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

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
2022-10-13
DATE **SIGNATURE**

Case Number: 59537/2021

In the matter between:

D[…] S[…]

Identity number: […] Applicant

and

L[…] M[…]

Identity number: […] Respondent

JUDGMENT

POTTERILL J

[1] In this matter for ease of reference I will refer to the parties by name. Ms. M[…] issued and served a subpoena *duces tecum* on Investec Bank Ltd, the bank who Mr S[…] applied to for a mortgage bond. The subpoena *duces tucem* was issued by Ms M[…] purportedly in terms of Rule 38 of the Uniform Rules of Court.

[2] Ms M[…] and Mr S[…] are unmarried, but have a daughter. Ms M[…] launched an application [the main application] to declare a motor vehicle a gift from Mr S[…] to her and to order Mr S[…] to pay the monthly instalment and insurance and to register the vehicle in the applicant's name upon the last instalment being paid. Ms M[…] also seeks that an alleged agreement to pay maintenance in the amount of R4 495.00 be enforced including ancillary relief thereto. Furthermore interim relief is sought pertaining to the primary residence and contact rights of the minor child pending an investigation by the Family Advocate.

[3] I had expressed my concern to counsel for Ms M[…] that the nature of the application leans itself to a *bona fide* dispute of fact which could render the application still-born. Counsel however was of the view that in the main

application there would be no dispute of fact and the matter could proceed on mere affidavits.

[4] In the answering affidavit to the main application Mr S[…] set out that he was experiencing financial difficulties and that he cannot afford to pay the amount maintenance claimed. This averment caused Ms M[…] to resort to the issuing and service of the subpoena, because Mr S[…] had bought a property and a vehicle, yet was pleading poverty.

[5] Mr S[…] filed the replying affidavit to the Rule 30 application late and sought condonation for the late filing thereof. On behalf of Ms M[…], in order to finalise the matter, no formal objection to the condonation application was placed on record. Accordingly condonation for the late filing is granted.

[6] The conditional counter-application of Ms M[…] was conceded to be irregular in Rule 30 proceedings and it was abandoned.

The Rule 30 application

[7] Mr S[…] is seeking that the subpoena *duces tecum* dated 23 March 2022 be set aside as an irregular step in terms of Rule 30.

[8] Much of the opposition to this application is only relevant to the main application. The crisp issue is whether in an application a party can without the court's consent issue such subpoena. Rule 38(1)(a)(iii) and (c) of the Uniform Court Rules makes provision for various procedures to procure evidence for a trial. Utilising Rule 38 in these circumstances is irregular. Firstly, because it relates to securing the attendance of a witness for trial. If, as argued, there will be no trial to resolve factual disputes then no witness can

testify. The procedure cannot be utilised to secure documentation and not a witness to tender the document into evidence. A subpoena *duces tecum's* whole purpose is to facilitate the attendance of such witness to produce a document. In this application procedure chosen by the legal representation of Ms M[…] no witnesses can testify. By no means can this rule be utilised for an application.

[9] Ms M[…] chose to proceed by means of application. Only the court can in application proceedings order and only when there is a dispute of fact, whether the application will be dismissed, or referred to oral evidence, or trial and whether witnesses must be subpoenaed.

[10] Ms M[…] is not without a remedy. Rule 35(13) caters for discovery of documents in application proceedings.

[11] I see no reason why the costs must not follow the result, but I do not find the jurisdictional requirements for a punitive costs order. Accordingly, I make the following order:

11.1 The subpoena *duces tecum* dated 23 March 2022 is set aside.

11.2 The respondent is to carry the costs on a party and party scale.

_____

S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 59537/2021

HEARD ON: 11 October 2022

FOR THE APPLICANT: ADV. G. KYRIAZIS

INSTRUCTED BY: Cowan-Harper Madikizela Attorneys

FOR THE RESPONDENT: ADV. L. VAN DER WESTHUIZEN

INSTRUCTED BY: Barnard Incorporated Attorneys

DATE OF JUDGMENT: 13 October 2022