;
3. Directing the Respondent to effect payment of R100 000.00 as and for the loan repayment within 7 (seven) days of this order being granted, together with interest at 10% from 21st March 2019 to date of final payment;
4. Directing the Respondent to pay R132 806.00 in respect of arrear educational, medical, and extra-mural accounts as contemplated by clause 1.3 and 1.4 of the order in case number 10675/2023, within 7 (seven) days of this order being granted together with interest at the legal rate from date of the relevant debt to date of first payment;
5. Directing the Respondent to make available, in Bushman's Mouth, Province of the Eastern Cape, the furniture set out in annexure "SM10" to the Founding Affidavit within 30 (thirty) days of this order being granted;
6. Directing the Respondent to pay the sum of R250 000.00 as an interim contribution to the Applicant's costs by depositing same into the trust account of the Applicant's attorneys of record within seven (7) days of the order being granted;
7. Costs to be costs in the divorce proceedings.'

[3] *JS v WF* [2020] ZAGPPHC 350 para 28.

[5] Rule 43 is a procedure, calculated to be expeditious and inexpensive, whereby defined issues may be resolved on an interim basis pending the final adjudication of the divorce. The rule applies to matrimonial proceedings which are pending before 'the court'. As the court noted in *SW v SW*,[4] (*SW*) considering both the Uniform Rules and the Superior Courts Act, 2013,[5] 'the court' before which the procedure may be invoked is (ordinarily) only that court before which the main *lis* in the divorce action is pending.[6]

[6] *SW* considered and relied upon the decision of this court in *Green v Green*[7] (*Green*).[8] In that matter, Jones J expressed the position as follows:

'It would, I think, be going too far to lay down that under no circumstances will a Court of one Division or country entertain a Rule 43 application in respect of a divorce action pending in another Division or country. Reference has already been made in *Venter*'s case *supra* to the possibility of a Court making an interim custody award in these circumstances where this is urgently required in the best interests of the child. In appropriate circumstances the reasoning in *Massey*'s case may justify a Court in exercising jurisdiction in preliminary matters though the main action is pending elsewhere. But in the ordinary course authority and common sense dictate that a claim which is *pendente lite* should be tried in the Court in which the *lis* itself is to be tried.'

[7] The judgment in *Green* preceded the enactment of the Children's Act, 2005.[9] The court in *Green* accepted that there may be circumstances which would justify a court exercising its inherent jurisdiction to protect the best interests of a minor child in circumstances where that was urgently required during matrimonial proceedings. As a result, the applicant in *SW* argued that the court had the jurisdiction to entertain a rule 43 application, notwithstanding that the divorce action was pending before a different court. The court in *SW* rejected that contention:[10]

'Although the *Green* judgment refers to the possibility of a court entertaining a 'Rule 43 application', a reading of the judgment, together with the authorities referred to in that judgment, suggests that the jurisdiction referred to, namely to intervene in the interests of the

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[4] *SW v SW and Another* 2015 (6) SA 300 (ECP) (*SW*) para 12.
[5] Superior Courts Act 10 of 2013.
[6] *SW* above n4 para 13.
[7] *Green v Green* 1987 (3) SA 131 (SE).
[8] See DE van Loggerenberg *Pollak: The South African Law of Jurisdiction* (2025) (RS 2, 2020) ch 12–296 and further.
[9] Act 38 of 2005.
[10] *SW* above n4 paras 17, 19, 20 (emphasis as contained in *SW*).

minor child, is not in fact the exercise of jurisdiction in terms of rule 43 … The jurisdiction of the court to make orders pendente lite arises in the first instance from the fact that the litigation is pending before that court. Where, however, the court *otherwise* has jurisdiction it may be able to exercise its general or inherent jurisdiction in relation to proceedings pending before another court. When it does so, it does not, in matrimonial matters, do so on the basis of the provisions of rule 43 … [which] regulates the procedure in matrimonial matters by which the court exercises its jurisdiction to make appropriate orders pendente lite in relation to matters *pending* before it. The jurisdiction referred to in *Green* is not jurisdiction which the court exercises by virtue of the divorce action pending. It is an aspect of its inherent jurisdiction to protect the interests of minor children … to give effect to the paramountcy of the best interests of the minor child …'

[8] The court then summarised the position:[11]

'Two things flow from this. The first is that a litigant who is party to a divorce action pending before another court cannot invoke the jurisdiction of this court to secure the relief contemplated in rule 43 by the exercise of the procedure provided in rule 43. *In other words, a rule 43 application cannot be brought in this court if there is a divorce action pending in another court* … What was left open in [earlier] cases was not the possibility of utilising the rule 43 procedure. Rather it was that a court could exercise its inherent common-law jurisdiction to act in appropriate circumstances in the interests of minor children to make an order, notwithstanding that there are proceedings pending before another court. The second is that in order to invoke the common-law inherent jurisdiction the applicant must establish *(a)* that considerations of urgency justify the intervention; and *(b)* that the intervention is necessary to protect the best interests of the minor child.'

[9] In *Macphail v Macphail and Another*, Lowe J considered an urgent rule 43 application involving the present parties.[12] In those proceedings, the defendant sought a rule *nisi* to set aside a directive of a parental coordinator regarding the removal of the parties' children to Cape Town for a holiday period. The court accepted that it had jurisdiction to determine the matter based on the provisions of the Children's Act, 2005[13] and the judgment of the SCA in *FS v JJ*,[14] which concerned the best interests

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[11] *SW* above n4 para 20 (emphasis added).
[12] *Macphail v Macphail and Another* (unreported Eastern Cape Division, Makhanda, case no. 1188/2024, delivered 4 April 2024) (*Macphail*) paras 62–70.
[13] Act 38 of 2005 (the Children's Act).
[14] *FS v JJ and Another* 2011 (3) SA 126 (SCA) (*FS*).

of a child and the rights of unmarried fathers in the context of the Children's Act. The defendant relies on this judgment in opposing the application for rescission based on lack of jurisdiction.

[10] Section 29 of the Children's Act specifically permits selected kinds of applications to be brought before courts within whose area of jurisdiction the child concerned is ordinarily resident.[15] It does not permit a court to accept jurisdiction in all matters in which children are involved based purely on their ordinary residence within that court's jurisdiction. *FS v JJ* confirms as much and, importantly, the SCA cautioned against a practice of forum-shopping:[16]

'…I would caution against a practice of forum-shopping, even in cases concerning disputes over parenting rights and responsibilities. High Courts should not in general be faced with litigation requiring them in effect to set aside an order made in another jurisdiction. And as a rule, since one is entitled to assume that any order has been made in the best interests of a child, should those interests change over time, the court that made the initial order should be approached for a variation. Much of the difficulty may now be resolved with the enactment of s 29 of the Children's Act, which came into operation only in 2010. It provides that an application under ss 23 and 24 (for parental responsibilities and rights by an interested part) may be brought in a High Court within whose area of jurisdiction the child is ordinarily resident. Where that does not assist, however, reliance on formalism and a resort to inflexible rules is to be discouraged, a matter to which I shall revert when dealing with the second judgment in the Northern Cape High Court.'

[11] The SCA's remarks pertaining to 'formalism' and 'inflexibility' were occasioned by a biased approach on the part of the presiding judge in the court *a quo* in that matter. This included an invitation to one of the parties to bring an application for an order that the other was in contempt of court, so that the court was criticised as being 'more concerned about legal niceties than the child's best interests'.

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[15] The only applications listed are those permissible in terms of sections 22(4)(*b*) (date of effect of a parental responsibilities and rights agreement), 23 (assignment of contact and care to interested person by order of court), 24 (assignment of guardianship by order of court), 26(1)(*b*) (order confirming paternity) or 28 (termination, extension, suspension or restriction of parental responsibilities and rights) of the Children's Act.

[16] *FS* above n14 para 38.

[12] Considering these authorities, and as a starting point, it appears to be appropriate to draw a distinction between rule 43 applications pertaining to matters regulated by s 29 of the Children's Act and other rule 43 applications. Care and contact of children are matters regulated by s 29 of the Children's Act and rule 43(1)(*c*) and (*d*). While couched under rule 43, the application before Lowe J triggered the provisions of s 29, read with s 23, of the Children's Act so that the court heard the matter based on the children being ordinarily resident within its jurisdiction. The learned judge emphasised that the relief sought was not a variation of the Western Cape Division order but rather a matter pertaining to care and contact with the three minor children.[17] In effect, the court exercised jurisdiction based on ss 23 and 29 of the Children's Act and held that it would have been formalistic to refuse to hear the matter because the application had been framed purely in terms of rule 43.[18] I respectfully align myself with that approach.

[13] Unlike the situation confronted by Lowe J, however, the application before Nobatana AJ was an ordinary rule 43 application for maintenance, rather than for interim care or contact with the children. Although the defendant linked the claim for increased maintenance to the needs of the children, and unlike the case before Lowe J, the application did not trigger the application of s 29 of the Children's Act.

[14] This is not to suggest that it will only be in the instances enumerated in s 29 that a court will exercise jurisdiction based on where the children are 'ordinarily resident'. As the SCA alluded to in *FS v JJ*, while s 29 is expected to resolve much of the difficulty, the door remains open for a court to exercise its common-law, inherent powers of jurisdiction in appropriate circumstances in the best interests of a child. This remains the exception where the divorce action is being adjudicated by a different court.[19] On the authority of *Green*, deviation from the ordinary position required a proper case to be made out that considerations of urgency justified the intervention and that the intervention was necessary to protect the best interests of the minor children. Leaving aside the fact that the application before Nobatana AJ was framed

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[17] The court added that, to the extent necessary on the facts, limited variation of the Western Cape Division order was justified: *Macphail* above n12.
[18] Ibid.
[19] *AC v RC* [2015] ZAECPEHC 1 para 19.

in terms of rule 43, that case was not made out on the papers.[20] Read with *SW*, such jurisdiction is not exercised by virtue of the divorce action pending before the court but rather an aspect of the court's inherent jurisdiction to protect the interests of minor children. Such jurisdiction cannot be invoked automatically in any claim for maintenance simply because a child would likely obtain some benefit from an increase in the maintenance amount. To permit this would unjustifiably circumvent and negate the established position, as expressed in *Green*, when the main action is pending before a different court and where interim care or contact with a child is not in issue. By the doctrine of precedent, this court is not at liberty to ignore the judgment in *Green* unless that decision is clearly wrong. I am unable to draw that conclusion.

[15] The effect of the preceding analysis is that the court lacked jurisdiction when it made the order. It may be added that, on the defendant's own papers before Nobatana AJ, the plaintiff was permanently resident in Dubai. A domicile of choice shall be acquired by a person when they are lawfully present at a particular place and have the intention to settle there for an indefinite period.[21] On the probabilities, including due consideration of the plaintiff's submissions to the court dated 8 July 2024 (the plaintiff's letter), the plaintiff's domicile at the material time was Dubai. As such, the court could not exercise power in terms of s 8(2) of the Divorce Act, 1979[22] (the Act) absent the plaintiff's consent.[23] Not only did the plaintiff's letter contain no such consent, the plaintiff also alluded to an application for additional maintenance struck from the roll in the maintenance court in Alexandria because of the Francis J order and the pending divorce proceedings in the Western Cape Division. Considering the wording of s 8(2), any argument that the court had jurisdiction based on s 2 of the Act, read with the

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[20] There were contradictory allegations that 'the sum previously ordered is insufficient … I was never able to maintain the children on the amount' and 'I am no longer able to maintain the minor children, and myself, on the sum of R26 000.00' and the bulk of the application focused on alleged 'short payment', repayment of a debt, furniture and a contribution to costs. The answering affidavit to the rescission application reflects that the defendant was 'struggling on R26 000,00 per month for myself and our three teenage sons and hence the request for an increase…'.

[21] S 1 of the Domicile Act, 1992 (Act 3 of 1992).

[22] Act 70 of 1979.

[23] S 8(2) provides: 'A court other than the court which made an order referred to in subsection (1) may rescind, vary or suspend such order if the parties are domiciled in the area of jurisdiction of such first-mentioned court or the applicant is domiciled in the area of jurisdiction of such first-mentioned court and the respondent consents to the jurisdiction of that court.'

definition of 'divorce action', fails based on the maxim that general rules do not derogate from special ones.[24]

Nullity?

[16] The fact that the order was granted in circumstances where the court lacked jurisdiction is not by itself dispositive of the present litigation. The validity of court orders is derived from the Constitution, 1996, itself. Section 165(5) of the Constitution states that 'an order or decision issued by a court binds all persons to whom and organs of state to which it applies'.[25] Following *Department of Transport and Others v Tasima (Pty) Ltd*[26] (*Tasima*), and *Ekurhuleni City v Rohlandt Holdings CC and Others*[27] (*Rohlandt*), a court order can no longer be ignored or rescinded merely upon proof that it would have been regarded as a common-law nullity.[28] It suffices to establish that there was a court and that the court issued an order. Once that is established, any order so issued is valid and binding until set aside, even if it is grossly wrong. Judicial orders wrongly issued exist in fact, may have legal consequences and are not to be treated as nullities.[29] Court orders must be appropriately challenged to be set aside and it is the court that, once invalidity is proven, can overturn the decision. Parties cannot usurp the court's role in making legal determinations.[30]

[17] In *Van Dyk and Another v Rhodes*,[31] a full court confirmed that the ordinary principles of rescission or appeal will always apply to court orders wrongly granted, no matter what error led to their issuance. Accepting that authority puts paid to the argument that the plaintiff incurred unnecessary costs in launching the rescission

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[24] See GE Devenish *Devenish on Interpretation* (2nd Ed) (2024) at 531. S 2(1): 'A court shall have jurisdiction in a divorce action if the parties are or either of the parties is –

(a) domiciled in the area of jurisdiction of the court on the date on which the action is instituted; or

(b) ordinarily resident in the area of jurisdiction of the court on the said date and have or has been ordinarily resident in the Republic for a period of not less than one year immediately prior to that date.'

[25] Also see s 2, read with s 172(2)(*a*), as discussed in *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC); 2017 (1) BCLR 1; [2016] ZACC 39 (*Tasima*).

[26] *Tasima* above n25.

[27] *Ekurhuleni City v Rohlandt Holdings CC and Others* 2025 (1) SA 1 (CC); [2024] ZACC 10.

[28] *Van Dyk and Another v Rhodes* 2025 (4) SA 313 (GJ) (*Rhodes*) para 1. *Cf The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others* 2012 (3) SA 325 (SCA); [2011] ZASCA 238 paras 14–15, and the cases cited there.

[29] *Tasima* above n25 para 182.

[30] *Tasima* above n25 paras 191, 192.

[31] *Rhodes* above n28 para 1.

application when the basis for this was already canvassed as a defence to the contempt proceedings. In the circumstances, he was obliged to institute appropriate proceedings to set aside an order wrongly issued, separate from defending the contempt application.

Delay

[18] I am satisfied that the application for rescission has been brought within a reasonable period, despite the lapse of a year since the order was served on the plaintiff. In coming to this decision, I have considered that the plaintiff was unrepresented for part of this time and that his representatives raised the issue of the court's jurisdiction in granting the order by the end of October 2024. This basis for rescission was also raised during January 2025 in opposition to the contempt application. There were also *bona fide* efforts to settle the matter for some time thereafter. Considering these factors as a part-explanation for the delay, the absence of any real prejudice to the defendant and the prospects of success, the delay in applying for rescission is condoned.

The Divorce Act, 1979

[19] In addition to relying on rule 42 and the common law, counsel for the plaintiff relied on s 8 of the Act, as interpreted in *Sharma v Harry*,[32] in heads of argument and during argument, as a basis for rescission. To the extent that this amounted to a new point, it is open to this court to consider the argument given that each of the well-established pre-conditions have been met.[33] It is a point of law in the true sense, foreshadowed in the affidavits or supported by the established facts in the record. There is also no prejudice to the defendant given that the parties have fully addressed the question of rescission and variation of the order and considering that the argument was raised squarely in the plaintiff's heads of argument.

[20] Rule 43 regulates the procedure to be followed whenever a spouse seeks interim relief from the court in respect of various matters, including maintenance *pendente lite*. The substantive basis for maintenance in the context of a pending

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[32] *Sharma v Harry* [2019] 3 All SA 645 (GJ) (*Sharma*).
[33] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) para 109.

divorce is the Act, read with the common law and the Children's Act, 2005.[34] Section 8(1) of the Act provides for rescission of a maintenance order made in terms of this act 'at any time … if the court finds that there is sufficient reason therefor…'.[35] A rule 43 maintenance order is a maintenance order granted in terms of the Act and is accordingly susceptible to rescission in terms of s 8(1).[36] In the present circumstances, the finding that the order was granted absent the necessary jurisdiction constitutes sufficient reason to grant the rescission sought on that basis, and without the need to establish the requirements in terms of s 42(1)(*a*) or the common law.

The common law

[21] If this approach is erroneous, it is appropriate to consider whether rescission is warranted based on either the rules or common law. It is convenient to consider the common law position first. To succeed, an applicant is required to prove that there is 'sufficient cause' or 'good cause' to warrant rescission.[37] This is assessed as follows:[38] 'First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a *bona fide* defence which *prima facie* carries some prospect of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded.'

[22] Under the common law, the courts of Holland enjoyed a relatively wide discretion, and adopted a more lenient attitude, in respect of 'applications for purgation of procedural defaults and the rescission of default judgments'.[39] The exercise of the court's discretionary power has, broadly speaking, been influenced by considerations of justice and fairness, having regard to all the facts and circumstances of a particular case.

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[34] Act 38 of 2005. See, for example, *JG v CG* 2012 (3) SA 103 (GSJ) para 28. Also see Cilliers *et al Herbstein & Van Winsen: The Civil Practice of the High Courts of South Africa* (5th Ed) (2009) at 1535.
[35] 'Divorce action' is defined in s 1(1) of the Act to include 'an application *pendente lite* for an interdict or for the interim custody of, or access to, a minor child of the marriage concerned or for the payment of maintenance…'.
[36] *Sharma* above n32 para 25.
[37] *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) (*De Wet*) at 1033C and 1042G.
[38] *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 (Council for the Advancement of the South African Constitution and Democracy in Action Amicus Curiae)* 2021 JDR 2069 (CC) (*Zuma*) para 71.
[39] *De Wet* above n37 at 1040D–1041D.

[23] In the present instance, the plaintiff was employed and resident in Dubai when the second rule 43 application was launched. The application was e-mailed to him on 26 June 2024, the defendant noting that his attorneys had withdrawn and that he was no longer legally represented. In response, he addressed a letter to the presiding judge on 8 July 2024. That correspondence informed the court, inter alia, that '…I do not have resources or legal skills to defend this action at present and I respectfully request that My Lord stand the matter over until next year when I hope to have an improved financial position … I have taken up a new post, but I am still in the training and probationary period … I have yet to earn the leave entitlement which would allow me to attend the court in person…'.

[24] This constitutes a reasonable and satisfactory explanation for default in my view, rather than action in wilful disregard or indifference of court rules and processes. This was not an instance where the plaintiff deliberately and freely failed or omitted to take steps to avoid the default, so that he must be saddled with the consequences. Unrepresented as he was, he took personal steps to convey his position to the court, including the reasons for his inability to attend in person. In addition, while it is apparent that the plaintiff's circumstances changed favourably once he was employed by Emirates, also in respect of his entitlement to benefits, so that an increase in the maintenance amount ordered by Francis J may well be justified, I am satisfied on the papers that the application was made *bona fide* and that the plaintiff has shown a *bona fide* defence to the defendant's claims which *prima facie* have some prospect of success based on the financial information presented.[40] On this basis too, it is appropriate to rescind the order in the exercise of the court's discretion. I consider it fair and just to do so having regard to all the facts and circumstances of the matter. It is therefore unnecessary to consider whether a case has also been made out for rescission in terms of rule 42.

Contempt

[25] A rescinded default judgment is a nullity and neither advantage nor disadvantage can flow therefrom. The plaintiff is entitled to proceed on the basis that

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[40] *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) para 11.

the *status quo ante* the judgment be restored. Once a judgment has been rescinded, the consequences thereof fall to be set aside.[41]

[26] In the circumstances, I am in any event satisfied that the plaintiff was not in wilful contempt of the order or that his non-compliance with its provisions was in bad faith. Objectively assessed, the plaintiff's actions were not intended to obstruct justice deliberately or intentionally or to act in with contumacious disrespect for judicial authority. At the very least the plaintiff has discharged the evidential burden and there is reasonable doubt whether he acted wilfully and in bad faith. The application for contempt is accordingly dismissed.

Variation of the school fees order

[27] On 13 February 2025, this court issued the school fees order, by agreement between the parties, pursuant to an urgent application launched by the defendant. The material parts of the school fees order are quoted below:

'4. The payment of the account for James to attend St Andrew's College during the 2025 academic year will be arranged by the applicant [the defendant], without recourse to the respondent [the plaintiff].

5. The respondent will continue to pay directly to the applicant the equivalent as was required to be paid in 2024, in regard to James' educational costs … pursuant to the provisions of the court order of 11 October 2023 (in the Western Cape High Court …).

6. To the extent that there is a shortfall in regard to the amounts referred to in paragraph 5, above, emanating from James' schooling at St Andrew's College, payment of such shortfall shall be arranged by the applicant without recourse to the respondent.

7. The respondent will not be liable to pay any amount directly to St Andrew's College in regard to James' schooling at St Andrew's College during the 2025 academic year, unless agreed or ordered otherwise by this Honourable Court …

10. The respondent is to approach his employer in regard to the possibility of the school fees for James and Matthew to attend St Andrew's College being covered (and, if so, the extent to which they would be covered), within thirty (30) working days, and to provide certainty on this issue to the applicant prior to the main divorce action being finalised (whether by way of settlement or otherwise).

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[41] *Naidoo v Somai* 2011 (1) SA 219 (KZD) at 221G–H; *Securiforce CC v Ruiters* 2012 (4) SA 252 (NCK) at 261D–E.

11. In the event that the respondent's employer undertakes to pay any portion (or all) of James and Matthew's fees for St Andrew's College during the 2025 academic year, then the applicant's liability in regard to such fees shall reduce accordingly …
15. Paragraphs 1 to 13 of this order shall (subject to any amendment by this court) remain in effect until the main divorce action is finalised, or until the end of the 2025 academic year, whichever is the later, alternatively as may be ordered by this court in due course.'

[28] The defendant seeks to vary paragraph 15 of the school fees order by making the plaintiff liable to pay all amounts due to St Andrew's College for 2025 within seven days, coupled with an order directing the plaintiff to sign all admission documents with the school in respect of James, and costs. The defendant seeks these amendments to compel reimbursement of school fees paid by the children's maternal grandfather, and to ensure formal enrolment of the children at St Andrew's College through signature of the admission forms. The basis for this is that the plaintiff, despite enjoying the employment benefit of private schooling for his children, has not taken any steps to activate the benefit. The application was launched urgently on the basis that the defendant's father's retirement investment was being depleted and that he could not afford his grandchildren's private schooling when this was the plaintiff's obligation. It was further alleged that James' tenure at the school was under threat.

[29] The plaintiff argued, inter alia, that the school fees order had been agreed to on the basis that the defendant had managed to secure funding for James to attend St Andrew's College for the entire 2025 academic year. Paragraph 4 was framed accordingly. The plaintiff had submitted the relevant information to his employer without receipt of a response at the time the application was argued.

[30] I accept that private school fees constitute significant financial expenditure. This explains why the plaintiff was seemingly determined to avoid the responsibility of bearing such costs during 2025 while the divorce remained unfinalized. There is simply no proper explanation on the papers as to why and how the defendant's financial position, pertaining to the St Andrew's schooling, has been altered since the time the school fees order was agreed to between the parties. The allegation that James' tenure at the school is now at risk, a few months after the parties agreed to specific school funding arrangements for 2025, is bald and unsubstantiated. It does not help

matters that no confirmatory affidavit was filed by the defendant's father in respect of his changed circumstances, bearing in mind that the anticipated costs of private schooling would have been apparent prior to the school fees order being agreed. That order was carefully crafted to operate only until the end of the 2025 academic year, if the divorce was not finalised by that time. The defendant expressly agreed to make the necessary arrangements without recourse to the plaintiff, who remained obliged to pay what had been paid during 2024 in respect of James' schooling. Interpreting the school fees order, it is apparent that the plaintiff was only willing to obtain reimbursement from his employer, without accepting personal liability for the 2025 school year. On the papers, the defendant has failed to make out a proper case for varying the school fees order on an urgent basis. In arriving at that conclusion, I accepted that the plaintiff had acted in terms of the school fees order in raising the matter with his employer, albeit that no response had been received at the time the application was argued. Considering the affidavits and supporting documentation presented, the defendant's belief that the plaintiff has refused to comply with the school fees order, or simply refuses to take up the employment benefit of private schooling, is erroneous.

Costs

[31] This court has a wide discretion in respect of the awarding of costs, notwithstanding that both parties sought costs orders against the other. In respect of the application for rescission, I am mindful that the plaintiff sought an indulgence,[42] and that the defendant opposed the jurisdictional basis for rescission, at least in part, by relying on the order of Lowe J in the previous rule 43 application.[43] Given the events that resulted in the order by default and the basis for the application for rescission, including the authority in point, the opposition to the application was unreasonable in my view, so that it is appropriate for each party to pay their own costs.

[32] In arriving at that decision, I am mindful of the nature of the proceedings and the acrimonious, sustained litigation that has enveloped the parties. To quote *TN v NN*:[44]

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[42] *Phillips t/a Southern Cross Optical v SA Vision Care (Pty) Ltd* 2000 (2) SA 1007 (C) at 1015.
[43] See *Williams v Shackleton Credit Management* 2024 (3) SA 234 (WCC) para 67.
[44] *TN v NN and Others* 2018 (4) SA 316 (WCC) para 31.

‘Costs fall to be decided judicially in the exercise by the court of a broad discretion in the strict sense of the concept. The general rule that costs should follow the result does not always work satisfactorily in matrimonial proceedings, and particularly when the interests of the parties’ children fall to be addressed as part of the issues for determination … I think it would also be appropriate, in what were primarily matrimonial and family law proceedings, to take into account the apparent inequality of the financial means of the parties. The first defendant is a well-established senior attorney and self-described entrepreneur, whereas the plaintiff is a middle-ranking civil servant dependent upon a comparatively modest salary. She has incurred substantial debt in respect of legal expenses leading up to the trial. To burden her with the liability to pay the first defendant’s costs of suit would work unduly harshly in the circumstances and, having regard to her role as primary caregiver, would also probably redound negatively against the material best interests of the parties’ minor child.’

[33] Such considerations appear to find application in respect of both the contempt application and the application to vary the school fees order. The contempt application was defeated due to the rescission of the underlying judgment and the variation application failed based on this court’s interpretation of the school fees order and reading of the affidavits and supporting documentation. Neither application was brought in bad faith and I consider it inappropriate to saddle the defendant with the costs in the context of the overall litigation between the parties, their respective financial positions and the role of the defendant as the primary caregiver of the minor children. As a result, each party is ordered to bear their own costs in respect of all these proceedings, including the costs reserved on 12 June 2025.

[34] It goes without saying that a future court considering litigation between the same parties may adopt a less benign approach. More importantly, it is hoped, in the best interests of the children, that the parties may be guided by those who advise them towards an expeditious yet fair finalisation of their divorce.

Order

[35] The following order is issued:

1. The respondent’s late filing of an application for rescission is condoned.
2. The order granted by Nobatana AJ on 23 July 2024 under case number 2630/2024 is rescinded.

3. The contempt application under case number 2630/2024 is dismissed.
4. The application to vary the order dated 13 February 2025 under case number 96/2025 is dismissed.
5. Each party to pay their own costs.

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A GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 1 August 2025

Delivered: 21 August 2025

Appearances:

For the Applicant:	Adv TS Miller
Instructed by:	Wheeldon Rushmere & Cole Makhanda
For the Respondent:	Adv SA Sephton
Instructed by:	Nolte Smit Inc Makhanda