

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC CASE NO: _____

In the matter between:

S E S Applicant

and:

V V-S Respondent

In re:

V V-S Applicant

and:

S E S Respondent

APPLICANT'S FOUNDING AFFIDAVIT

I, the undersigned,

S E S

do hereby declare the following under oath:

A. INTRODUCTION

1. I am a major male of full legal capacity and the Applicant herein. I reside at 16 Alcade Road, Lynwood Glen, Pretoria, Gauteng Province.

2. I am represented by Ndumiso Voyi Incorporated, a firm of attorney practicing at Ground Floor, Building 5, Midrand Business Park, 563 Main Road, Halfway House, Midrand, Gauteng Province.
3. The facts set out in this affidavit are within my own personal knowledge, unless the contrary is expressly indicated or it is apparent from the context. These facts are to the best of my knowledge and belief both true and correct.

B. THE PARTIES

4. I am the Applicant herein and the Respondent is **V V-S** a major female of full legal capacity whose last known residential address is No. 3 Zambezikiaat Street, The Wilds Estate, Pretorius Park, Extension 15, Pretoria, Gauteng Province.
5. At all relevant times, the Respondent is being represented by Snyman De Jager Attorneys, a firm of attorneys practicing at Atterbury Boulevard, Upper Level, corner Atterbury and Manitoba Streets, Faerie Glen, Pretoria, Gauteng Province.
6. As Snyman De Jager Attorneys are the present attorneys of record for the Respondent, a copy of the present Application is to be served at their offices.

C. PURPOSE AND SCOPE OF THIS APPLICATION:

7. This is an application launched in terms of Rule 19 of the Rules of this Honourable Court seeking leave to appeal against the Order of the Supreme Court of Appeal (“**the SCA**”) dismissing my application for leave to appeal against the whole judgment and Order handed down by The Honourable Acting Justice Magardie (“**Margadie AJ**”)
8. The judgment and Order of Margadie AJ was handed down before the High Court of South Africa (Gauteng Local Division, Pretoria) under case number 50975/2015 on **19 August 2015**. The Order of the SCA is attached hereto marked Annexure “**S1**”.
9. In the alternative, I seek leave to appeal against the whole of the judgment and order of Margadie AJ, as aforesaid. The judgment and Order of Margadie AJ are annexed to this affidavit and marked Annexures “**S2**” and “**S3**”, respectively.
10. The Magardie AJ granted an Order, effectively, entitling and authorising the Respondent to issue a Warrant of Execution to attach and sell in execution an immovable property I own together with my wife, being Mrs Z S (“**Mrs S**”). The immovable property is Erf 31, Lynnwood Glen, Pretoria, Registration Division J.R., Gauteng Province, measuring 1939 (one nine three nine) square metres and held by myself in terms of Deed of Transfer No. T23278/2007 (“**the Property**”).

11. The Property is to be sold in execution in satisfaction of highly questionable amounts the Respondent is claiming from me, allegedly, pursuant to an Order granted by the High Court of South Africa (Gauteng Division, Pretoria) on 29 October 2010 under Case No. 50975/2008.
12. The Judgment and Order against which leave to appeal is presently being sought were granted pursuant to an application launched by the Respondent in terms of **Rule 46(1)(a)(ii)** of the Uniform Rules of Court. The said application was launched on or about 20 January 2015.
13. I applied to The Honourable Magardie AJ for leave to appeal against the Judgment and Orders granted by her, as provided for by section 17(2)(a) of the Superior Courts Act, read together with Rule 49 of the Uniform Rules of Court.
14. The application for leave to appeal was heard on 2 March 2016. Leave to appeal was refused.
15. A true copy of the Court Order refusing leave to appeal is attached hereto marked **Annexure "S4"**.
16. My attorneys requested written reasons or judgment for the Order refusing leave to appeal.
17. Same was only issued on 07 July 2016 and a copy thereof is attached hereto marked Annexure **"S5"**.

D. BACKGROUND FACTS

18. The Respondent and I were married to each other on 24 November 2007.
19. Subsequent to our marriage and on 5 September 2008, a minor child, namely K S S ("***the minor child***") was born.
20. The marriage relationship between the Respondent and I did not last long and soon after we were married, it became evident that the marriage relationship between us had broken down irretrievably.
21. I, subsequently, instituted divorce proceedings against the Respondent out of the High Court of South Africa (Gauteng Division, Pretoria) under Case Number: 50975/2008 ("***the divorce action***"). The divorce action was launched in or about March 2008.
22. While the divorce action was pending, the Respondent took up temporary employment in the United States of America ("***the USA***") and moved there during or about May 2010.
23. Prior to moving to the USA, the Respondent had signed a settlement agreement. To be specific, the said settlement agreement was signed by the Respondent at Sandton on 10 May 2010.
24. I counter signed the settlement agreement on 29 October 2010 and the divorce action, subsequently, became settled.

25. The express terms of the settlement agreement, that are relevant for purposes hereof, are, *inter alia*, the following:

25.1 Our contact with the minor child would be as set out in the settlement agreement. It was, further, recorded that the Respondent accepted an employment offer in terms whereof the Respondent would take up employment in the USA for a limited duration;

25.2 I would pay the Respondent the sum of R2,500.00 (Two Thousand Five Hundred Rand) per month for the maintenance of the minor child ("the basic maintenance payment");

25.3 The basic maintenance payments would increase by the consumer price index on the anniversary of the signing of the agreement and on all subsequent anniversaries;

25.4 In addition to the basic maintenance payments, I would be liable for half (50%) of the minor child's crèche/school fees and the Respondent would be liable for the remaining half (50%);

25.5 Each party would be liable for half (50%) of all costs of the minor child's text books, school uniforms, reasonably required extra lessons, extra mural activities and uniforms equipment, school outings and tours and other necessarily related educational expenses and the like;

- 25.6 Should the minor child display the aptitude as well as interest, after successful completion of the senior certificate qualification, or other qualification, and where the minor child has complied with the entrance requirements to any tertiary education facility, the parties shall bear half (50% each) of the costs of the tuition and residence (if applicable) fees thereof, together with all and any text books and the like as may be required for such further education; and
- 25.7 I would be liable for 50% (fifty %) of the minor child's medical, dental, pharmaceutical, ophthalmic, specialist and other related medical expenses reasonably incurred that are not covered by my medical aid scheme.
26. The settlement agreement was made an Order of Court on 29 October 2010.
27. In taking this Honourable Court to my confidence, I wish to frankly disclose, at this juncture, that I did fall behind with the basic maintenance payments.
28. This was at the time when I was experiencing insurmountable financial difficulties arising from being a breadwinner for my house and also for the extended family.

29. I have, however, since expressed my preparedness and willingness to cover the arrears on the maintenance by way of top-up instalment amounts over and above the monthly maintenance I am presently paying towards the Respondent.
30. Accordingly, I paid an amount of R3,200.00 (Three Thousand Two Hundred Rand) to the Respondent. The additional amount thereon was meant to cover the arrears I am behind on in relation to maintenance.
31. The issue of falling behind with my maintenance payment was also exacerbated by the fact that the Respondent had moved out of the country and there were no effective means to communicate my financial difficulties to the Respondent. The latter still harbours resentment against me for having divorced her.
32. I was also not aware of the fifty per cent (50%) additional maintenance requirements as the Respondent never communicated any of these to me.
33. The Respondent returned to the Republic of South Africa during January 2014.
34. During the latter part of February 2014, the Sheriff of the district of Pretoria East ("**the Sheriff**") attended at my place of residence with a Warrant of Execution, in the amount of R306 550.18 (THREE

HUNDRED AND SIX THOUSAND RAND FIVE HUNDRED ANF FIFTY RAND AND EIGHTEEN CENTS).

35. A true copy of the Warrant is attached hereto as **Annexure "S6"**.
36. It became clear that the Respondent had a Warrant of Execution issued upon her return from the USA and, *inter alia*, the said Warrant of Execution related to expenses the Respondent *allegedly* incurred, in respect of the minor child's education, medicine, etc, while she was residing in the USA.
37. The Respondent filed an affidavit in support of the Warrant, wherein she was setting out how the amount of R306 550.18 was arrived at.
38. The Respondent stated that the amount of R306 550.18 was made up as follows:

38.1 Alleged arrears in respect of fixed
monthly maintenance payments: R50 130.04

38.2 Alleged arrears in respect of one half
of school fees, paid by the
Respondent: R201 941.81

38.3 Alleged arrears in respect of medical
expenses: R41 486.19

38.4	Alleged arrears in respect of extra mural activities:	R12 992.14
		<hr/>
	TOTAL	R306 550.18
		<hr/>

39. A true copy of the affidavit is attached hereto marked **Annexure "S7"**.
40. In relation to the alleged expenses, the Respondent incurred same in US Dollars and converted the said expenses to the Rand value, based on the Exchange Rate that she was contending applied at the date that each expense was allegedly incurred.
41. With regard to the aforesaid expenses, the following is of, further, relevance:
- 41.1 the Respondent alleged that the amount paid in respect of school fees, the Rand/Dollar exchange rate and the calculation of the 50% (fifty percent) school fees payable by myself, was calculated as per schedule "**VS4**" to her affidavit;
- 41.2 the Respondent alleged that the amount owing by me in respect of medical expenses, having reference to the Rand/Dollar exchange rate, were as per an attachment to her affidavit marked Annexure "**VS5**"; and

- 41.3 the Respondent alleged that I owe half contribution towards text books, school uniforms, reasonably required extra lessons, extra mural activities, etc., and the amounts owed were as calculated per Annexure “**VS6**” to her affidavit.
42. Of pivotal importance, many of the amounts claimed were not supported by any vouchers, tax invoices or any other source documents that explained how the amounts were made up and/or arrived at.
43. The Respondent simply listed the alleged expenses she incurred.
44. It was, therefore, my contention that the Warrant of Execution could only have been issued on the so-called expenses clause contained in the maintenance order, on condition that the amounts claimed were easily ascertainable in an affidavit filed on behalf of the Judgment Creditor.
45. It was, further, my contention that such expenses had to be identified with reference to items purchased and/or expended and the price of the said items and/or unit price for such expenses. This could only have been done with reference to invoices and/or proofs of payment.
46. In relation to the Respondent’s Warrant of Execution, it was not possible to ascertain the veracity of the amounts claimed. I, further, had no knowledge as to what expenses the Respondent had, in fact,

incurred and, as a result, the lack of detail caused me to be highly suspicious of the amounts the Respondent was claiming from me.

47. I, therefore, approached the High Court of South Africa (Gauteng Division, Pretoria) for an Order setting aside the Warrant of Execution, *alternatively* varying the Warrant of Execution by reducing the amount claimed thereon to an amount of R50 130.04 (FIFTY THOUSAND ONE HUNDRED AND THIRTY RAND AND FOUR CENTS), this being the amount I had admitted outright to the Respondent I was behind on in relation to maintenance payments.
48. My aforesaid application was unsuccessful. A copy of the Order dismissing same is attached hereto as **Annexure "S8"**.
49. Shortly thereafter, the Respondent proceeded with an Application in terms of **Rule 46(1)(a)(ii)** of the Uniform Rules of Court.
50. The application was proceeded with on the basis that, *inter alia*, the Sheriff had issued a *nulla bona* return on or about 22 February 2014. This *nulla bona* return was issued by the Sheriff despite the fact that, in my property, there are movable assets.
51. In the *nulla bona* return, the Sheriff writes that I had stated that I have no money or disposable assets wherewith to satisfy the Warrant of Execution or any portion thereof. However, the Sheriff never entered

into any discussion with me regarding my movable assets and spoke about attaching my immovable property from the onset.

52. All I said to the Sheriff was that I did not have the amount of money that was required in the Warrant of Execution.

53. The Sheriff went further in the *nulla bona* return to state that no disposable assets could be found after a diligent search and enquiry. This I still take issue with.

54. The Sheriff was inside my house and he could easily see the furniture and effects, as well as other disposable assets. These were items that were visible and in front of him.

55. Nevertheless, the Respondent seized the opportunity to proceed with the Application in terms of Rule 46(1)(a)(ii) after the refusal of my application to set aside the Warrant of Execution.

56. In support of her application to execute against my immovable property, the Respondent stated as follows:

56.1 she had taken all reasonable steps to recover the monies owing to her in terms of the settlement agreement which was made an Order of Court but she had been unable to secure any payments from me;

56.2 due to the fact that the Sheriff had already issued a *nulla bona* return, the Respondent had no other option but to request that

she be authorised to issue a Warrant of Execution to attach my immovable property;

56.3 the Respondent stated that to the best of her knowledge, the specific immovable property was not acquired by me by means of or with the assistance of a state subsidy and was utilised for residential and not commercial purposes;

56.4 the Respondent submitted that my liabilities towards her will not be liquidated within a reasonable period without her having to execute against my immovable property;

56.5 the Respondent stated that she does not have knowledge whether or not I will lose access to housing as a result of execution being levied against my immovable property;

56.6 she also stated that she does not know what my position is and that of my dependants would be should she be permitted to execute against my immovable property; and

56.7 the Respondent stated that she has no other legal avenues to pursue in order to recover the substantial amount I was allegedly owing to her.

57. She accordingly requested that my immovable property be declared executable and that she be authorised to execute against this immovable property.

58. The affidavit in support of the application to declare my immovable property executable was as brief as it was startling. A copy thereof is attached hereto marked **Annexure "S9"**.
59. I vehemently opposed the application. In my opposing affidavit, I stated that the application was simply not about a *bona fide* Judgment Creditor seeking to recover a judgment debt.
60. On the contrary, I stated that the application as all about a bitter, resentful and perverse ex-wife who was hell-bent on making my life an excruciating misery.
61. The Respondent knows very well that I still question my paternity over the minor child. My numerous requests for an independent and objective paternity test have been refused outright by the Respondent.
62. Based on recent rumours that have reached my ears, there are three (3) of us that are currently maintaining the minor child.
63. I am not at liberty to mention the names of the other two men as they are married and hold high positions in their respective fields of work. I can only do so with their consent, which I presently do not have.
64. Of importance, I have now instructed my attorneys to proceed with an application to compel the Respondent to submit the minor child to the taking of a blood sample in order to carry out scientific tests relating to the paternity of the minor child.

65. In my affidavit in opposing the application to declare my immovable property executable, I fully stated the motive behind the launching of the application.
66. I, further, made reference to the provisions of **Rule 46(1)** of the Uniform Rules of Court, as well as the relevant circumstances to be considered before the Order sought could be granted.
67. I pointed out that the affidavit filed by the Respondent in support of her application fell far short of addressing any of the requirements or relevant circumstances to be satisfied before an immovable property could be declared specially executable.
68. Of importance, I made mention in my answering affidavit of an offer in an amount of R100 000.00 (one hundred thousand rand) which I had made to the Respondent in an attempt to reduce and liquidate the amounts allegedly owing.
69. It was my intention to obtain a loan from a banking institution in the aforesaid amount. The R100,000.00 was not in full and final settlement of the debt but was meant to reduce same.
70. This proposal was, however, rejected by the Respondent without any explanation. The Respondent demanded the full amount in the warrant and nothing short.

71. I also stated to the Court *a quo* the implications of the granting of the Order. I, therefore, asked that the application be dismissed.
72. A true copy of my Answering Affidavit is attached hereto marked **Annexure “S10”**.
73. Of importance in relation to the application launched by the Respondent, Mrs S, was not cited as a party. I own the Property together with my wife by virtue of us being married in community of property.
74. We both contribute towards the Property in relation to payment of the mortgage bond instalments.
75. My wife has equally the same rights I have over the Property and her non-joinder as an interested party in the application is a matter which I intend to raise at the hearing of the appeal. It is also an issue that was never considered by the Court *a quo* when it granted its Judgment and Orders.
76. I am also advised by my wife that she has obtained independent legal advice on the matter and will be launching an application to intervene as a party in the intended appeal.

E. GROUNDS FOR LEAVE TO APPEAL

77. It is my, respectful, submission that the provisions of **Rules 46(1)(a)(ii)** of the Uniform Rules of Court are applicable to an application of the nature that was sought by the Respondent.
78. The said provisions stipulate that no Warrant of Execution against immovable property of any judgment debtor shall be issued until such immovable property shall have been declared to be specially executable by the Court; “... ***[p]rovided that, where the property sought to be attached is the primary residence of the judgment debtor, no Warrant of Execution shall be issued unless the Court, having considered all the relevant circumstances, orders execution against such property.***”
79. The relevant circumstances to be considered are, by now, trite. These were articulated in my answering affidavit to be the following:
- 79.1 the amount and nature of the debt;
- 79.2 the circumstances in which the debt arose;
- 79.3 my financial situation and that of my family;
- 79.4 my payment history;
- 79.5 the attempts I made to pay off the debt;
- 79.6 the availability of alternatives which might allow recovery of the debt without the sale in execution of the property;

- 79.7 the hardship which will be caused to myself and my family;
- 79.8 whether the Respondent's interest will be adequately protected;
- 79.9 the current estimated value of the property if sold on the open market, and
- 79.10 other relevant circumstances.

80. As can be seen from the affidavit in support of the Respondent's application to declare my property specially executable, none of the aforementioned factors are addressed, either sufficiently or at all.

81. Equally and in the Judgment granted by the Court *a quo*, the aforementioned relevant circumstances are specifically and adequately addressed.

82. The Court *a quo*, with respect, simply took a dim view against me in view of the fact that the nature of the debt was in relation to maintenance payments. A heavily condemning approach was taken wherein I was denounced and lambasted by the Court *a quo* for having failed to pay the maintenance.

83. The best interests of a child were the sole and primary consideration that occupied the Court *a quo* and this was an imbalanced approach in deciding upon the application in terms of **Rule 46(1)(a)(ii)** of the Uniform Rules of Court.

84. With the relevant factors not having been considered at all or adequately by the Court *a quo* at all, I respectfully submit that I stand a reasonable prospect of succeeding with the intended appeal.
85. I respectfully maintain so as the injunction on the latter part of **Rules 46(1)(a)(ii)** of the Uniform Rules of Court was not adhered to by the Court *a quo*.
86. Furthermore, it is my considered view that there is another 'compelling reason' why the intended appeal should be allowed. In the present matter, the Court *a quo* ordered that the immovable property that I own with my wife should be executed upon and disposed of on auction.
87. The Court Orders granted by the Court *a quo* was issued without taking into account the hardship which will cause to myself and, in particularly, to my family. My family and I would be rendered homeless by virtue of the Court Order granted by the Court *a quo*.
88. The Court *a quo* took the view that the relief sought was the only appropriate remedy and it did so in complete disregard of my constitutional rights under sections 25 and 26 of the Constitution.
89. The Court *a quo* attempted to balance two allegedly competing rights and took the view that my constitutional right to housing cannot take precedence over the best interests of the child.

90. I am advised and respectfully submit that this was an incorrect approach for the Court *a quo* to adopt.
91. There were no competing rights per se in the present matter. The right that was going to be infringed should the relief the Respondent sought be granted was my and my family's constitutionally entrenched right to property.
92. There was no encroachment of the best interests of the minor child in this matter; considering the fact that I was paying maintenance and I was taking steps to offset the balance owing on the maintenance.
93. Most importantly, my family was not encroaching on the best interests of the minor child for it to be rendered homeless by virtue of the Court Order granted by the Court *a quo*.
94. Furthermore, I had offered an amount of R100 000.00 (One Hundred Thousand Rand) in reduction of the overall debt I owe to the Respondent.
95. The Court incorrectly considered this offer to be a full and final settlement offer despite the fact that it was simply an amount aimed at substantially reducing the overall debt.
96. It is, therefore, my respectful view that the Order granted by the Court *a quo* tramples upon my constitutionally entrenched right to housing.

97. It, further, tramples upon my family's constitutionally entrenched right to housing. This was so done without any consideration of the relevant circumstances, most notably the attempts I made to pay off the debt, the availability of alternatives which might allow the recovery of the debt, the current estimate value of the Property and the hardship which will be cause to myself and my family, etc.
98. Section 26(3) of the Constitution of the Republic of South Africa states, in no uncertain terms, that no one may be evicted from their home, or have their home demolished, without an Order of Court made **after considering all the relevant circumstances.**
99. In the present matter, I am being disposed of my home without any consideration of the relevant circumstances. Accordingly, the present matter does indeed raise a constitutional issue. For this reason as well, it is my respectful submission that in will be in the interest of justice that leave to appeal should be granted and the intended appeal be heard.
100. It is, therefore, worth reiterating that not only do I have reasonable prospects of success in this case but that it is also in the interests of justice that this Honourable Court considers the issues arising in this case and decide them.
101. It is my respectful submission that there has been a travesty of justice in this matter.

102. The matter not only raises a constitutional issue, it is equally raises *an arguable point of law of general public importance which ought to be considered by [this] Court*. For this reason also, it is my respectful submission that leave to appeal ought to be granted and that the intended appeal be heard.

F. CONCLUSION

103. In the premises, I respectfully submit that I have made out a case for the relief I seek in the present Application.

104. I seek no order in relation to costs.

WHEREFORE I pray for an Order as set out in the Notice of Motion to which the present Affidavit is affixed.

DEPONENT

**THUS SWORN AND SIGNED ON THIS ____ DAY OF OCTOBER 2016
BEFORE ME, COMMISSIONER OF OATHS, THE DEPONENT HAVING
ACKNOWLEDGED THAT HE/SHE UNDERSTANDS THE CONTENTS
OF THIS AFFIDAVIT, HAS NO OBJECTION IN TAKING THE OATH AND
REGARDS THE OATH AS BINDING ON HIS/HER CONSCIENCE AFTER
COMPLYING WITH THE REQUIREMENTS OF GOVERNMENT NOTICE
R1258, DATED 21 JULY 1972, AS AMENDED.**

Before me:

COMMISSIONER OF OATHS

NAME:

CAPACITY:

ADDRESS: