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**REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

**CASE NO.: 081393/2024**

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

Date: 17 September 2024

E van der Schyff

In the matter between:

Muthray & Associates Incorporated

First Applicant

Kineil Muthray

Second Applicant

and

ABSA Bank Ltd

First Respondent

Vigneshvarie Pillay

Second Respondent

Thomson Wilks Incorporated

Third Respondent

Keshan Pillay

Fourth Respondent

*In re:*

Keshan Pillay

Plaintiff

and

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JUDGMENT

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Van der Schyff J

**Introduction and background**

- [1] On 23 July 2024, Van der Westhuizen J issued a *Rule Nisi* in the urgent court. The order was returnable on 12 September 2024. The second and third respondents were granted leave to file papers prior to the hearing date on 12 September 2024.
- [2] The order, which operates as an interim interdict pending the return date, reads as follows:
- ‘2. The First Respondent is interdicted and restrained from producing copies of bank statements of the First Applicant Trust Account, with account number: 4[...], for the period 13 August 2020 to 19 June 2024 or any other period, to the Second and/or Third Respondent.
3. The First Respondent is interdicted and restrained from disclosing or providing in any way any personal information of the Applicants or its clients, which information is contained and can be found in the bank statements of the 1<sup>st</sup> Applicant’s Trust Account.’
- [3] The applicants also sought a costs order to be granted *de bonis propriis* against the third respondent, the second respondent’s legal representatives, and a punitive costs order against the second respondent if she opposes the application.
- [4] The urgent court proceedings originated in a subpoena *duces tecum* served on ABSA Bank. Of importance is the fact that ABSA was ordered in terms of this subpoena to serve bank statements of the first applicant’s trust bank account for

the period 13 August 2020 to 19 June 2024, to *the defendant's attorneys*, lodge it with the registrar of this court, and file same on Caselines.

- [5] The *rule nisi* was enrolled to be heard on the return date, 12 September 2024. The second and third respondents served a condonation application and answering affidavits on the applicants by email on 11 September 2024 at 20h37.
- [6] When the matter was called on the unopposed motion roll, it was evident that counsel for the second and third respondents only had instructions to request that the matter be removed from the roll since it was opposed. He initially did not have any instructions to argue the matter on the merits.

## Discussion

- [7] It is a fallacy for a respondent opposing a matter enrolled in the unopposed motion court at the eleventh hour, to merely accept that the application will be removed from the roll simply because an answering affidavit was filed.
- [8] A notice of intention to oppose the application in the urgent court was filed on 23 July 2023. Despite the *rule nisi* being granted, the respondents failed to file an answering affidavit timeously and filed their answering affidavits the evening before the hearing date. The reasons for the delay in timeously filing an answering affidavit set out in the condonation application are coached in general terms and do not cover the full period of the delay.
- [9] In the condonation application the third respondent claims that the applicants did not provide a timetable for the filing of papers. This view implies that the third respondent, an officer of this court, held the view that papers could be filed at its leisure without any regard to the Uniform Rules of Court or the time spent by the presiding judge in preparing the matters on the unopposed motion roll.
- [10] However, the main reason the *rule nisi* stands to be confirmed is the terms in which the subpoena *duces tecum* is phrased. It is trite that this type of subpoena

requires a witness to produce documents pertinent to a specific case. Rule 38(1)(a)(ii) provides as follows:

‘If any witness is in possession or control of any deed, document, book, writing, tape recording or electronic recording (herein after referred to as a ‘document’) or thing which the party requiring the attendance of such witness desires to be produced in evidence, the subpoena should specify such document or thing *and require such witness to produce it to the court at the trial*’.

- [11] *In casu*, the subpoena served on ABSA Bank requires identified bank statements to be delivered, amongst others, to the defendant’s attorney, the third respondent in this application. Neither Rule 38(1) nor Form 16A in the First Schedule of the Uniform Rules of Court provide for documents to be delivered to any of the party’s attorneys. Rule 35, on the other hand, provides for the discovery of documents in action proceedings. It is evident from the supplementary affidavit filed that the mechanism provided for in Rule 35 was not exhausted before the third respondent issued the subpoena in question.
- [12] I am alive to the fact that the subpoena was not served on the applicants but on ABSA Bank, and that no application has, to date, been launched to have it set aside. The relief sought is, however, tantamount to the setting aside of the subpoena. Section 36(5) of the Superior Court Act 10 of 2013, provides for the cancellation of a subpoena by any judge of the court after reasonable notice by the Registrar to the party who sued out the subpoena.
- [13] It is trite that the ‘documents’ referred to in subrule 38(1)(a)(iii) of the Uniform Rules of Court must be a document that is relevant to the issues before the court.
- [14] The information sought from the first respondent indiscriminately encompasses the totality of transactions recorded in the first applicant’s Trust Bank Account irrespective of the clients it relates to. By seeking access to information on all the transactions recorded in the first applicant’s Trust Bank account statements, the

second and third respondents have cast the net too wide. The judge in the urgent court explained to the second and third respondents' counsel that they cannot use the subpoena in a 'fishing expedition' in the hope of unearthing evidence. The second and third respondents are not entitled to information about people and entities not connected to the divorce proceedings between the second and fourth respondents. The applicants have an interest to protect, that expands their own interest and encompasses the interests of all their clients.

- [15] In its current form, the subpoena ordering ABSA Bank to deliver copies of bank statements to the defendant's attorneys amounts to an abuse of process. Even if condonation is granted, the answering affidavits accepted, and the application postponed to the opposed motion court, the respondents do not have any prospects of success. As a result, the condonation application stands to be dismissed.

## Costs

- [16] It is trite that an award of costs falls in the discretion of the court. This discretion must be exercised judicially, having regard to the facts of the case. It is the duty of a litigant to avoid any course that unduly protracts a lawsuit or increases costs. Adopting the wrong procedure could also result in a party being liable for the costs.<sup>1</sup>
- [17] The third respondent knew a costs order *de bonis propriis* was sought against it. Only an attorney can take responsibility for issuing a subpoena *duces tecum*. The relentless opposition in this application and the manner in which the second and third respondents approached the opposition warrants an order of costs that marks this court's displeasure. Exceptional circumstances are present in this matter that justify the granting of a costs order *de bonis propriis*. Having regard to the facts of this matter, it would not be just to require the second respondent, the third

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<sup>1</sup> *Sceepers and Nolte v Pate* 1909 TS 353.

respondent's client, to carry the costs caused by the failed opposition of the application instituted by the applicants.

## **ORDER**

**In the result, the following order is granted:**

- 1. The condonation application is dismissed;**
- 2. The *rule nisi* is confirmed;**
- 3. The third respondent shall pay the costs of the application, *de bonis propriis*, on the scale as between attorney and client.**

E van der Schyff  
Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

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| For the applicants: | Adv. E de Lange           |
| Instructed by:      | Muthray & Associates Inc. |

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| For the second and third respondents: | Adv. B Denton      |
| Instructed by:                        | Thomson Wilks Inc. |

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|----------------------|-------------------|
| Date of the hearing: | 12 September 2024 |
| Date of judgment:    | 17 September 2024 |