

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Reportable

Case Number: 19849/2022

In the matter between:

E[...] H[...] (previously V[...] D[...])

Applicant

and

J[...] C[...] J[...] V[...] D[...]

Respondent

Coram: Greig AJ

Heard: 10 June 2026

Delivered: 2 October 2026

Summary: Practice – urgent application – reconsideration in terms of Rule 6(12)(c), alternatively rescission in terms of Rule 42(1)(a), or common law – applicant notified of virtual hearing of ex parte application an hour beforehand – heard without legal representation – no opportunity to file opposing affidavits – order not granted in applicant’s ‘absence’ – no fraudulent non-disclosure established – application dismissed.

ORDER

- (a) The application, and the respondent's application to strike out, are dismissed.
- (b) The costs of this application, as well as those of the application to strike out, shall be costs in the cause in Part B of the respondent's notice of motion dated 17 April 2026 ('Part B'), save that the wasted costs occasioned by the set down of this application on the urgent roll for hearing on 13 May 2026 shall be paid by the applicant, including the costs of counsel on Scale B.
- (c) The applicant shall deliver her answering affidavit in Part B within 15 court days of the date of this order.
- (d) The respondent shall deliver his replying affidavit in Part B (if any) within 10 court days after delivery of the applicant's answering affidavit.
- (e) Part B is to be heard on a date to be agreed by the parties within 15 court days of this order, failing which either party may approach the Registrar to enrol Part B for hearing on the first available date on the semi-urgent roll or, with the leave of the Judge President, on an earlier date. In agreeing or seeking a date the parties shall, as far as possible, take into account the likely duration of the maintenance enquiry in the Bellville Magistrates' Court directed by the order of Allie J of 14 February 2023 under case number 20445/2022, or any associated or resultant proceeding ('the maintenance enquiry'), so that the maintenance enquiry may be finalised before Part B is heard.
- (f) Heads of argument in Part B shall be delivered in accordance with the applicable practice directives.
- (g) If, 30 court days before the date allocated for the hearing of Part B, the maintenance enquiry has not been concluded and no order has been made pursuant to it in terms of the Maintenance Act 99 of 1998, either

party may within 10 court days thereafter apply for the postponement of the hearing of Part B, on such terms as that party considers appropriate.

JUDGEMENT

Greig AJ

Introduction

[1] Ten years after their divorce, the parties are still litigating about the maintenance which the respondent, Mr J[...] V[...] D[...], undertook to pay the applicant, Ms E[...] H[...]. The undertaking is contained in a consent paper made an order of this Court on 28 November 2016. It is spousal maintenance; there are no children born of the marriage. The respondent stopped paying altogether after 1 April 2020. What has followed is a long series of proceedings in which the applicant has sought to enforce the order and the respondent has sought to escape or vary it.

[2] On 24 May 2023 Wathen-Falken AJ declared the respondent to be in contempt of the divorce order ('the contempt order'). On 12 November 2024 a writ of commitment ('the writ') was issued for the respondent's periodical imprisonment. On Friday 17 April 2026 the sheriff, assisted by the South African Police Service, attempted to execute the writ at the Bellville Magistrates' Court, where the respondent was attending a mediation arranged by the prosecutor in a criminal maintenance complaint laid by the applicant. That afternoon the respondent launched an urgent application in two parts ('the stay application'). Part A sought the suspension of the contempt order and the writ pending the determination of Part B. Part B seeks the rescission of the contempt order.

[3] In terms of the notice of motion Part A was to be heard ex parte; however, Mphego AJ was not prepared to hear it without notice to the applicant. The applicant was therefore notified by WhatsApp message at about 17:02 on 17 April 2026, and thereafter joined a Microsoft Teams hearing at about 18:00 without legal representation. At the end of that hearing, Mphego AJ granted the relief sought in Part A in terms of a draft order supplied by the respondent ('the stay order').

[4] The applicant now asks that the stay order be reconsidered and set aside in terms of Rule 6(12)(c) of the Uniform Rules, alternatively that it be rescinded in terms of Rule 42(1)(a) or at common law.¹ The respondent opposes the application and has, in addition, given notice of an application in terms of Rule 6(15) to strike out a number of passages in the applicant's founding affidavit. For consistency I refer to the parties as they are cited in this application (though their roles were reversed before Mphego AJ).

[5] This application was launched on Monday 11 May 2026 for hearing on the urgent roll on Wednesday 13 May 2026. On that day the parties agreed to postpone the matter, ultimately to 10 June 2026, when I heard argument.

[6] As I see it the questions for determination are:

- (a) Whether the applicant made out a case for the extreme urgency with which she set the matter down;
- (b) Whether the stay order was granted in her 'absence', which is the jurisdictional foundation for a reconsideration under Rule 6(12)(c) and, as I see it, also for rescission under Rule 42(1)(a); and
- (c) Whether a case for rescission has been made out on the ground of non-disclosure or fraud.

¹ The founding affidavit also mentions Rule 31(2)(b) as a further alternative. That ground was not pursued in the heads of argument or at the hearing, and correctly so; the rule has no application to an order of this kind.

[7] For the reasons that follow I have concluded that the application must fail.

Background

The litigation history

[8] Much of the history is common cause or, at least, not seriously disputed. I set out only so much of it as is relevant to the issues to be decided.

[9] The parties' consent paper obliges the respondent to maintain the applicant until her death or remarriage by paying cash maintenance, medical aid and insurance premiums, mortgage bond instalments, and vehicle costs. In March 2019 the respondent contended that he could no longer meet these obligations, and after 1 April 2020 he ceased making any payments at all. He attributes this to the collapse of his international construction work during the Covid-19 pandemic. The respondent twice unsuccessfully applied to the Bellville Maintenance Court, in June 2021 and December 2021, for the discharge or variation of his maintenance obligations.

[10] The applicant, for her part, obtained a writ of execution which produced a *nulla bona* return. She further laid a criminal complaint, and on 23 November 2022 launched contempt proceedings in this Court at a time when the arrears stood at R 1,166,542.02. The respondent opposed the contempt application and delivered an answering affidavit as well as heads of argument. On 13 December 2022 the contempt application was postponed by agreement to 24 May 2023 ('the postponement order'). The respondent agreed, in the interim, to pay R 5,000 per month towards the arrears, to make certain further payments, and to make financial disclosure. On 19 December 2022 he left for Goma, in the Democratic Republic of the Congo, on a six-month construction contract. Though he paid the R 5,000 for a few months, he otherwise did not comply with the postponement order.

[11] In the meantime, on 1 December 2022, the respondent applied to this Court to review the maintenance officer's decision of 4 July 2022 not to refer his complaint to the maintenance court. The applicant did not oppose. On 14 February 2023 Allie J granted the following order ('the review order'):

'1. That the decision made by the 1st Respondent [the Maintenance Officer, Magistrates' Court, Bellville], on or about 4 July 2022, not to refer the Applicant's complaint in terms of Section 6(1)(b) of the Maintenance Act, 99 of 1998 (the "Maintenance Act") to an enquiry in the maintenance court in terms of Section 10, is reviewed and set aside.

2. That this Honourable Court direct that the complaint laid in terms of Section 6(1)(b) be referred to the maintenance court for a Section 10 enquiry.'

[12] The review order features prominently in what follows. It was mentioned neither in the founding affidavit in the stay application nor in the applicant's founding affidavit in this application, and surfaced for the first time in the respondent's answering affidavit.

[13] On 3 May 2023, before the hearing of the contempt application, the respondent's attorneys withdrew. The respondent says he only learned of this on 23 May 2023, when he reached Goma and regained access to his email. On the morning of the hearing on 24 May 2023 he replied to an email from the applicant's attorneys reminding him of the hearing thus: 'Currently out of the country till end of July in DRC at the moment would not be able to be at the court today'.

[14] The contempt application came before Wathen-Falken AJ that day. It appears to be common cause that counsel for the applicant handed up a photograph of the review order and submitted that, despite that order, there were no proceedings pending in the maintenance court.

[15] Wathen-Falken AJ granted the contempt order which declared the respondent to be in contempt of the divorce order, directed him to pay arrears of R 1,375,288.66 in two instalments by 7 and 22 June 2023, and

imposed a suspended sentence of twelve months' periodical imprisonment. The order further provided that, in the event of the respondent's non-compliance, the Registrar could issue a warrant for his arrest.

[16] When asked for reasons, Wathen-Falken AJ stated on 27 July 2023 that the matter 'was heard in open Court on 24 May 2023. The Respondent failed to attend on the proceedings and Order was granted by default'.

[17] The respondent was served with the contempt order on 25 May 2023. He did not comply with it, nor did he apply to rescind the order. On 7 June 2023 his newly appointed attorneys, Bisset Boehmke McBlain, asked the applicant for an indulgence of one month. This was refused. A warrant for his arrest was then issued on 4 October 2023.

[18] On 13 October 2023 his attorneys wrote to the applicant's attorneys, recording that the respondent was 'substantially overindebted' and only able to increase his monthly payment from R 5,000 to R 20,000. The letter further stated:

'Accordingly, we are instructed to request that your client indicate her willingness to stay the execution of the warrant of arrest for a period of 6 (six) months pending the referral of our client's complaint to the Bellville Maintenance Court for purposes of a section 10 enquiry (as contemplated in the Review Order granted on 14 February 2023).

...

Please let us have your client's feedback in respect of the above by no later than 17h00 today, 13 October 2023, failing which our client shall have no option but to bring an urgent application to stay the execution of the warrant of arrest.'²

[19] The applicant's attorneys refused the above request. No urgent application by the respondent followed. Nor, on the respondent's own version, did he

² The letter was handed up at the hearing as annexure 'VD6', the annexure 'AA4' to the answering affidavit having been wrongly attached.

take any steps to have the section 10 enquiry set down or progressed. The R 20,000 monthly maintenance was also not paid. Enforcement then stalled while, following an objection by the South African Police Service, the contempt order was twice varied to provide for execution by the sheriff; the respondent did not oppose the second variation. The writ was issued on 12 November 2024.

[20] From November 2024 the applicant sought to have the sheriffs in three jurisdictions arrest the respondent. All these efforts failed. The Laingsburg sheriff's return of 17 December 2024 records that on 29 November 2024 the respondent spoke to the sheriff through a small window saying 'that he knows about the warrant for his arrest', and then shut the gate. The respondent explains that the visit came a week after his mother's death and that he reacted in anger, as the return also records. He does not dispute that he knew from then on that a warrant was out for his arrest.

[21] On 21 August 2025, at the applicant's instance, a criminal summons was issued out of the Bellville Magistrates' Court charging the respondent with failure to comply with the divorce order. The parties differ as to whether the charge extends to the arrears fixed by the contempt order. The criminal matter was postponed three times for mediation, most recently to 17 April 2026. On 16 April 2026 the respondent's attorneys raised with the prosecutor the possible conversion of the criminal proceedings into a maintenance enquiry (at that stage, the respondent says, they did not know of the review order). The prosecutor indicated, according to the respondent, that conversion was not possible while the writ was pending. The writ therefore remained enforceable, and the respondent was due at the Bellville Magistrates' Court the next morning. That afternoon he instructed his attorneys to apply for the rescission of the contempt order.

The hearing before Mphego AJ

[22] On 17 April 2026 the respondent arrived at the Bellville Magistrates' Court for the mediation, which was scheduled for 11:00. The sheriff and the police arrived and told him that unless he produced an order suspending the writ by 17:00 that day, he was to report to the Goodwood police station that evening, to be held until Sunday evening. The respondent's attorneys accordingly arranged the postponement of the criminal matter to 14 May 2026 and urgently prepared the stay application. The papers were issued at about 16:00 and emailed to the after-hours registrar at 16:03 under cover of a note which explained that 'the matter is brought on an ex parte basis due to the extreme urgency thereof and also because the relief sought is purely interim in nature'. Counsel appeared in chambers at 17:00 before Mphego AJ, who insisted that the applicant be given notice and stood the matter down to 18:00.

[23] At 17:02 the respondent's attorneys therefore sent the applicant a WhatsApp message attaching the application and reading: 'The above matter will be heard in court 5 at the High Court, Keerom Street, Cape Town at 17H30 this afternoon. In short, Mr V[...] D[...] seeks suspension of the writ whilst the parties continue mediation and alternative dispute resolution.' At 17:04 the respondent's counsel telephoned the applicant. She was shopping at the time and had not seen the message. At 18:04 an MS Teams link was sent to the applicant's daughter. The applicant joined the hearing from her daughter's home, with her daughter beside her.

[24] The founding affidavit in the stay application runs to 29 short paragraphs. It records that the respondent was working in the Democratic Republic of the Congo when, 'on or about May of 2023, I received an email from the clerk of the court that I must attend at court at 10h00 that morning. I replied to the email stating that it was impossible for me to attend. I would later

learn that on that day, that I was held in contempt of court'. It describes the events of 16 and 17 April 2026, states that the respondent is not in a financial position to comply with the divorce order, and undertakes to bring the rescission application 'as soon as reasonably possible'. It says nothing of the papers which the respondent filed in the contempt application, or of his non-compliance with the postponement order. Nor does it mention the review order, or the sheriff's attempts to arrest him in November 2024.

[25] The applicant's attorneys obtained the recording of the Teams hearing and had it transcribed. It is clear from the transcript that counsel told the Court that the contempt order had been granted on 24 May 2023 while the respondent 'was in the Congo doing a six months project', and that the suspension was sought for two reasons: so that the respondent could bring an application for rescission of the contempt order, and 'more importantly', so that the parties could try to resolve the matter. He added that the applicant 'has given us the name of her attorney now two minutes ago so it's somebody from Catto Neethling so we'll be contacting them and seeing if we can't in the next week or two sit with them and come to some sort of a resolution herein'.

[26] The applicant's daughter then asked to speak, saying 'obviously this was very last minute we don't have legal representation there's just a few things that was said that we would just like to correct from our side'. Mphego AJ required the applicant herself to confirm her attendance, which she did, adding that she was 'not very good with all these technology'. The judge asked whether the papers had been served on her. She answered: 'It was on WhatsApp five o'clock this evening.' The Court responded: 'It is an urgent application – it came before me just after four, whereafter I considered the papers, so you were served also at five o'clock.' Asked whether she had read the papers and wished to make any submission, the applicant said: 'Sorry I haven't read the documents because I worked today.' Mphego AJ explained

the nature of the application and asked whether the applicant wished to oppose it or make a submission. The applicant asked: 'What? Sorry, what do you mean by submission?' When the question was rephrased she said: 'No, he knows very well about the Writ ... uhm in the past two years.' Her daughter interjected that 'my mom's just not understanding', and the applicant said: 'I'm just my nerves are finished, I'm sorry. I just can't take all this now anymore. Can my daughter just say something quickly?' The Court read out the relief sought in Part A and asked the applicant what she wished to say about it. The applicant answered: 'I want the Writ to remain.' To which the Court responded, 'All right. I've heard you.'

[27] Mphego AJ then asked counsel for the respondent to address her on 'the genuineness of the Applicant's intention to bring the rescission'. In the course of that address he told the Court that the applicant 'actually does not arrive at court for the mediation' and that her 'hostile attitude is not conducive to a mediation'. The applicant interjected that she had not been subpoenaed, and was told that in court 'we don't speak ... unless we are spoken to'. When invited to respond she said that the prosecutor had telephoned her on the Tuesday (14 April 2026) to say that she need not attend.

[28] The Court then granted the relief in Part A, explaining to the applicant that the order 'does not take away the Writ it simply suspends it while Part B of the application is being dealt with'.

[29] The stay order records that it was made 'Having heard the parties and having read the documents filed of record', and provides:

- '1. The matter is heard as one of urgency, in terms of subrule 6(12);
2. That, pending the outcome of the relief sought in Part B of this notice of motion:

2.1 The operation of the contempt judgment granted in favour of the respondent/applicant against the applicant/respondent by this Honourable Court on 24 May 2023 under the above case number be stayed and suspended; and

2.2 The operation of the writ of commitment for contempt of court, issued by this Honourable Court on 12 November 2024 under the above case number and pursuant to the contempt judgment (“the writ of execution”), be stayed and suspended;

3. Costs shall stand over for determination at the hearing of the relief sought under Part B of the Notice of Motion.’

[30] The stay order contains no return day, and no directions for the exchange of papers or the enrolment of Part B. Counsel for the respondent fairly conceded at the hearing that the regulation of Part B in the draft order which Mphego AJ was asked to make therefore left something to be desired.

[31] The applicant gave notice of her intention to oppose Part B in late April 2026. On 9 June 2026, the day before the hearing before me, the respondent delivered a supplementary founding affidavit in support of Part B, together with a notice of intention to amend his notice of motion to seek, in the alternative, an extension of the stay order until the section 10 enquiry directed by the review order has been finally determined.

The applicant’s complaints about the hearing before Mphego AJ

[32] The applicant’s complaints about the hearing before Mphego AJ may be summarised as follows:

- (a) The stay application was framed as an ex parte application and its notice of motion did not call on her to oppose Part A or to file any answering affidavit.
- (b) The papers were sent to her by WhatsApp after working hours, while she was shopping, and she did not read them before the hearing. She had, at most, an hour between receiving the message and attending the hearing.

- (c) She is not legally trained, uncomfortable with technology and was distressed and confused, as the transcript shows. She did not understand what a ‘submission’ was. She was allowed to say only that she wanted the writ to remain, and was then told ‘I’ve heard you’.
- (d) She and her daughter told Mphego AJ that her attorneys were not present but the matter nonetheless proceeded. Her daughter had tried, without success, to reach the attorneys after hours.
- (e) The respondent’s attorneys knew that she was represented by Catto Neethling Wiid, because they had telephoned that firm on 25 March 2026 to ask for copies of the court file, yet they did not serve the application on the firm.
- (f) What Mphego AJ was told was, in the applicant’s submission, incomplete and misleading, and her version was not before the Court.

[33] On this basis the applicant contends that, although she was physically present on the Teams link, the stay order was for all practical purposes granted in her absence: she was not afforded an opportunity to participate meaningfully or to place her version before the Court.

The respondent’s answer

[34] The respondent answers these complaints as follows:

- (a) The application was not, in the result, heard ex parte. Mphego AJ insisted on notice and the applicant attended the hearing and was heard.
- (b) The notice, though short, was proportionate to the urgency. The respondent had until 17:00 to produce an order or report to the police station. The sheriff was acting on the applicant’s instructions, and she must have known of the deadline he had set.

- (c) The applicant had been represented by Catto Neethling Wiid for at least five years. She had an hour in which to telephone them, or at least to seek advice. She chose instead to contact her daughter.
- (d) Mphego AJ asked the applicant whether she wished to make submissions or to oppose the application. The fact that she did not place evidence under oath before the Court did not prejudice her.
- (e) A self-represented litigant who is heard is not ‘absent’ merely because her submissions were less thorough or less eloquent than those of a lawyer.

The parties’ contentions on non-disclosure

[35] The applicant contends that the respondent, having approached the Court on what was framed as an ex parte application, was bound to disclose every material fact, and that the founding affidavit and counsel’s address gave an incorrect impression of his knowledge of, and participation in, the contempt proceedings, and concealed his inaction since 25 May 2023. In reply she added the non-disclosure of the review order, which she says the respondent cannot now invoke to bolster his case.³ She relies on *Schlesinger v Schlesinger*,⁴ *Rainbow Farms (Pty) Ltd v Crockery Gladstone Farm*⁵ and *A.M v M.A.M.*⁶ The respondent answers that nothing said to Mphego AJ suggested that he had not known of the hearing date; that he could not, in the time available, have given the detail the applicant says was required; that a respondent in a reconsideration application may place further facts before

³ For this the applicant relies on *Industrial Development Corporation of South Africa v Sooliman and Others* 2013 (5) SA 603 (GSJ) at 605–606.

⁴ 1979 (4) SA 342 (W) at 349.

⁵ (HCA15/2017) [2017] ZALMPPHC 35 (7 November 2017).

⁶ (024353/2024) [2025] ZAGPPHC 1231 (14 November 2025) paras 28–36.

the Court;⁷ that no facts supporting the allegation of fraud were advanced; and that the review order would have fortified, not undermined, Mphego AJ's decision. I deal with these contentions after urgency.

Urgency

[36] Two considerations bear on urgency. The first concerns the initial set down for hearing on 13 May 2026. The second concerns the postponed date on which the matter was heard, 10 June 2026.

[37] As to the former, the application was launched one court day before it was to be heard. It was emailed to the respondent's attorneys at 14:21 on Monday 11 May 2026. The notice of motion required notice of opposition by 16:00 that afternoon and an answering affidavit by 09:00 the next morning (about 10 hours and 40 minutes), for a hearing the day after that.

[38] The justification for this extreme urgency was that the respondent's next appearance in the Bellville criminal court would be on 14 May 2026. The founding affidavit states that the respondent would attend, because if he did not the prosecutor would cause a warrant for his arrest to be issued. If the suspension of the writ were lifted before then, the sheriff could arrest him when he attended court.

[39] The founding affidavit states that, although the stay order dated back to 17 April 2026, time had been needed 'to obtain the recording of the MS Teams conference before Ms Acting Justice Mphego to establish what had in fact happened, and consult with [the applicant's attorneys] regarding the implications of the order'. How long it took to obtain the recording, and how long the consultations took, is not said. What is indisputable is that the

⁷ *Mazetti Management Services (Pty) Ltd and Another v amaBhungane Centre for Investigative Journalism NPC and Others* [2023] ZAGPJHC 771; 2023 (6) SA 578 (GJ) para 14.

whole process took the better part of a month, from 17 April to 11 May 2026.

[40] An applicant who seeks an urgent hearing must set out explicitly in the founding affidavit the circumstances which render the matter urgent, and the reasons why substantial redress cannot be obtained at a hearing in due course.⁸ ‘Mere lip service to the requirement of Rule 6(12)(b) will not do, and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm which is involved in the time and day for which the matter be set down.’⁹

[41] Measured against these requirements, the explanation for the extreme urgency is inadequate. The lapse of about a month before the application was brought on one day’s notice is not properly explained. If there were difficulties or delays in obtaining the recording, they are not laid out, and none of the correspondence which one would expect to have been generated is attached. The dates of the consultations between the applicant and her legal representatives are also not disclosed. A sensible assessment of the allegation that the delay arose from attempts to obtain the recording and to consult on its content is therefore all but impossible.

[42] The answering affidavit alleges that the applicant’s attorneys obtained the MS Teams recording from Mphego AJ’s registrar on 29 April 2026. The applicant does not deal with this in reply.

[43] The respondent also submits, I think correctly, that there is no explanation for the twelve calendar days, or six court days, which elapsed between receipt of the recording on 29 April 2026 and the launch of the application.

⁸ *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2011] ZAGPJHC 196 (23 September 2011) para 6.

⁹ *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin’s Furniture Manufacturers)* 1977 (4) SA 135 (W) at 137F.

Had the applicant consulted with her attorneys on the recording in the two or three days after it was obtained, and had the application been drafted in the two or three days thereafter, the respondent could have been afforded about a week before the hearing in which to consult and prepare an answering affidavit.

[44] Moreover, on 13 May 2026 the applicant was prepared to agree to a postponement of several weeks. It also transpired that the respondent would in all likelihood have had to attend the Bellville criminal court on later dates as well. The applicant does not explain why a more reasonable timetable, affording the respondent a proper opportunity to answer and prepare, could not have been adopted with reference to one of those dates.

[45] It is further noteworthy that, although this matter was heard on 10 June 2026, there was insufficient time on the day to complete the applicant's replying argument, and the applicant undertook to deliver a written reply. However, this was only received on 13 August 2026.

[46] For these reasons I consider the degree of urgency with which the application was launched on 11 May 2026, for hearing on 13 May 2026, to have been inadequately motivated. The urgency has every appearance of having been self-created, and pinned to a Bellville criminal court hearing of 14 May 2026, a date which it transpired was not critical.

[47] I have accordingly decided that the respondent's wasted costs of the hearing on 13 May 2026 should be paid by the applicant. I have, however, decided not to strike the matter from the roll. The parties agreed to argue the matter before me on a later date. The respondent did not, by that agreement, concede urgency, at least not of the initial set down. But the need for finality between these parties is pressing, and I therefore consider it fitting to hear and dispose of this application as sensibly as possible. The costs order in

relation to the initial set down, in my view, adequately addresses the prejudice which the respondent suffered.

Reconsideration in terms of Rule 6(12)(c)

The applicable principles

[48] Rule 6(12)(c) provides:

‘A person against whom an order was granted in such person’s absence in an urgent application may by notice set down the matter for reconsideration of the order.’

[49] The absence of the aggrieved party has been described as the ‘underlying pivot’ to which the exercise of the power under the sub-rule is coupled.¹⁰ Once the sub-rule is engaged, the court’s approach ‘is a comprehensive revisit of the circumstances as they present at the time of the reconsideration’.¹¹ The framers of the rule have not sought to delineate the factors which may be taken into account. The court thus has a wide discretion to reconsider the order given.¹²

Discussion

[50] The question is therefore whether I am entitled to revisit comprehensively the circumstances as they now present themselves. Before this Court can embark on that exercise it must be established that the stay order was granted in the applicant’s absence.

[51] The applicant submits that:

‘our Courts are very clear that the physical presence of a party or his/her legal representative is not in and of itself determinative as to whether such a party is “present” before Court in the context of Rule 6(12)(c). Our Courts have found that the most

¹⁰ *ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others* 1996 (4) SA 484 (W) at 486H.

¹¹ *South African Airways SOC Ltd v BDFM Publishers (Pty) Ltd and Others* 2016 (2) SA 561 (GJ) at 565I.

¹² *ISDN Solutions* above at 487A–C.

significant factor is whether a party has been afforded an opportunity to meaningfully place his/her own version before the Court in the form of an answering affidavit.’

[52] For this proposition the applicant relies on *Madavanhu and Others v 1st Insurance Brokers (Pty) Ltd and Another*.¹³ In that case the respondents in a reconsideration application under Rule 6(12)(c) contended that the order granted under Part A, the urgent portion of the relief, had not been granted in the absence of the applicants, who had been in court on the day. The applicants conceded that they were in court, but said that they were seated in the gallery and took no part in the proceedings. They had also not yet filed answering affidavits.

[53] Semenya ADJP held that ‘it cannot be said that the order was granted in their presence simply because they were physically present in court’, relying for this on *Rainbow Farms (Pty) Ltd v Crockery Gladstone Farm*.¹⁴ She added that it was not in dispute that the court hearing the matter had not heard the applicants’ version and that they ‘did not get the opportunity to present their case’. On this basis she held that Rule 6(12)(c) applied.

[54] The passage in *Rainbow Farms* on which the Court relied in *Madavanhu*, and on which the applicant likewise relies, is at paragraphs 10 to 12:

‘[10] ... This matter was an application and the presence or absence of a party can only be determined by whether that party has submitted affidavits or not. The presence of the actual party and/or Counsel in Court is irrelevant to that issue. In the absence of any affidavits (bearing in mind that there is no option available for the party to testify at such a hearing) it is logical to conclude that that party is in default of appearance when the Order was made notwithstanding that Counsel may have been in Court.

[11] In my view where opposing papers have not been filed there is a “default” even if the Respondent in the matter or his legal representative is present in Court. See: *Morris v*

¹³ (7134/2017) [2021] ZALMPPHC 56 (2 July 2021).

¹⁴ (HCA15/2017) [2017] ZALMPPHC 35 (7 November 2017).

Autoquip (Pty) Ltd 1985 (4) SA 398 (WLD); *First National Bank of SA Ltd v Myburgh and Another* 2002 (4) SA 176 (CPD).

[12] The question of what is meant by “default” was considered in *Katritsis v De Macedo* 1966 (1) SA 613 (A). In this matter the Appellate Division (as it then was) held that “default” which then as is the case now is not defined in the Rules or the Act, meant a default in relation to filing the necessary documents required by the Rules in opposition to the claim.’

[55] *Rainbow Farms* was a full court appeal against the refusal of an application for rescission of a judgement in the main application, which had declared the termination of a written agreement between the parties void. As appears from the passage quoted, the court relied on *First National Bank of SA Ltd v Myburgh and Another*¹⁵ and *Morris v Autoquip (Pty) Ltd*.¹⁶ Both these latter judgements are authority for the proposition that where, in summary judgement proceedings, a defendant files an opposing affidavit but does not appear at the hearing, it remains incumbent on the court, particularly given the drastic nature of the remedy, to consider the merits of the defence disclosed in the opposing affidavit.

[56] In *Autoquip* the court held:

‘It seems to me that a summary judgment application falls to be considered on a different footing to that of the trial action or even an application for provisional sentence. Summary judgment is an extraordinary remedy, as pointed out by Melamet J in *Slabbert’s* case. What is more, a Court is not entitled, on the authorities quoted, to ignore an affidavit submitted by a defendant in opposition to an application for summary judgment. Because of this fact it cannot, in my view, be said that a defendant is in default when he submits an affidavit opposing summary judgment even though ideally he would have wished to have been represented by counsel. It may be that counsel could have swayed the Judge to make a different order had he appeared on behalf of the defendant,

¹⁵ 2002 (4) SA 176 (C).

¹⁶ 1985 (4) SA 398 (W) at 400E–F.

but this is not the test. There is no “default” in the sense in which the word is used in the *Katritsis* case.’

[57] *Rainbow Farms* turned on the rescission of a judgement, and on the meaning of ‘default’ in that context. It was not an application for reconsideration under Rule 6(12)(c).

[58] A ‘default’ in a trial or an application which results in judgement being given against the defaulter is not necessarily congruent with absence. It may consist in a failure to file the documents which the rules require in opposition to a claim, or in a failure to appear when the case is called, or in a failure to continue to attend during the hearing. That a finding of ‘default’ depends on its context and the surrounding circumstances is, to my mind, evident from the discussion of the concept in *Katritsis v De Macedo*, on which the applicant relies.

[59] The requirement of ‘absence’ in Rule 6(12)(c) is, I venture to suggest, a narrower enquiry. It is less concerned with whether a party’s case was fully or adequately put, than with whether the party was afforded the opportunity to be present and to be heard. The fact that the applicant’s attendance in this case was secured on a virtual platform is, I think, an example of this: she was not absent because she appeared by video link rather than in person, the form of her attendance having been dictated by the urgency of the matter and endorsed by Mphego AJ.

[60] However, I do not believe that the concept can be extended, as the applicant seeks to do, to situations in which opposing affidavits have not been filed, or in which a party has not had an opportunity to participate ‘meaningfully’ at the hearing. I agree with the respondent’s submission that *Morris* and *Myburgh* do not support that proposition. In both cases, which concerned summary judgement, opposing affidavits *had* been filed. The question was whether they could be disregarded where the party absented

himself from the hearing; or whether, if the court had disregarded the opposing affidavit in granting judgement, the judgement had been granted by ‘default’.

[61] In this regard I am mindful that, in the context of Rule 42(1)(a), the Constitutional Court in *Zuma*¹⁷ held that the words ‘granted in the absence of any party affected thereby’ ‘exist to protect litigants whose presence was precluded, not those whose absence was elected’.¹⁸ It added that

‘the issue of presence or absence has little to do with actual, or physical, presence and everything to do with ensuring that proper procedure is followed so that a party can be present, and so that a party, in the event that they are precluded from participating, physically or otherwise, may be entitled to rescission in the event that an error is committed’.¹⁹

[62] *Zuma* concerned a litigant who was physically absent by choice, the converse of the present case. But the principle applies both ways. If absence does not turn necessarily on physical presence, neither does presence. The question is whether the party was precluded from participating: whether, in the words of the Constitutional Court, the party was ‘not afforded a genuine opportunity to participate on account of the proceedings being marred by procedural irregularities’.²⁰ That is an enquiry into the regularity of the procedure which the court followed. It is not an enquiry into whether opposing affidavits were filed, or into how effectively a party used the opportunity given. Nor, in an urgent application, is the enquiry answered by showing that the notice was short. Rule 6(12)(a) permits the court to

¹⁷ *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 and Others* (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021).

¹⁸ Para 56.

¹⁹ Para 60.

²⁰ Para 61.

dispense with the forms and service provided for in the rules, and to dispose of the matter at such time and place, and in such manner, as it deems fit. Notice abridged by the court in the exercise of that power is the procedure which the rules contemplate for urgent matters; it is not an irregularity which precludes participation.

[63] Accordingly, to the extent that *Rainbow Farms* and *Madavanhu* may be taken to support the proposition that ‘absence’ for the purposes of Rule 6(12)(c) is established merely because an opposing affidavit was not filed, or because a party’s participation at the hearing was not ‘meaningful’, they do not bind me, and I respectfully decline to follow them.²¹ (There is, moreover, force in the respondent’s submission that the passage in *Madavanhu* was *obiter*. The interim order in that case had lapsed by effluxion of time some 21 months before the judgement.)²²

[64] I am fortified in this view by the trite principle that a judgement, once pronounced, is final and unalterable save in certain exceptional circumstances,²³ of which Rule 6(12)(c), and rescission under Rule 42 or at common law, are examples. It is in the public interest that a court order should generally bring litigation to finality, and the parties must be able to arrange their affairs on the footing that, once an order is granted, it is final.²⁴ At a practical level, one need not look far for the undesirable consequences of a principle that a party may be regarded as ‘absent’, and a reconsideration application therefore competent, if the party had insufficient opportunity to

²¹ I note that in the further appeal, *Crockery Gladstone Farm v Rainbow Farms (Pty) Ltd* (592/18) [2019] ZASCA 61 (20 May 2019), the Supreme Court of Appeal, whilst upholding the judgement of the full court, did not deal with the meaning of ‘absence’ in Rule 6(12)(c).

²² *Madavanhu* above paras 7 and 10.

²³ See *Ex parte Nel* 1957 (1) SA 216 (N).

²⁴ *Firestone South Africa Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 309.

file opposing affidavits, had only short notice of the hearing, or did not participate ‘meaningfully’ at it. Urgent orders may sometimes be granted in the absence of opposing affidavits, if circumstances dictate, and the numinous nature of ‘meaningful participation’ would undermine the clear purpose of the sub-rule in making ‘absence’ the relevant criterion. Urgent orders are, almost by definition, granted on abridged notice; if the brevity of the notice were enough to render a party absent, the requirement of absence would be deprived of meaning. The profusion of reconsideration applications which would follow may well be imagined.

[65] I should mention expressly that I have not considered the matter on the basis that so-called ‘simple interlocutory orders’ may be varied.²⁵ The application was not brought or argued on that basis. The scope of the exception for such orders is in any event limited. Courts remain reluctant to vary even such orders, and will do so only where the variation sought is purely procedural or incidental, where fresh facts have arisen since the order was granted, or where the object of the order has fallen away; a ‘radical or material’ variation of the main issue generally cannot be countenanced.²⁶ Here the applicant seeks nothing less²⁷ than an order that ‘the court order granted by the Honourable Acting Justice Mphego on 17 April 2026 be reconsidered and set aside’, alternatively ‘rescinded’. That relief is indeed ‘radical’: it would set aside the suspension of the contempt order and the writ, and would leave Part B in limbo (at best). Nonetheless, when it comes to procedural and incidental matters, I have had regard to these principles, and to this Court’s inherent power to regulate its own process, in making the directions set out below for the further conduct of Part B.

²⁵ *Bell v Bell* 1908 TS 887.

²⁶ *Sayprint Textiles (Pvt) Ltd and Another v Girdlestone* 1984 (2) SA 572 (ZH).

²⁷ An invitation at the hearing to moderate this relief was not taken up.

[66] It was regrettable that the urgency required the applicant to attend, without legal representation,²⁸ a virtual hearing convened an hour after she was notified of it by WhatsApp message, and that she evidently had little opportunity to answer the respondent's case, whether on urgency or on its merits. I do not minimise the invidious position in which she found herself. But Mphego AJ was confronted with the respondent's imminent incarceration, with the attendant grave and irreversible consequences, and she took the step which fairness required of her: she declined to hear the matter *ex parte*, and stood it down so that the applicant could be notified and heard.²⁹ The brevity of the notice was thus a consequence of the urgency, which Mphego AJ regulated by insisting on notice; it was not an irregularity which precluded the applicant's participation. This is a distinction between this case and *Morudi*,³⁰ in which the High Court refused to give audience to parties who wished to be heard. Here, Mphego AJ did the opposite: she declined to proceed without the applicant.

[67] It is true that the respondent's counsel mentioned at the outset of the hearing that the applicant had given the name of her attorneys, and they would be contacted in the following week to seek a resolution. The applicant's attorneys were not, however, invited to participate. I accept, however, that the urgency also precluded the participation of the applicant's attorney by this stage.

²⁸ The applicant says that she was unable to reach her attorneys because the hearing took place after hours. The respondent submits that she elected not to have her attorneys present.

²⁹ As to the respondent's self-created urgency at the time of that hearing, of which frequent mention was made in argument, the submissions have force. But it is as well to remember that the judge was asked to decide whether he should be imprisoned that evening before the merits of his rescission application could be considered. In any event, I cannot embark on a reconsideration of that issue, given my conclusion that the necessary jurisdictional foundation has not been established.

³⁰ *Morudi and Others v NC Housing Services and Development Co Ltd and Others* [2018] ZACC 32; 2019 (2) BCLR 261 (CC), discussed in *Zuma* above paras 59–60.

[68] Thus, although the application began as an ex parte application, it was not heard as one.³¹ The applicant was present at the hearing. She was asked whether she wished to oppose the relief, and what she wished to say about it. She said that the respondent had known about the writ for two years and that she wanted it to remain. Limited as it was, that was an opportunity to address the Court. Once the order was pronounced, it became final, subject only to the recognised exceptions. The jurisdictional foundation for reconsideration under Rule 6(12)(c), namely the applicant's absence from the hearing, has in my view not been established.

Rescission

Rule 42(1)(a)

[69] The alternative basis for the relief is that the stay order should be rescinded in terms of Rule 42(1)(a), on the ground that it was 'obtained in circumstances where not all of the true and material facts were placed before Ms Acting Justice Mphego, including where this was done fraudulently by the Respondent'. The applicant avers that 'had Ms Acting Justice Mphego been aware of all the true and relevant facts of this matter, she would not have granted the impugned court order'.

[70] The non-disclosures relied on in the founding affidavit are the following 'impressions' which the respondent is said to have conveyed in the stay application:

- (a) That prior to the morning of the contempt hearing he was not aware of the application;
- (b) That he was not afforded an opportunity to oppose the contempt application; and

³¹ The order expressly records that it was made 'having heard the parties'.

(c) That he was not afforded an opportunity to place his version before the court.

[71] It is not self-evident to me that disclosure of these matters, which on the applicant's own case are no more than 'impressions' drawn from a brief founding affidavit, would have persuaded Mphego AJ not to grant the order. The founding affidavit does not say in terms that the respondent was unaware of the hearing date; it says that he was out of the country and could not attend, which was true. Nor is it apparent why the fact that the respondent had opposed the contempt application on the papers, and had then failed to attend the hearing, though he had filed an answering affidavit, would have counted against a temporary suspension of his imprisonment pending an application to rescind the resulting order.

[72] In reply the applicant relied further on the non-disclosure in the stay application of the review order of 14 February 2023. This issue is more material and requires some consideration. It is significant that, as long ago as 13 October 2023, the respondent's erstwhile attorneys wrote the letter quoted above, asking the applicant to agree to a stay of execution of the warrant of arrest for six months 'pending the referral of our client's complaint to the Bellville Maintenance Court for purposes of a section 10 enquiry (as contemplated in the Review Order granted on 14 February 2023)', and warning that unless a response was received by 17:00 that day the respondent would have 'no option but to bring an urgent application to stay the execution of the warrant of arrest'.

[73] The request was refused by the applicant on 17 October 2023. Nothing whatsoever was then done by the respondent to launch the threatened application, or to progress the section 10 enquiry. He waited some two and a half years, until the sheriff caught up with him, before bringing the stay application.

[74] The difficulty for the applicant, however, is that the non-disclosure of the review order was not raised as a ground in her founding affidavit. Nor could it have been: she did not mention the review order. Instead, it was the respondent who complained, in his answering affidavit, that the applicant had failed to disclose the review order when the contempt order was obtained before Wathen-Falken AJ. The applicant defends herself by stating that ‘my counsel handed up a photograph of the review court order during the hearing of the contempt of court order. My counsel also made the submission that there were no proceedings pending in the Bellville Maintenance Court pursuant to the review court order’, and that it was not incumbent on her to follow up on the implementation of the review order, or to mention it in the subsequent enforcement proceedings.

[75] Thus, far from relying on the review order as a cardinal non-disclosure in her founding affidavit, the applicant’s stance was that the review order is of no consequence because there are no proceedings pending in the maintenance court. An applicant must make out her case in the founding affidavit. A ground of rescission first raised in reply, and then only in answer to a complaint by the respondent, cannot properly found the relief sought.

[76] The respondent submits, in any event, that the review order is a factor which strengthens his case in Part B, and that its disclosure would not have caused Mphego AJ to decide the matter otherwise than she did. There is substance in this submission. A High Court judge had, on review, found that the respondent’s complaint warranted an enquiry into whether good cause existed to vary his maintenance obligations. That is not a fact which an applicant seeking the temporary suspension of his imprisonment, pending an application to rescind the contempt order, would have had any reason to suppress, except perhaps in relation to self-created urgency.

[77] In any event, even if a material non-disclosure were established, the applicant's reliance on Rule 42(1)(a) runs up against the same requirement of 'absence'. The sub-rule permits rescission of an order 'erroneously sought or erroneously granted in the absence of any party affected thereby'. Here *Zuma* applies: the sub-rule protects litigants whose presence was precluded, and the applicant must show both that the order was granted in her absence and that it was erroneously sought or granted. 'Both grounds must be shown to exist.'³² For the reasons I have given in relation to Rule 6(12)(c), the applicant's presence was not precluded. She was notified, at the Court's insistence, and she attended and was heard. The shortness of the notice was the product of the urgency, accepted and regulated by the Court, and not of any irregularity. The failure of that requirement is dispositive of the reliance on Rule 42(1)(a).

[78] On the papers before me I therefore cannot find that a proper case has been made out for the rescission of the stay order in terms of Rule 42(1)(a).

Non-disclosure in ex parte applications

[79] The applicant's heads of argument rely on *Schlesinger v Schlesinger* for the proposition that in ex parte applications all material facts which might influence the court must be disclosed. The non-disclosure need not be wilful or *mala fide* to incur the penalty of rescission.³³

[80] However, in this matter, though the stay application began as an ex parte application, by Mphego AJ's direction it was not heard as one. The applicant was notified and was present when the matter was heard. She was invited to say whatever she wished about the relief sought. The rationale for the strict duty of disclosure applies with little, if any, force where the party affected

³² *Zuma* above para 54; see also para 57.

³³ *Schlesinger* above at 349.

has been given notice and heard, however limited the notice which the urgency allowed. I thus do not believe that I am in a position to approach the matter on the hypothetical basis that the application was heard *ex parte*.

Common law rescission

[81] The position might have been different had a material and fraudulent non-disclosure been established. At common law, however, it must be shown that the successful party was a party to a fraud which misled the court into pronouncing a judgement which, but for the fraud, it would not have given.³⁴ The mere circumstance that certain material facts were not disclosed does not in itself establish wilful concealment; fraudulent intent must be affirmatively proved.³⁵

[82] The applicant's affidavits are replete with the words 'fraud', 'fraudulent' and 'deliberate misrepresentation'. However, no fact is identified from which an intention to mislead Mphego AJ can be inferred (as opposed to an incomplete, and hurriedly prepared, account of a long litigation history).

[83] I am unable to find on the papers, bearing in mind that this is a claim for final relief and that the respondent's version must therefore be accepted unless it is untenable, that the respondent fraudulently failed to disclose the review order, or any other material fact, to Mphego AJ. Nor is it established with any degree of confidence that, had Mphego AJ known of the review order, she would not have acted as she did in the pressing circumstances which prevailed at the time.

³⁴ *Bankorp Ltd v Ridl* 1993 (4) SA 276 (D) at 277B–D.

³⁵ *Cape Town Council v Pinn* (1906) 23 SC 213; Herbstein and Van Winsen *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed at 945.

Mediation

[84] The applicant evidently wished to effect the respondent's arrest under the writ on 17 April 2026, when he was due to attend a mediation of the criminal complaint arranged by the prosecutor. As to the civil remedies for enforcing payment of the maintenance, she has on one occasion sought to execute against his property and received a *nulla bona* return. She has not, for instance, pursued sequestration, and has focused her energies on compelling payment through the threat of arrest.

[85] The applicant, whilst notionally in favour of mediation, complains in the founding affidavit that the respondent's 'take it or leave it' stance on mediation is not sincere, particularly when he is paying nothing towards her maintenance but admits that he has paid his attorneys.

[86] The applicant further contends that 'the prosecutor cannot mediate the arrears which have been crystallised by the contempt of court order'. In other words, she adopts the stance that the only arrears capable of mediation are those which have accrued since the contempt order. She has also indicated, in her notice in terms of Rule 41A, that she is not willing to mediate.

[87] The respondent, for his part, expresses a willingness to mediate. His attitude, as I understand it, is that the prosecutor's initiative in referring the parties' disputes to mediation could produce an overall settlement.

[88] I do not see that I can characterise the respondent's willingness to mediate as 'insincere' merely because he seeks an overall or 'once off' solution. But the applicant rightly points out that the respondent's continued failure to pay any maintenance at all, and his evident failure to progress the section 10 enquiry after the review order was granted in his favour on 14 February

2023, are matters of grave concern, and raise similar questions about his own bona fides.

[89] Given my conclusion that it is not open to me to reconsider the stay order, it is unnecessary to decide whether the applicant's stance on the 'crystallisation' of the arrears is correct, or to weigh the respondent's own derelictions in the balance. Though I refrain from deciding these issues, it is by no means self-evident to me that the law precludes mediation of all disputes between the parties, whether under the auspices of the prosecutor at the Bellville Magistrates' Court, or before an independent mediator. It would be unfortunate if it did. A matter such as this, which has its origins in a divorce and has since spawned a decade of litigation, seems to me an ideal candidate for mediation, or at least for a concerted attempt at it. As to the criminal matters, I can only assume that the resolution by mediation of all outstanding disputes would have a material bearing on the prosecutor's discretion whether to continue the prosecution.

[90] The parties, of course, cannot be compelled to mediate. But the reasons for any failure to do so may be taken into account for the purposes of costs at the hearing of Part B, and I say no more on the subject.

Further conduct of Part B

[91] This Court has the inherent power to protect and regulate its own process, now entrenched in section 173 of the Constitution.³⁶ In the exercise of that power I intend to make certain orders for the further conduct of this matter, so as to ensure that Part B is heard as expeditiously as possible. I do so not least because counsel for the respondent conceded at the hearing that the regulation of Part B in the order which Mphego AJ was asked to make left something to be desired, and because there is a need for a final resolution of

³⁶ *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC) paras 39–40.

the issues between the parties. The stay order suspends the contempt order and the writ until Part B is decided. It is in neither party's interest that Part B should continue to drift. The respondent has now delivered his supplementary founding affidavit and a notice of intention to amend; the applicant has given notice of her opposition. The timetable which I set below proceeds from that footing.

[92] I had considered granting relief compelling the parties to progress the section 10 enquiry, and had formulated such relief in draft, when my registrar received an email notification, in connection with the upliftment of the court file, advising that 'the proceedings in the Bellville Magistrate's Court have now been converted into a maintenance enquiry by the Magistrate'. I have therefore referred to that enquiry only in the context of a possible postponement of Part B, and of a further exchange of affidavits to bring the Court up to date before Part B is heard.

The application to strike out

[93] These complaints by the respondent for the most part relate to characterisations and conclusions ('fraud' and 'misrepresentation', for example) necessary for the pleading of the claim of rescission based on the common law ground of fraud. I do not consider them unduly prejudicial or vexatious, and accordingly the application to strike out is dismissed.

[94] However, the allegations of fraud and misrepresentation were not sustained on the papers, and the complaints raised by the respondent are not without foundation (occasionally the applicant's allegations do sail close to the wind, for instance, the allegations of an 'ulterior purpose'). On balance, my view is further that the costs of the application to strike out should be costs in the cause in Part B.

Conclusion

[95] For the reasons set out above, the application must fail. The urgency with which it was set down on 13 May 2026 was inadequately motivated. The stay order was not granted in the applicant's absence, and reconsideration under Rule 6(12)(c) is therefore not competent. For the same reason, and because the non-disclosures relied upon were either not raised in the founding affidavit, or not shown to have been material to the interim relief which Mphogo AJ granted, no case has been made out for rescission under Rule 42(1)(a). There is no fraudulent non-disclosure shown on the papers, bearing in mind that this is a claim for final relief.

[96] That is not to say that the applicant's complaints are without substance. She was brought before a court on an hour's notice, on a Friday evening, without her attorneys, and was expected to respond to an application she evidently had not had a proper opportunity to read. Nothing in this judgement should therefore be read as endorsing the manner in which the stay application was framed and served, or the respondent's failure, over nearly three years, to do anything about a contempt order of which he was fully aware. Those are matters for the court which hears Part B. The proper course, in my view, is to ensure that Part B is heard as soon as reasonably possible so that the suspension which the applicant complains of endures no longer than is necessary to decide whether the contempt order should stand.

Costs

[97] I have already indicated that the wasted costs occasioned by the set down of the matter on the urgent roll for 13 May 2026 should be paid by the applicant. Those costs should include the costs of counsel on Scale B. I do not believe that the complexity of this matter warrants costs on a scale higher than Scale B.

[98] As to the remaining costs of the application, the applicant has failed and the ordinary rule would entitle the respondent to his costs. I have nonetheless decided, in the exercise of my discretion, that those costs should be costs in the cause in Part B, for the reasons in paragraph [96] above, as well as the following reasons:

- (a) This application was to a large degree an attempt to pre-empt Part B, raising many issues which may be relevant to its determination, including the respondent's delays, the parties' non-disclosure and non-pursuit of the review order, and their respective attitudes to mediation. These are issues which will be fully ventilated in due course when Part B is heard.
- (b) The court which hears Part B may also have the benefit of facts or outcomes which emerged from the maintenance enquiry underway in terms of the review order.
- (c) The respondent obtained an order which, as his counsel conceded, did not adequately regulate the further conduct of Part B. The applicant's submission that she was left with an indefinite suspension is a point of substance, though it did not found the relief she sought.
- (d) The court which hears Part B will be in a far better position to assess the parties' conduct in relation to mediation under Rule 41A.

Order

[99] I accordingly make the following order:

- (a) The application, and the respondent's application to strike out, are dismissed.
- (b) The costs of this application, as well as those of the application to strike out, shall be costs in the cause in Part B of the respondent's notice of

motion dated 17 April 2026 ('Part B'), save that the wasted costs occasioned by the set down of this application on the urgent roll for hearing on 13 May 2026 shall be paid by the applicant, including the costs of counsel on Scale B.

- (c) The applicant shall deliver her answering affidavit in Part B within 15 court days of the date of this order.
 - (d) The respondent shall deliver his replying affidavit in Part B (if any) within 10 court days after delivery of the applicant's answering affidavit.
 - (e) Part B is to be heard on a date to be agreed by the parties within 15 court days of this order, failing which either party may approach the Registrar to enrol Part B for hearing on the first available date on the semi-urgent roll or, with the leave of the Judge President, on an earlier date. In agreeing or seeking a date the parties shall, as far as possible, take into account the likely duration of the maintenance enquiry in the Bellville Magistrates' Court directed by the order of Allie J of 14 February 2023 under case number 20445/2022, or any associated or resultant proceeding ('the maintenance enquiry'), so that the maintenance enquiry may be finalised before Part B is heard.
 - (f) Heads of argument in Part B shall be delivered in accordance with the applicable practice directives.
 - (g) If, 30 court days before the date allocated for the hearing of Part B, the maintenance enquiry has not been concluded and no order has been made pursuant to it in terms of the Maintenance Act 99 of 1998, either party may within 10 court days thereafter apply for the postponement of the hearing of Part B, on such terms as that party considers appropriate.
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M GREIG
ACTING JUDGE OF THE HIGH COURT
WESTERN CAPE

Appearances:

For the applicant: J L McCurdie SC

Instructed by: Catto Neethling Wiid Inc, Cape Town

For the respondent: F J Gordon-Turner SC with L van Zyl

Instructed by: Barnaschone Attorneys, Cape Town