

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



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE

DATE: 22 December 2022

CASE NUMBER: 35079/2019

In the matter between:

T M

First Applicant

A COMPANY (PTY) LTD

Second Applicant

and

C M

First Respondent

FIRST NATIONAL BANK LIMITED

Second Respondent

JUDGMENT

WILSON J:

- 1 The first applicant, Mr. M, is divorcing the first respondent, Mrs. M. Mr. M controls the second applicant, to which I shall refer as “the Company”. He derives income from the Company which Mrs. M says has not been fully

disclosed. The question in this case is whether Mrs. M can, in seeking to advance that contention, require the second respondent, FNB, to answer a subpoena for the Company's bank statements.

2 The question arises in circumstances where Mrs. M has not obtained those documents by way of discovery under Rule 35. Mr. M says that, having been unsuccessful in compelling him to discover the statements, Mrs. M cannot subpoena them. Mr. M says that Mrs. M's attempt to subpoena the documents is contemptuous of the order this court previously made on her application to compel discovery ("the compelling order"), and that the subpoena constitutes an abuse of process.

3 Mr. M has launched two applications to press these claims. The first application seeks an order setting aside Mrs. M's subpoena for the Company's bank statements as an abuse of process. The second application seeks a declaration that Mrs. M is in contempt of the compelling order.

4 Only the application to set aside the subpoena as an abuse of process is before me. But if Mrs. M's subpoena is contemptuous, then it is plainly also an abuse of process. Even though the contempt application is not before me, I must nevertheless decide whether Mrs. M is in contempt of the compelling order and whether, if she is not, the subpoena is otherwise an abuse of process.

5 In this judgment, I find that Mrs. M is entitled to subpoena the Company's bank statements, and that her attempt to do so does not place her in contempt of the compelling order. Nor is it otherwise an abuse of process.

Mr. M's application to set the subpoena aside must accordingly be dismissed. These are my reasons for reaching those conclusions.

The compelling order

6 Mr. and Mrs. M are married out of community of property, but subject to the accrual system provided for in the Matrimonial Property Act 88 of 1984. Mr. M launched the divorce action in October 2019. He sought a decree of divorce, various orders relating to the parties' minor children, and an order directing that Mrs. M should forfeit her share of the accrued marital estate. Mrs. M pleaded to Mr. M's particulars of claim in February 2020. She also instituted a counterclaim for a share in the accrual, for her own orders regulating the consequences of the divorce for the parties' children, and for a range of orders requiring Mr. M to maintain her and the parties' children. Both parties amended their pleadings before moving on to the discovery stage.

7 Mrs. M then launched an application to compel Mr. M to discover documents that would assist her in sustaining her defences to the divorce action and in proving her counterclaim. She was substantially successful. On 4 June 2021, Mogagabe AJ made the compelling order. He directed Mr. M to reply to Mrs. M's discovery notice, which he annexed to his order. Paragraph 1 of the discovery notice requires the production of "[a]ll bank statements in respect of all bank accounts held in [Mr. M's name] or used by [Mr. M] in the conduct of his business, excluding [the Company's bank statements]".

8 Mr. M's case is that the subpoena Mrs. M has now issued is contemptuous of this aspect of the compelling order, or is otherwise an abuse of process,

because the effect of the compelling order is that she is not entitled to the Company's bank statements.

9 Purely at the conceptual level, that case is impossible to sustain. An order directing Mr. M to respond to a discovery notice that excludes the Company's bank statements from its scope plainly does not prohibit Mrs. M from ever seeking those statements in future.

10 It was not seriously suggested that Mogagabe AJ found that Mrs. M was disentitled to the Company's statements because they could never be relevant to the issues in the divorce action. The application was instead argued on the basis that Mogagabe AJ had decided to exclude the Company's bank statements from the compelling order because the Company forms no part of the accrued marital estate, and because it owes no duty of support to the parties' children. That "ruling" is what Mr. M says Mrs. M is now trying to circumvent.

11 However, I do not think I can accept that Mogagabe AJ ever made such a ruling. The compelling order is inconsistent with it. On its face, the compelling order is consistent only with the proposition that Mrs. M did not ultimately seek the Company's bank statements. It may be that there was a concession made at the hearing and then embodied in a revised discovery notice which found its way into the compelling order, but that does not matter. The bottom line is that the compelling order itself has nothing to say about Mrs. M's entitlement to the Company's bank statements. It simply does not apply to them.

12 It was not argued before me that Mogagabe AJ found that Mrs. M had waived her right to pursue disclosure of those statements at a later stage. Accordingly, there is no conceivable basis on which Mrs. M is in breach, let alone contempt, of the compelling order.

Abuse of process

13 That leaves the question of whether Mrs. M's subpoena is otherwise an abuse of process. In the circumstances of this case, the only basis on which Mrs. M's subpoena could be an abuse of process is that the documents it identifies are irrelevant to the issues in the divorce action.

14 Mrs. M says the Company's bank statements are relevant to the parties' respective contentions about their capacity to maintain each other and their children. It is alleged that Mr. M derives a significant undisclosed income from the Company. The production of the bank statements is plainly relevant to that contention.

15 Mr. M does not seriously suggest otherwise. In his notice of motion, he asks for orders setting aside the subpoena, and directing him to file bank statements that he will redact such that only the relevant material is shown. Ms. van den Heever, who appeared for Mr. M, argued quite strenuously that this did not entail a concession that the Company's bank statements contain relevant material, but I was unable to understand the gravamen of her submissions on that point.

16 Mr. M's prayers plainly entail a concession that the Company's bank statements contain material that is relevant to the divorce action. The fact

that they might also contain material that is not directly relevant does not provide a basis on which they can be redacted or withheld, unless there is some confidentiality or other legal interest that is in need of protection. In other words, “full inspection” is the norm, unless a party defines the relevant interest, and identifies the documents that, if disclosed, would infringe that interest (see *Crown Cork & Seal Co Inc v Rheem South Africa* 1980 (3) SA 1093 (W) at page 1100A-D).

17 No such interest has been defined. Mr. M originally suggested that disclosure of the Company’s bank statements would breach the Protection of Personal Information Act 4 of 2013. However, Ms. van den Heever did not pursue that point, which is plainly without merit. No particularity was given of exactly what “personal information” defined in section 1 of the Act is contained in the Company’s bank statements. Nor was it suggested that disclosure of the statements in answer to a subpoena would not be to discharge “an obligation imposed by law” within the meaning of section 11 (1) (c) of the Act. Nor was it argued that the answering of a subpoena with a document containing “personal information” is not covered by the exception for disclosure of information in legal proceedings, defined in section 15 (3) (c) (iii) of the Act.

18 The classic definition of an “abuse of process” appears in *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 734G. There, it is said that an abuse of process takes place when “the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective”. It seems to me that the subpoena Mrs. M issued is entirely

consistent with the sort of truth-seeking the Rules of Court are meant to facilitate.

The postponement application

19 Mr. M's application was first enrolled before me on 13 October 2022. Shortly before the application was to be heard, Mr. M brought an application to postpone it pending the determination of his application to hold Mrs. M in contempt of the compelling order. That application was then amplified by the submission that counsel who settled the contempt application, Ms. van den Heever, had fallen ill and was unable to appear. However, Ms. Metzger, who had appeared for Mr. M at every stage of the proceedings up until that point, was available to argue the matter.

20 Mrs. M opposed the postponement application, which I refused. I undertook to give my reasons for doing so in this judgment.

21 My reasons are that the contempt application stood such a remote prospect of success that there could be no appreciable prejudice to Mr. M in proceeding with the application to set aside the subpoena, and that Ms. Metzger advanced no acceptable reason why she could not continue to act for Mr. M in Ms. van den Heever's absence, given that she had been steeped in the matter throughout. There was accordingly no prejudice to Mr. M in continuing to be represented by Ms. Metzger.

22 After I refused the postponement application, Ms. Metzger withdrew as Mr. M's counsel. Very creditably, Ms. Segal, who appeared for Mrs. M, declined to press for an order dismissing the application in Mr. M's absence. She asked only that I keep the matter on my roll, and that I hear argument at the earliest opportunity on which Mr. M's counsel was available. That opportunity presented itself on 23 November 2022, when the application proceeded.

Costs

23 Ms. Segal argued that the application to set aside the subpoena was so ill-conceived that I should make a special costs order. That order, Ms. Segal argued, should be made not just against Mr. M, but also against his legal representatives.

24 It is true that this application has been advanced without any discernible rational basis. It is also true that legal practitioners do themselves no credit when they take a point, no matter how ill-conceived it turns out to be, simply to afford an aggressive client the illusion of possible success. I am satisfied that the arguments advanced in this case, including those in support of the postponement application, were so transparently poor as to border on the inappropriate.

25 However, there are strong reasons of public policy why a court will not generally direct a legal representative to pay the costs of a manifestly ill-founded application. Legal practitioners must be free to pursue unmeritorious arguments on behalf of unpopular clients without fear of judicial reprisal.

- 26 In my view, costs orders *de bonis propriis* against legal practitioners for involvement in the pursuit even of manifestly ill-founded litigation will rarely be appropriate. They may come into play if some degree of malice or bad faith can be attributed to the legal practitioners behind the litigation, but that is not a question I need to decide in this case. Here there is no evidence of bad faith or malice, and accordingly no warrant for a costs order *de bonis propriis*.
- 27 The fact remains that this application was manifestly ill founded. It depends on a wholly untenable interpretation of Mogagabe AJ's order, and upon the facile assertion that the material sought to be subpoenaed is irrelevant to the issues in the divorce action. That assertion was made even though relevance had effectively been conceded in Mr. M's founding papers.
- 28 In these circumstances, a costs order on the scale as between attorney and client is clearly warranted.

Order

- 29 For all these reasons –
- 29.1 The application is dismissed with costs, including the wasted costs of 13 October 2022. Those costs will be taxed on the scale as between attorney and client.
- 29.2 The second respondent is directed to comply with the first respondent's subpoena *duces tucem* within five days of the service of this order upon it.

S D J WILSON
Judge of the High Court

This judgment was prepared and authored by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 22 December 2022.

HEARD ON: 13 October and 23 November 2022

DECIDED ON: 22 December 2022

For the Applicants: A van den Heever
L Metzger
Instructed by Strydom M and Associates

For the First Respondent: L Segal SC
Instructed by Greta Eiser Attorneys