

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

CASE NO : 2019/22224

(1) REPORTABLE: YES/ NO
(2) OF INTEREST TO OTHER JUDGES: YES/ NO
(3) REVISED: YES / NO

12 June 2025

In the matter of

T[...] : S[...] A[...]

Applicant

And

T[...] : G[...] J[...]

First Respondent

MATTHEW MARTINO

Second Respondent

AMANDA WOEST

Third Respondent

In Re :

T[...] : G[...] J[...]

Plaintiff

And

T[...] : S[...] J[...]

First Defendant

T[...] : G[...] J[...] N.O.

Second Defendant

WETHERALL : STEVEN LEE N.O.

Third Defendant

JUDGMENT – APPLICATION FOR LEAVE TO APPEAL

Von Ludwig, AJ

1. Applicant brought an Application to Compel First Respondent's compliance with her R35(3) Notice in their divorce action. In the same application she cited Martino and Woest as Second and Third Respondents and sought to compel them to comply with subpoenas which had been served on them to produce documents relevant to the divorce action notwithstanding that they are not parties to that action.

2. I adjudicated Second and Third Respondents' (herein, for convenience, "the Respondents") Application in terms of s30(1) to have the Application to Compel (and an Affidavit which Applicant had filed in reply to Respondent's s30(2)(b) Notice) set aside.

3. I dismissed the Application and ordered the Respondents to pay attorney client costs.

4. The Respondents have sought leave to appeal the whole of my Judgment and Order.

5. The first point for consideration is that raised by the Applicant that my Judgment and Order is not appealable because it is an Order which (being Interlocutory and/or Incidental) does not have a final effect / does not dispose of the main issues in the Application to Compel.

6. It is clear from my Judgment in the s30(1) Application that I was not called upon to, and did not, deal with the actual Application to Compel which was the “main application” in this sub-set of the litigation. I was not called on to, and nor did I, adjudicate on who could or should be compelled to disclose what and when. I was simply called on to determine whether it was an Irregular Step for the Applicant to have used the same document (a short form Notice of Motion at that, with which Respondents also took issue) to bring all three Respondents before Court to deal with their failure to comply with the different documents which had been served on each of them (R35(3) in Respondent of T[...] and subpoenas in respect of the other two) to produce documents, some of which were called for from all and some of which just from T[...].

7. How any judgment or order dealing with that can be contended to be dispositive of the main application I do not know. I clearly contemplated in my own Judgment which is the subject of this Application for Leave to Appeal that there would still be “the Court which adjudicates on the eventual Application to Compel”.

8. There can thus be no basis to contend that my Judgment and Order was final and/or disposes of the main issues in the application in question (being the Application to Compel). As such, irrespective of the fact that I did not, in such Judgment, consider it necessary to formally find whether the application before me was Interlocutory or Incidental, it is clear that it did not deal with, let alone dispose of the main issues in the actual Application to Compel, and cannot be considered to be “final” in the way contemplated in **WK Agricultural Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd** as cited by *Applicant in Heads of Argument at paragraph 16*.

9. The important principle enunciated in **WK Agricultural Holdings** is to “*prevent(s) piecemeal appeals that are often costly and delay the resolution of matters...*”. To appeal my Judgment and Order in this matter, when the court dealing with the actual Application to Compel can and will address all relevant issues, would obviously lead to significant delays and increased costs.

10. For the Respondents to contend that my Judgment is “*definitive of the Respondents’ rights to joinder*” (Respondents’ Heads of Argument paragraph 53) and this “*This compels their participation in the main action*” (Heads paragraph 54) and to speak in this context of the “trial court”, is a leap too far. It is clear that their involvement here has only to do with the subpoenas which were served in them and the subsequent application to compel compliance. I thus reiterate and stand by what I have said in 9 above.

11. As such I am satisfied that, my Judgment and Order not being dispositive of the merits of the Application to Compel, cannot thus be contended to be “final” and is thus not capable of appeal.

12. That in itself can and should dispose of this Application for Leave, but for clarity and for costs I go on to address the substantive application.

13. With regard to the Respondent’s various grounds of appeal I have formed the, albeit humble and cautious, view that, especially given the “higher bar” that an appeal “*would*” *have a reasonable prospect of success*”, that leave to appeal should not be given.

14. I disagree that an appeal is necessary because my judgment “conflicts with the judgment of Goosen J in **Maqeda**” and this conflict requires resolution. My statement in my Judgment that the facts of **Maqeda** “*are so materially distinguishable...that I find it of no bearing*” explains why the **Maqeda** principle is not relevant or applicable in this case and why the judgments of Goosen J and I do not in fact conflict. **Maqeda**, as I said in my Judgment, dealt with a wife herself trying, as Applicant, to join an interlocutory application when she was not a party to the main case. Here, as Respondents, we have witnesses who have received, and apparently ignored, subpoenas, being brought by one of the litigants into an Interlocutory Application in the main case, to procure their adherence to documents served in the main case. There is no “parity of reasoning” by which, as Respondents contend, the Maqeda principle can be applied to the case in hand where the facts, and the results to be achieved, are so materially distinguishable. The judgments are thus not “conflicting” and thus no need for another court to resolved “conflicting” judgments.

15. The Respondent's ground of appeal that the Court did not apply the ratio decidendi enunciated in **Maqeda** to this case is baseless because it ought not to have been applied and could not be applied as the facts herein are materially distinguishable.

16. Respondents' ground of appeal would result in an entirely separate application having to be launched, under a new case number, to deal with an isolated issue, in an existing main action, of subpoenas issued under the main action case number. This cumbersome process cannot possibly be the result intended. It does not require the Court to have made an express finding about where the R30(1) Application is Interlocutory or Incidental. No other Court would perceive this as Respondent's contend it ought reasonably to be perceived.

17. The argument about "initiation" of proceedings and the use of short or long form notice of motion, and whether or not this is an Interlocutory or Incidental Application, is all part of the same contention that Applicant ought to have brought a separate application against the Respondents. If this is not found to have been necessary, then the use of the short form document likewise does not support Respondent's opposition to the application or their application for leave to appeal.

18. The Respondent's ground of appeal based on R10(3) is not entirely clear (which in itself would preclude another Court from coming to any conclusion based thereof), but is in any event misplaced given that R10(3) applies to Defendants being sued in a action, where it is clear that this is an application, these are witnesses (not defendants) and there is no attempt to join them as defendants since the relief sought in the main action is not against them.

19. Even if one were able to stretch the application of R10(3) which I do not believe can be done in this matter, I am of the view that the nature of the application is materially the same against all three Respondents namely to procure their compliance with documents which call on them to provide paperwork Applicant requires in her divorce, all of which documents are relevant one way or another to the proprietary situation of her husband.

20. The differences between subpoenas and a R35(3) Notice, and parties who are or who are not parties to the litigation, can all be dealt with by the Court to be seized of the Application to Compel.

21. The convoluted attempt at reasoning (my quoting) beginning with “Maqueda must be applied” (which is incorrect) and leading to “but the Respondents could not be joined because this breaches R10(3)” (which is also incorrect) fails on both legs and there can be no genuine submission that any other Court would come to a different conclusion based on this defective train of argument.

22. This disposes of grounds to appeal listed in paragraphs 6 and 7 of the Application for Leave.

23. In response to the ground in paragraph 8 no court could, and certainly not would, disagree with the premise that however the application to compel came before Court, each party can and must deal only with what that party has been required to provide, and whether that is done in the separate process contemplated by the Respondents or in this process, what they would have to say is what they would say. Being part of the same application as has been brought against the First Respondent does not require the Second and Third Respondents to deal with the allegations made and relief sought against him.

24. The issues about delays and confirmatory affidavits did not in any event go to the root of the merits of the R30(1) application and such “findings” have no material effect on the basic Judgment and Order. Even if this Court erred in these findings, (and it is submitted this Court was correct in its findings and another Court would share these conclusions) they have little relevance to the material issues and thus little or no influence in any appeal.

25. Insofar as this Court made a “finding” on the issues of the “Reply” and what “ought” to have been done in respect thereof, this likewise had no effect on the substance of the Judgment or Order and could and would not cause any court to come to a different conclusion on the substance of the matter.

26. As the Applicant submits in Heads of Argument, it does not “pass muster” for the Respondents to simply list every aspect of the Court’s findings/Judgment and simply content (my quotes) “this was wrong”. It is for the Respondents to substantively illustrate why another Court would come to a different conclusion, and with regard to the issues of delay, filing of Confirmatory Affidavits and the “Replies” this has not been done. As such there is nothing herein to support the Respondent’s Application for Leave to Appeal.

27. The Court set out clearly why the Respondent’s versions had not only failed but had constituted obvious attempts to delay and avoid furnishing documents, using unfounded bases of law and unsubstantiated procedural points. Describing this as “unnecessarily form over substance approach” does not mean that the Court did not understand the ambit and meaning and purpose of R30. The facts, and lack of merit in the Respondents’ case, indicate that another Court would not come to a different finding as regards costs and that a costs order on an attorney client basis was justified.

28. The Respondents have made out no case that another Court would come to a different conclusion on any of the grounds of appeal raised by them and that they have any reasonable prospects of success on appeal. There is no conflict with the judgment of Maqeda as the facts are so distinguishable that the Maqeda principle cannot be contended to apply herein and hence no reason why an appeal should be heard. Accordingly, the Application for Leave to Appeal is dismissed.

29. Having regard to the manner in which the grounds of appeal have been set out, namely with significant duplication, with little clarity as to the basis on which it is contended that the Court erred, and on which it is submitted that another Court would come to a different conclusion, this application is not *bona fides* and appears to be another strategy used by Respondents to further delay and avoid any disclosure of documents. An appeal would certainly do the exact opposite of leading to any form of just or prompt resolution of any of the issues between the parties to the main divorce action or the parties to this Application to Compel.

Order

30. In my view there was this no basis for an Application for Leave to Appeal to be brought, and no basis therefore for it to be granted. As such I award the costs of this application for leave to appeal against the Respondents, jointly and severally, on an attorney and client scale.

**C VON LUDWIG
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG**

Date of Hearing:	04 June 2025
Date of Judgment:	12 June 2025
For the Applicant:	Adv H Epstein SC and Adv K Naidoo instructed by Douglas Smart Attorneys
For the Respondents:	Mr M Nowitz instructed by Nowitz Attorneys