

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



REPORTABLE

CASE NO: A176/2018

In the appeal between:

DIANNE MARJUNES GREEFF

Appellant

and

NEVILLE CHARLES COOPER (SENIOR)

First Respondent

ABSA BANK LIMITED

Second Respondent

NEVILLE CHARLES COOPER (JUNIOR)

Third Respondent

JUDGMENT DELIVERED ON 18 SEPTEMBER 2018

DAVIS, AJ

1. This appeal deals with the correct procedure to challenge a subpoena *duces tecum* issued out of the Magistrates' Court. The crucial question is whether it is legally competent to interdict compliance with a Magistrates' Court subpoena *duces tecum* on the basis that it is an abuse instead of applying to set aside the subpoena.

2. The appellant ("Greeff") initiated proceedings against the third respondent ("Cooper Junior") in the Cape Town Magistrates' Court in terms of s 65A(1) of the Magistrates' Court Act 32 of 1944 ("the Act") with a view to recovering unpaid taxed costs of R 68 117.41 owed to her by Cooper Junior in terms of an order of this Court dated 1 July 2017. The financial enquiry envisaged in s 65A(1) was scheduled to take place on 28 November 2017.

3. On 23 August 2017 Greeff's attorney issued a subpoena *duces tecum* against the second respondent ("ABSA") requiring the production of bank statements and applications for credit in respect of both Cooper Junior and the first respondent ("Cooper Senior"). Cooper Senior is the father of Cooper Junior and the two have identical names. This judgment deals only with the subpoena in relation to Cooper Senior, which I shall refer to as "the subpoena".

4. Cooper Senior was aggrieved by the subpoena. He brought an urgent *ex parte* application under case number 6765/2017 in the Cape Town Magistrates' Court on 6 November 2017 for an order interdicting ABSA from filing any of his bank statements in terms of the subpoena, alternatively setting aside the subpoena. The relevant prayers in the notice of motion read as follows:

"2. That ... ABSA Bank be interdicted in terms of Section 30(1) of the Magistrates' Court Act 32 of 1944 from filing any bank statements relating to any accounts, or any information regarding applications for credit in terms of the subpoena *duces tecum* issued on the 23rd of August 2017 relating to NEVILLE CHARLES COOPER (Snr) with ID Number 4205265096082;

3. *Alternatively, that the subpoena duces tecum issued on the 23d of August 2017 as it relates to the Applicant, being Neville Charles Cooper (Snr) with ID Number 4205265096082, be set aside.”*
5. The magistrate on 6 November 2017 granted an interdict as sought in prayer 2, quoted above, and issued a *Rule Nisi* returnable on 29 November 2017 calling upon the respondents in that application¹ to show cause why the order should not be made final.
6. Greeff opposed the granting of a final order, and on 23 January 2018 the magistrate gave judgment in favour of Cooper Senior confirming the *Rule Nisi* and ordering Greeff to pay costs.
7. This appeal lies against that judgment.

The litigation history

8. Greeff and Cooper Junior are the parents of a minor child, Caitlyn. Cooper Senior is the father of Cooper Junior, and the grandfather of Caitlyn.
9. Greeff and Cooper Junior have been involved in extensive litigation involving Caitlyn. In the process Greeff obtained two costs orders against Cooper Junior, one in the Children’s Court and one in this Court.
10. Cooper Junior failed to pay the Children’s Court costs, and Greeff resorted to proceedings in terms of s 65A(1) of the Act in the Cape Town Magistrates’ Court in an attempt to recover the Children’s Court costs. As Cooper Junior

¹ ABSA, Greeff and Cooper Junior were cited as first, second and third respondents respectively.

was uncooperative, failing despite four appearances over six months to provide the necessary documents, Greeff's attorney resorted to issuing subpoenas *duces tecum* to compel various financial institutions to produce financial records of both Cooper Junior and Cooper Senior.

11. The reason for this course of conduct was explained in Greeff's affidavit in opposition to the confirmation of the *Rule Nisi* in the court *a quo*. Access to Cooper Senior's bank statements was sought because it was apparent from documents which Cooper Junior had provided that an amount of R 10 000.00 per month was paid to him by Cooper Senior, who apparently employed Cooper Junior in his business. This amount had previously been R 20 000.00 per month, but was mysteriously reduced to R 10 000.00 in June 2014, precisely one year before Cooper Junior launched an application to reduce the amount of maintenance payable for Caitlyn. It had further been noted that Cooper Junior used Cooper Senior's credit card to fund a lavish lifestyle despite his pleas of poverty. Greeff also suspected that Cooper Junior was working as a specialist Information Technology Consultant and that his earnings were being paid into the account of his father, who bears the identical name. It was also suspected that Cooper Senior was funding Cooper Junior's expenses and paying money for him into an undisclosed bank account. For all these reasons it was considered necessary to have sight of the financial records of both father and son.
12. In the event, the procedure bore fruit as Cooper Senior, evidently reluctant to produce his bank statements, agreed to pay the Children's Court bill of costs in the amount of some R 28 000.00 on behalf of Cooper Junior. He did so on

condition that the subpoenas *duces tecum* in respect of both Cooper Senior and Junior were withdrawn.

13. The High Court bill of costs remained unpaid, however, prompting Greeff to pursue further s 65 proceedings against Cooper Junior in an attempt to recover the High Court costs.
14. A notice in terms of s 65A(1) was issued on 11 August 2017 calling upon Cooper Junior to appear on 28 November 2017 for purposes of an enquiry into his financial position with a view to making an order in regard to payment of the taxed High Court costs in the amount of R 68 117.41. The notice was duly served on Cooper Junior on 13 September 2017.
15. The subpoena was then issued on 23 August 2017 and served on ABSA, who alerted Cooper Senior to its existence on 5 October 2017. ABSA informed him that they were obliged to comply with the subpoena, and that they had commenced locating the required documents and would shortly deliver them to the relevant authorities.
16. Cooper wrote to ABSA on 9 October 2017 pointing out that in terms of the subpoena ABSA was required to produce the documents to the court on the day of the hearing, i.e. 28 November 2017, and was neither obliged, nor entitled, to hand over the documents to Greeff or her legal representatives. Cooper Senior also stated that he regarded the subpoena as “*an abuse*” and a “*fishing expedition*” and indicated that he would challenge “*the extremely*

wide ambit of this subpoena at the hearing". He expressly forbade ABSA from disclosing his documents to Greeff or her legal representatives.

17. ABSA responded in writing on 20 October 2017, stating that they were obliged to disclose customer information in accordance with statute. ABSA regarded itself as obliged to comply with the subpoena, and stated that the documents requested therein would be "*delivered to the Clerk of the Court in compliance with Rule 38(1) of the Uniform Rules of Court.*" ABSA warned that if it did not receive a Court Order setting aside the subpoena by 27 October 2017, it would deliver the documents to the Clerk of the Court. Cooper Senior evidently feared that once this was done, Greeff's attorney would have access to the documents.

18. ABSA evidently did not appreciate that it was dealing with a Magistrates' Court subpoena and that Uniform Rule 38 is not applicable. The High Court and Magistrates' Court rules regarding subpoenas *duces tecum* differ. Whereas Uniform Rule 38(1)(b)² obliges the recipient of a subpoena *duces tecum* to hand the documents to the Registrar as soon as possible, whereafter the parties to the matter may take copies thereof, Rule 26(3)³ of the Magistrates' Court Rules only obliges the recipient of such a subpoena to produce the documents to the court at the trial.

² **Uniform Rule 38(1)(b) reads as follows:**

"Any witness who has been required to produce any deed, document, writing or tape recording at the trial shall hand it over to the registrar as soon as possible unless the witness claims that the deed, document, writing or tape recording is privileged. Thereafter the parties may inspect such deed, document, writing or tape recording and make copies or transcriptions thereof, after which the witness is entitled to its return."

³ **Magistrates' Court Rule 26(3) reads as follows:**

"If any witness has in his or her possession or control any deed, instrument, writing or thing which the party requiring his or her attendance desires to be produced in evidence, the subpoena shall specify such document or thing and require him or her to produce it to the court at the trial."

19. In the event Cooper Senior approached the Cape Town Magistrates' Court for the urgent interdictory relief referred to above aimed at preventing ABSA from filing documents at court in response to the subpoena. He complained that the subpoena was an abuse and a fishing expedition on the part of Greeff because Cooper Junior had not yet had a chance to place his financial information before the court (the implication being that Cooper Senior's information might not be required), that the subpoena was vague and overly wide in ambit and that it breached his right to privacy. Cooper Senior alleged that he had no alternative but to approach the court for relief since ABSA had made it clear that they would deliver his information to the Clerk of the Court unless he obtained a Court Order setting aside the subpoena.
20. Greeff in her answering affidavit denied the allegations of abuse of process and disclosed why Cooper Senior's bank statements were required. She explained that Cooper Junior was living far beyond his professed means and that there were indications that he was receiving funds in undisclosed accounts, which included funds emanating from Cooper Senior.

The judgment of the court *a quo*

21. The magistrate referred to s 65A(1) and placed great emphasis on the fact that the section relates to proceedings between the judgment creditor and the judgment debtor, and that Cooper Senior is not a party to the s 65 proceedings between Greeff and Cooper Junior. She observed that Cooper Senior is not responsible for the debts of Cooper Junior, that any amounts

which he pays Cooper Junior are at his discretion, and that a court cannot order him to assume responsibility for his son's debts. She held – and the reasoning is difficult to follow in this regard – that the subpoena was “premature” because Cooper Senior was “not a party to any of the court proceedings” and because Cooper Senior was not indebted to Greeff.

22. The point evidently escaped the magistrate that Cooper Senior's bank accounts and documents were being sought not because Cooper Senior owed Greeff any money, but because it was thought that his accounts would reveal payments into undisclosed bank accounts for the benefit of Cooper Junior as well as the receipt of monies earned by Cooper Junior. Greeff's affidavit makes it clear that there was a well-grounded suspicion that Cooper Senior was assisting Cooper Junior to evade payment of his obligations to Greeff, *inter alia* by permitting Cooper Junior's earnings to be deposited into his bank account.

23. The magistrate had no regard to the provisions of s 65D(1) of the Act, which reads as follows in relevant part:

“On the appearance before the court of the judgment debtor [in terms of s 65A(1)] ... the court shall permit the examination or cross-examination of the judgment debtor ... on all matters relevant to the judgment debtor's financial position and his or her ability to pay the judgment debt, and the court shall receive such further evidence as may be adduced orally or by affidavit or in such other manner as the court may deem just, by or on behalf of either the judgment debtor or the judgment creditor, as is material to the determination of the judgment debtor's financial position and his or her ability to pay the judgment debt, and for the purposes of such evidence witnesses may be summoned in the manner prescribed in the rules.” [Emphasis added]

24. Section 65D(1) of the Act makes it clear that a judgment creditor is entitled to adduce relevant evidence at a s 65A(1) enquiry, and that witnesses may be summoned for that purpose as provided for in the Magistrates' Court Rules. Thus it is entirely permissible to subpoena a third party to give evidence at a s 65 enquiry, and/or produce documents, if the third party has information relevant to the judgment debtor's financial position and his or her ability to pay the judgment debt. The magistrate therefore misdirected herself when she found that the subpoena *duces tecum* issued in respect of Cooper Senior's documents was "*premature*".
25. In my view the magistrate also misdirected herself by failing to consider whether the interdictory relief sought by Cooper Senior was legally competent, a question which I turn to examine.

Was the interdict sought legally competent?

26. It is important to note that a Magistrates' Court has no general power to set aside a subpoena, and is bound by the four corners of the Act and the Magistrates' Court Rules ("the rules"). It may only cancel a subpoena issued against a judicial officer in the circumstances set out in s 51(3) of the Act,⁴ and may set aside service of a subpoena in terms of Rule 26(5) of the rules where there has been short service.⁵

⁴ Where it appears to the court that the judicial officer is unable to give evidence or produce any documents, or that the documents could be produced by someone else, or that compelling the attendance of the judicial officer would be an abuse of the process of the court.

⁵ **Magistrates' Court Rule 26(5) reads as follows:**

"The court may set aside service of any subpoena if it appears that the witness was not given reasonable time to enable him or her to appear in pursuance of the subpoena."

27. Unlike the High Court, a Magistrates' Court has no inherent jurisdiction to set aside a subpoena on the grounds that it is vexatious or amounts to an abuse of the process of the court.⁶ Therefore where a person wishes to challenge a subpoena issued out of the Magistrates' Court on the grounds that it amounts to an abuse of process, it is incumbent on him or her to apply to the High Court for an order setting aside the subpoena as an abuse.⁷
28. However Cooper did not do so. Instead he approached the Magistrates' Court for relief which, although couched as an interdict, was predicated on the basis that the subpoena was an abuse. Indeed the notice of motion included an alternative prayer for the setting aside of the subpoena on that basis.
29. It bears emphasis that Cooper Senior did not base his case on the fact that ABSA was under a misapprehension regarding what was required of it under Rule 26(3) of the rules, and that it was only obliged (and therefore only entitled) to produce the documents to the court on the day of the hearing. He did not seek a temporary interdict restraining ABSA from delivering the documents to the clerk of the court prior to the hearing with a view to his appearing at court and objecting to their production on the day of the hearing.⁸

⁶ *S v Matisonn* 1981 (3) SA 302 (A) at 313 E – F; *Marais v Smith* 2000 (2) SA 924 (W) at 933 F – G.

⁷ *S v Matisonn* (*supra*) at 313 F. See, too, *De Klerk v Scheepers and Others* 2005 (5) SA 244 (T) where the High Court set aside as an abuse of process a subpoena issued against a former head of state to appear and testify in support of a special plea which the accused had entered in a criminal trial pending before another court.

⁸ Cooper Senior would have been entitled to appear at the hearing on 28 November 2017 and object to the production and admission into evidence of his documents on the grounds that they were not material to the determination of Cooper Junior's financial position and his ability to pay the judgment debt, as envisaged in s 65D(1), in other words on the grounds of relevance. The magistrate would then have been in a position to assess whether Cooper Junior's documents were sufficient for purposes of the enquiry, or whether indeed Cooper Senior's documents were required in order to make an accurate assessment of Cooper Junior's true financial position. The magistrate, having heard argument from both parties, would have been called upon to make a ruling in this regard. Any party aggrieved by such ruling would have been entitled to launch review

30. Such narrow interim relief would have been unexceptionable. By virtue of his contractual relationship with ABSA as its customer, he would have been entitled to prevent ABSA from disclosing his confidential information otherwise than strictly in accordance with the behests of Rule 26(3). Thus he could have interdicted ABSA from delivering his documents to the Clerk of the Court instead of producing them to the court at the hearing, based on the wording of Rule 26 (3).
31. But instead he relied on an alleged abuse of process and breach of his right to privacy, as one would in an application to set aside a subpoena. The case made out in the founding affidavit makes it clear that although the relief was couched as an interdict, the application was, in substance and effect, an application to set aside the subpoena – relief which a Magistrates' Court cannot grant.
32. The requirements for a final interdict are trite. An applicant is required to establish a clear right, an infringement of the right actually committed or reasonably apprehended, and the absence of an alternative remedy.⁹ Cooper Senior relied on a breach of right to privacy by virtue of a subpoena which he contended was an abuse, or, to put it differently, had no legitimate purpose.
33. The right to privacy is not unlimited. All things being equal, requiring citizens to give material evidence or produce relevant documents at court in terms of

proceedings in the High Court in terms of s 22 (1)(d) of the Superior Courts Act 10 of 2013. (*cf Marais v Smith (supra)* at 933 D – F.

⁹ See LTC Harms '*Interdict*' 2 LAWSA Part 11 (2 ed), paras 396 to 399.

the statutes governing subpoenas constitutes a legitimate limitation of the right to privacy. As Griesel J observed in *Meyers v Marcus and Another*:¹⁰

“Our courts have repeatedly emphasised the importance of the general duty resting on all members of society to give whatever evidence they are capable of giving, coupled with the concomitant right of litigants to command such assistance.”

34. However the right to privacy may be unlawfully infringed by a subpoena which amounts in fact to an abuse of process, for instance because it has no legitimate purpose and is intended merely to oppress and harass the witness, or because the information or documents sought are irrelevant or insufficiently relevant to the case, or could more easily be obtained from another source.¹¹
35. In order to make out the case of an unlawful invasion of his right to privacy, Cooper Senior had to persuade the court that the subpoena was an abuse of process. I consider that the framing of the relief as an interdict was ill-conceived. Firstly, the notion of interdicting compliance with lawful process is counter-intuitive. A subpoena is lawful process which, absent lawful excuse, must be obeyed unless and until set aside by a competent court. If relief is required because the subpoena exceeds the bounds of lawful process, a competent court must decide whether or not the subpoena is an abuse. If it is, it must be declared as such and set aside.
36. Secondly, asking for an interdict to prevent compliance with a subpoena because it is an abuse of process is rather like trying to sneak in through the

¹⁰ 2004 (5) SA 315 (C) at para 22.

¹¹ See *Beinash v Wixely* 1997 (3) SA 721 (SCA); *Meyers v Marcus and Another* 2004 (5) SA 315 (C).

back door because you are not allowed to enter through the front door. It seems to me that if a Magistrates' Court does not have jurisdiction to set aside a subpoena on the grounds of abuse, it cannot have jurisdiction to interdict compliance with a subpoena on the grounds that it is an abuse, which amounts to the same thing. To hold otherwise would make a mockery of the limits of the Magistrates' Court jurisdiction in regard to subpoenas.

37. It seems to me that the proper remedy where it is complained that a Magistrates' Court subpoena amounts to an abuse of process, is to apply to the High Court for the setting aside of the subpoena, and not to interdict compliance with the subpoena. In my view the interdictory relief granted by the magistrate was not legally competent as it amounted, in substance, to an order setting aside the subpoena, which exceeded the court's jurisdiction.

Condonation, mootness and costs

38. The notice of appeal was delivered on 1 March 2018 and security for the respondent's costs furnished on 10 May 2018, on which date Greeff's attorney also delivered a notice in terms of Uniform Rule 50(4)(a) requesting a date for the hearing of the appeal.
39. The notice of appeal was delivered four court days out of time. On 9 July 2018 Greeff filed an application for condonation of the late delivery of her notice of appeal. The application was opposed, and in his answering affidavit Cooper Senior took the point that the appeal had not been properly noted until 10 May

2018 when security for costs was furnished.¹² Greeff's attorney deposed to a replying affidavit in the condonation application in which she explained that when she filed the notice of appeal at the Magistrates' Court on 1 March 2018, she attempted to pay the security of R 1 000.00 into court, but was told that the money could not be received since the court file was missing. She attempted unsuccessfully on no less than six occasions to pay the security into court, but the court file was not available until 10 May 2018 when the security was finally paid.

40. This information should have been included in the founding affidavit in the condonation application, but it appears that the issue of timeous lodging of security for costs was overlooked when the condonation application was prepared. Be that as it may, in my view the explanation for the default is acceptable, and condonation should be granted in the interests of justice in view of the strong merits of the appeal.
41. On 5 March 2018 Greeff served a subpoena *duces tecum* on Cooper Senior calling upon him to furnish all bank statements from which monies are paid to Cooper Junior from the date of the commencement of the latter's employment with Cooper Senior, and to testify at a s 65 enquiry into the affairs of Cooper Junior on 14 March 2018.
42. Therefore by the time a date was sought for the hearing of the appeal, the matter had already ceased to have practical significance for the parties

¹² In terms of Magistrates' Court Rule 51(4) an appeal is noted by the delivery of a notice of appeal and the giving of security for costs.

because the s 65 proceedings to which the subpoena pertains have come and gone. The appeal has no relevance to the parties save for the issue of costs.

43. Greeff was liable for the costs of Cooper Senior in the court *a quo*. A bill of costs was drawn in the amount of R 17 591.68, but was taxed and allowed on 8 March 2018 in the lesser amount of R 3 840.26. To all intents and purposes an appeal was fought in the High Court, with all the attendant costs, in order to escape a costs liability of R 3 840.26.
44. In terms of s 16(2)(a)(i) of the Superior Courts Act 10 of 2013 an appeal may be dismissed on the sole ground that the issues are of such a nature that the decision sought will have no practical effect or result. Section 16(2)(a)(ii) provides that the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs, save in exceptional circumstances.
45. Ms Ipser, who appeared for Cooper Senior, argued that the appeal should be dismissed because the decision sought on appeal had been rendered moot because a similar subpoena had been served on Cooper Senior in respect of a hearing which had already come and gone. In essence the decision sought on appeal had been superseded by subsequent events. Mr Vismer, however, who appeared for Greeff, contended that the magistrates' judgment was legally incompetent and manifestly wrong, and that it would be contrary to the interests of justice to allow it to stand. He also submitted that the matter was significant for legal practice generally.

46. Section 16(2)(a)(i) confers a discretion on the Court.¹³ Notwithstanding the mootness of the issue as between the parties to the litigation, a court may deal with the merits of the appeal where discrete legal issues of public importance arise which will affect similar matters in future.¹⁴ Although the answer in this case seems obvious, the issue raised in this appeal is a novel one, and the decision would have a practical effect in other cases where litigants seek to challenge a Magistrates' Court subpoena. It seems to me, therefore, that it would be in the interests of justice to deal with the merits of the appeal rather than dismissing it in terms of s 16(2)(a)(i) because of a lack of practical effect as between the parties.
47. However, this court's willingness to entertain the appeal should not be construed as tacit approval of the parties' conduct in this matter. While it is understandable that litigants, and their legal representatives, may be sorely aggrieved at a decision perceived to be patently wrong and palpably unfair, righteous indignation should not be allowed to displace common sense when it comes to considering an appeal. Litigants should be discouraged from pursuing appeals in circumstances such as the present where the relief is essentially academic and the cost of pursuing the appeal outweighs any potential benefit.
48. Once the costs for which Greeff was liable in terms of the judgment of the court *a quo* were reduced to a mere R 3 840.26, it made no sense whatsoever

¹³ *Centre for Child Law v Hoërskool Fochville and Another* 2016 (2) SA 121 (SCA) para 11. See, too, *Absa Bank v Van Rensburg* 2014 (4) SA 626 (SCA) para 8 (dealing with s 21A(1) of the now repealed Supreme Court Act 59 of 1959, being the forerunner to s 16(2)(a)(i) of the Superior Courts Act 10 of 2013).

¹⁴ *Centre for Child Law v Hoërskool Fochville and Another* (*supra*) para 11; *RAF v Faria* 2014 (6) SA 19 (SCA) para 25; *Motor Industry Staff Association v Macun NO and Others* 2016 (5) SA 76 (SCA) para 25.

to persist with the appeal. Nor did it make any sense for Cooper Senior to resist the appeal. Yet the parties pressed on regardless, running up costs in the process. One is left with the inescapable impression that this was a “grudge match” being fought to the bitter end.

49. The court is not bound to award costs in favour of a successful appellant. In the particular circumstances of this case, and having regard to the fact that the appeal had no practical effect as between the parties and simply ran up unnecessary costs, it seems to me that the right thing to do would be to make no order as to costs in the appeal, leaving each party to bear their own costs.

Conclusion

50. I would therefore make the following order:

1. The late noting of the appeal is condoned.
2. The appeal is upheld, with no order as to costs.
3. The order of the Cape Town Magistrates’ Court made on 26 January 2018 under case number 6765/2017 is set aside and replaced with the following order:

The *Rule Nisi* issued on 6 November 2017 is discharged and the application is dismissed, with costs.

D M DAVIS

Acting Judge of the High Court

I agree and it is so ordered.

M J DOLAMO

Judge of the High Court

For appellant: Adv T Vismer

Instructed by Tanya Nöckler Attorneys

For respondent: Adv M Ipser

Instructed by Ashman Attorneys