

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

Case No: 2025-054457

In the matter between:

S[...] P[...]

Applicant

and

S[...] B[...]

First Respondent

CONSUMER GOOD COUNCIL OF SA

Second Respondent

Heard: 22 April 2025

Delivered Electronically on: 19 June 2025

JUDGMENT

LEKHULENI J:

Introduction

[1] This is an application in which the applicant seeks an order setting aside a subpoena *duces tecum* issued by the Registrar of this court on 26 March 2026 under case numbers 2025-038948 and 6700/18. In the subpoena, the first respondent required the Consumer Goods Council of South Africa, (the applicant's employer) to

provide the first respondent with the applicant's salary advice dated from January 2020 up to March 2025. The first respondent also required the applicant's employer to provide the applicant's IRP5 certificates from 2020 to 2025.

[3] The applicant asserted that the matter under case number 6700/18 has been finalised in 2023 with a written judgment issued by Mantame J. The matter under case number 2005-038948 is still pending. However, both matters are motion proceedings. As such, the applicant contends that a subpoena *duces tecum* does not apply to motion proceedings. The applicant sought an order to have the subpoena set aside. The first respondent opposed the application and filed the necessary answering affidavit. The second respondent (Consumer Goods Council of South Africa) did not oppose the application. Instead, it filed a notice to abide.

Background facts

[4] The applicant and the first respondent were married and have two children aged 15 and 19 respectively. The children are staying with the first respondent. The applicant and the first respondent were divorced by this court on 20 August 2010, and their decree of divorce incorporated a maintenance order for the maintenance of their two children. The applicant and the first respondent were recently involved in a trial over a maintenance dispute of their children in the Cape Town Magistrates Court under case number 301/23/368. In that case, the applicant launched a substitution application in respect of the maintenance payable for the minor children. The first respondent opposed the application.

[5] The maintenance proceedings endured several days, culminating in an order granted on 14 February 2025. In addition to medical aid and other related costs, the maintenance court ordered the applicant to pay a cash component of maintenance to the first respondent in the sum of R172 188.63 towards the tuition cost of their major child from 26 March 2025 into the first respondent's bank account. The court also ordered the applicant to pay R20 906.14 towards the yearly school fees of their minor child. The total amount that the applicant had to pay as maintenance for his two children as of 26 March 2025 was a total sum of R222 197.22.

[6] After the maintenance order was granted, the applicant brought an urgent application in this court to suspend the implementation of the court order granted by the maintenance court. The applicant averred that the order granted by the maintenance court was almost double his net salary and that he could not afford to pay same. The applicant sought an order to have the maintenance order suspended pending the outcome of an appeal against that order. The applicant also prayed for an interim maintenance order to be granted to provide for the children's interim maintenance.

[7] The first respondent did not oppose or file opposing papers regarding that urgent application. After considering the matter, on 24 March 2025, the urgent court granted an interim order suspending the maintenance order issued by the maintenance court and called upon the first respondent to show cause on 12 June 2025 why the interim order suspending the maintenance order issued by the maintenance court should not be made final pending the outcome of the appeal hearing.

[8] Pursuant to that order, the first respondent issued a subpoena *duces tecum* and served it upon the applicant and the second respondent, the applicant's employer. According to the first respondent, the basis for issuing the subpoena was that the applicant misled the court in his application to suspend the maintenance order granted by the maintenance court. The first respondent asserted that the maintenance order granted by the maintenance court on 17 March 2025 was in line with what was provided by the applicant in terms of his monthly salary as well as his annual bonus that he receives, which amounts to over R1,000,000 a year.

[9] The first respondent asserted that the applicant did not provide proof to support his claim that he cannot afford to pay maintenance as ordered or any evidence to support that his financial standpoint has taken a turn for the worse ever since the order was made. To the contrary, the first respondent asserted that the applicant's IRP5, together with his March 2025 salary advice, will prove indisputably that the applicant can afford to pay the maintenance as ordered by the maintenance court and still have sufficient surplus left to manage his expenses for the month of March 2025.

[10] For this reason, the first respondent issued the subpoena *duces tecum* to prove that the applicant lied in his affidavit when he stated in his application for the suspension of the maintenance order that he could not afford the amount ordered by the maintenance court as his IRP5 will show that he had received more than a million rand in the month of March 2025 when he was supposed to pay in terms of the maintenance order. The first respondent requested this information to counter the applicant's claims of being unable to afford the maintenance order granted by the maintenance court. Furthermore, with this information, the first respondent seeks to have the interim order suspending the operation of the maintenance order discharged.

[11] On the other hand, the applicant sought an order that the subpoena *duces tecum* be set aside. The applicant posits that the documents the first respondent seeks are irrelevant. Furthermore, the applicant avers that should the second respondent provide the applicant's financial documents to the first respondent, there will be irreparable harm because there is no way the disclosure can be reversed. In the applicant's view, the documents sought by the first respondent relate to the actual maintenance matter that the maintenance court finalised. Mr Abduraouf, the applicant's counsel, implored the court to set aside the subpoena *duces tecum* and that the first respondent be ordered to pay the costs of this application, including the costs of counsel on scale C.

Discussion

[12] As foreshadowed above, the applicant seeks an order for the subpoena *duces tecum* to be set aside. The subpoena was issued under cases 6700/18 and 2025-038948. Case 2025-038948 is still pending in this court. The first respondent requested information from the applicant's employer to counter the applicant's claims of being unable to afford maintenance for their minor children under case number 2025-038948. An interim order suspending the maintenance order was granted. The first respondent stated that the applicant received payments exceeding R1,000,000 annually in March. When the maintenance court ordered him to start paying R172 188.63 in March 2025, it based its decision on this fact.

[13] In my opinion, the diligent efforts of the first respondent, an unrepresented litigant who has earnestly strived to secure the well-being and maintenance of her children, should not be characterised as an abuse of the court process. Her commitment to navigating the complexities of the legal system in person underscores her genuine intent to vindicate her children's needs, particularly maintenance. I am mindful that the current dispute between the applicant and the first respondent under case number 2025-038948 is an application or motion proceedings. I am also cognisant of the fact that there is no action or trial proceeding pending between the first respondent and the applicant. However, in my opinion, this matter stands on a different footing.

[14] It is well established in our law that in action or trial proceedings, the Registrar of the court may issue a subpoena *duces tecum* as provided for in Rule 38 of the rules of this court. Rule 38(1)(a)(iii) and (c) of the Uniform Rules make provision for various procedures to procure evidence for a trial. In addition, Rule 38 makes provision for the manner in which evidence will be adduced at a trial. It does not ordinarily deal with motion proceedings.

[15] In the case at bar, it is very clear that the applicant seeks the discovery of documents from the applicant to dispel the notion that the applicant cannot afford to pay the R172 188.63 maintenance ordered by the maintenance court. Unfortunately, she invoked Rule 38 instead of Rule 35(13). In my view, this incongruity is not the end of the matter, especially in a case such as this, which involves a minor and a dependent child who is at Stellenbosch University. A final order suspending the maintenance order issued by the maintenance court pending the finalisation of appeal proceedings will undoubtedly have serious consequences for the maintenance of the parties' two children. It must be stressed that in terms of section 25(3) of the Maintenance Act 99 of 1998, an appeal does not suspend the payment of maintenance in accordance with the payment of the maintenance order in question. Evidently, a final suspension of the maintenance court in this matter will have a deleterious effect on the minor children.

[16] The first respondent appeared in person. She issued the subpoena *duces tecum* with the assistance of the Registrar. The first respondent is the ex-wife of the applicant. The first respondent stated that at the maintenance court, the applicant confirmed during cross-examination that he had received bonuses since he was employed by the second respondent in 2016, and that he received a bonus every year.

[17] The first respondent averred that her request in terms of the subpoena *duces tecum* is to showcase that the applicant lied in his affidavit when he said that he could not afford to pay the R172 188.63. This amount, according to the first respondent, was granted by the maintenance court based on the evidence that was placed before the court. The first respondent asserted that when the interim order was granted suspending the maintenance order, this information was not placed before court. She averred further that she required this information to be incorporated in her answering affidavit, intended to oppose the final confirmation of suspending the maintenance order.

[18] The record of this matter reveals that the first respondent battled to coerce the applicant to honour his maintenance obligations. The first respondent has been looking after the children alone without the applicant's assistance. She is primarily left to nurture their children and shoulders the financial burden alone. Concernedly, in an application for variation of the maintenance order between the applicant and the first respondent that served before this court on 7 June 2023, Mantame J, stated as follows on the conduct of the applicant:

‘In fact, it is quite shocking that a father and a parent would celebrate (by taking a legal point) on a patent error that has been made unintentionally, on the fact that he would not be required to pay maintenance. *This has been a trend he adopted since he parted ways with the applicant which resulted in him being estranged from his own children.* The respondent has always maintained an upper hand towards providing maintenance of his minor children. *He contributed financially as and when it pleased him.* This attitude is insensitive, vindictive and spiteful to say the least. In fact, the report of the family advocate portrays a picture of an absent father where there is no

relationship between the minor children and himself. They consider their own father a total stranger in their lives.’ (emphasis added)

[19] I am mindful that parties and their legal advisors should not be encouraged to become slack in the observance of the court Rules, which are an important element in the machinery for the administration of justice. However, on the other hand, technical objections to less-than-perfect procedural steps should not be permitted in the absence of prejudice to interfere with the expeditious and, if possible, the inexpensive decision of cases on their real merits.¹ If the subpoena is set aside, the respondent will surely issue the Rule 35(13) notice, which would serve the same purpose as the current subpoena the applicant issued. This, in my view, will delay the finalisation of the matter to the prejudice of the minor and the dependent child.

[20] Most importantly, this matter centres around the maintenance of a minor child and a dependent child who is at a tertiary institution. As the upper guardian of minors, this court is empowered and under a duty to consider and evaluate all relevant facts placed before it with a view to deciding the issue which is of paramount importance: the best interests of the child. This case, in my view, cannot be divorced from the well-established principle that in all matters concerning the care, protection and well-being of a child, the standard that the child's best interest is of paramount importance must be applied.² The interest of the minor child should not be held at ransom for the sake of legal niceties and formalism.³ The interest of the children must be considered within the wider context of an objective regard of all relevant factors.⁴ Simply put, the centrality of the child's best interest in a case such as this must guide the court in decision making.

[21] The applicant pleaded financial hardship, leading to an interim suspension of the maintenance order issued against him by the maintenance court. The first respondent refutes the applicant's allegation of indigence and seeks to place facts to dispel the applicant's allegations. The applicant's counsel argued that the procedure

¹ *JA in Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 278F-G.

² See s 9 of the Children's Act of 2005 and s 28(2) of the Constitution.

³ *De Gree and Another v Webb and Others (Centres for child law as Amicus Curiae)* 2007 (5) SA 184 (SCA) para 99.

⁴ *Segal v Segal* 1971 (4) SA 317 at 323B.

the first respondent invoked was irregular in that a wrong Rule was invoked. To the extent that the first respondent should have ordinarily invoked Rule 35(13) to secure the relevant information, I agree with counsel; however, to set aside the subpoena *duces tecum* in these circumstances, in my view, will be putting form over substance. Moreover, to do so would, to my mind, amount to paying lip service to the protection of minor and dependent children as envisaged in section 28(2) of the Constitution and section 6 of the Divorce Act 70 of 1979.⁵ It must be stressed that Rules of court are made for the court and not vice versa. The rules are not an end in themselves to be observed for their own sake.

[22] In *Federated Trust Ltd v Botha*,⁶ the court stated:

‘The court does not encourage formalism in the application of the rules. The rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the courts...where one or other of the parties has failed to comply with the requirements of the rules what an order made in terms thereof and prejudices thereby being caused to the opponent, it should be the cause endeavour to remedy such prejudice in a manner appropriate to the circumstances, always bearing in mind the objects for which the rules were designed.’

[23] In the present matter, the circumstances are certainly exceptional. I am mindful that the first respondent is vulnerable and unrepresented. As I see it, there is no prejudice that the applicant will suffer if the subpoena is not set aside. While on the other hand, setting aside the subpoena will have deleterious effects on the first respondent and the children.

Order

[24] Consequently, given all these considerations, the following order is granted:

24.1 The applicant’s application is hereby dismissed.

⁵ *J.A.L v J.L and Another* (19441/2020) [2022] ZAWCHC 118 (10 June 2022) at para 38.

⁶ 1978 (3) SA 645 (A) at 654C-F

24.2 Each party is ordered to pay his or her own costs.

LEKHULENI JD
JUDGE OF THE HIGH COURT

For the Applicant: Adv Abduroaf
Instructed by: Nicole Lawrence Inc

For the First Respondent: In Person