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**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 GOODS COUNCIL OF SA

Second Respondent

Heard: 3 September 2025

Delivered Electronically on: 14 November 2025

JUDGMENT – LEAVE TO APPEAL

LEKHULENI J:

Introduction

[1] This is an application for leave to appeal to the Supreme Court of Appeal (*the SCA*) alternatively, to the full court of the Western Cape High Court in terms of section 17(1)(a) of the Superior Courts Act 10 of 2013 (*the Superior Courts Act*), against the whole judgment and order of this Court (*the main Judgment*) handed down on 19 June 2025. In that judgment, this Court dismissed the applicant's application to set aside a subpoena *duces tecum* issued by the registrar of this Court at the instance of the first respondent on 26 March 2025. In the subpoena, the first respondent required the second respondent, the Consumer Goods Council of South Africa (the applicant's employer), to provide the first respondent with the applicant's salary advice for the period from January 2020 to March 2025. The first respondent also required the applicant's employer to provide the applicant's IRP5 certificates for the years 2020 to 2025. The applicant now seeks leave to appeal against this Court's decision to dismiss his application to set aside the subpoena *duces tecum*.

Grounds of Appeal

[2] The applicant raised several grounds of appeal in his application for leave to appeal. However, the applicant's grounds of appeal discernible from the notice of appeal can be summarised briefly as follows: The applicant asserts that the appeal has a reasonable prospect of success. The applicant contended that this Court erred in finding that setting aside the subpoena *duces tecum* will have a deleterious effect on the first respondent and the children. According to the applicant, there was no prejudice to the children that warranted concern, and the Court's reference to serious consequences for the children was misplaced. The applicant pointed out that the maintenance order from the Maintenance Court was, according to him, not suspended but instead substituted by an interim High Court order of 24 March 2025 with similar monthly payment provisions in lieu of certain lump sum payments pending appeal.

[3] The applicant also submitted that the Court erred in finding that the applicant would not suffer any prejudice if the subpoena was not set aside. The applicant asserted that his right to privacy and dignity, entrenched in sections 10 and 14 of the Constitution, would be unjustifiably violated if the subpoena was not set aside. Furthermore, the applicant also submitted that case number 2005/038948, under which the subpoena was issued, was an application, and the issuance of a subpoena was not applicable in such a case. In addition, the applicant contended that he would suffer irreparable harm if the applicant's monthly salary advice, dated from January 2020 up to and including 2025, were disclosed. The applicant stated that this Court failed to find that the subpoena *duces tecum* should be set aside and the first respondent should have been ordered to pay the costs of the application on scale B.

The applicable legal principles

[4] The applicant's application for leave to appeal is based on section 17(1)(a) of the Superior Courts Act. Section 17 of the Act regulates applications for leave to appeal from a decision of a High Court. It provides as follows:

'(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

- (a) (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
- (c) Where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'

[5] The provisions of this section makes it is abundantly clear that leave to appeal may only be granted if the Court is of the opinion that (a) the appeal would have a

reasonable prospect of success, or (b) there are other compelling reasons for the appeal to be heard, for instance, where there are conflicting judgments on the matter under consideration that require resolution. In the absence of these conditions, leave to appeal must be refused. The test, which had been applied previously in similar cases, was whether there were reasonable prospects that another court might reach a different conclusion. With the enactment of section 17 of the Superior Courts Act, the threshold for granting leave to appeal a judgment of the High Court has been significantly raised. The use of the word 'would' in subsection 17(1)(a)(i) of the Act imposes a more stringent threshold compared to the provisions of the repealed Supreme Court Act 59 of 1959. (*S v Notshokovu* [2016] ZASCA 112 para 2).

[6] Our courts have emphasised that the Superior Courts Act raised the bar for reasonable prospects of success test. It is not enough that the case is arguable or has some remote chance of success. The applicant must convince the court that there is a realistic prospect of success on appeal.

[7] From the foregoing, what is required of this Court is to consider, objectively and dispassionately, whether there are reasonable prospects that another court will find merit in the arguments advanced by the losing party. (*Valley of the Kings Thaba Motswere (Pty) Ltd and Another v Al Maya International* [2016] 137 (ZAECHGHC) 137 (10 November 2016) para 4). These principles emphasise that the requirement for a successful leave to appeal is more than a mere possibility that another judge might come to a different conclusion. The test is whether there is a reasonable prospect of success that another judge would come to a different conclusion.

Background facts

[8] For the sake of clarity and to give context to the order I grant hereunder, I deem it worthy to briefly set out in summary the facts that led to the granting of the order in the main judgment. As explained in the main judgment, the applicant and the first respondent were divorced by this Court on 20 August 2010. Their decree of divorce incorporated a maintenance order for the maintenance of their two children

(one minor and the other a dependent child). The applicant and the first respondent were subsequently involved in a trial over a maintenance dispute regarding their children in the Cape Town Magistrates' Court, under case number 301/23/368. In that case, the applicant submitted a substitution application regarding the maintenance payable for the minor children.

[9] The maintenance proceedings lasted 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 costs of their major dependent 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. As of 26 March 2025, the total amount the applicant had to pay for the maintenance of his two children was R222,197.22.

[10] 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 suspending the maintenance order pending the outcome of an appeal against that order. The applicant also requested an interim maintenance order to provide for the children's interim maintenance.

[11] The first respondent did not oppose or submit any opposing documents regarding the urgent application. She explained that this was due to challenges in the application being served on her on 21 March 2025, which was a holiday. Furthermore, she was unrepresented and was not familiar with how to submit cases through the online portal. After considering the matter, on 24 March 2025, Khoza AJ, 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.

[12] 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 urgent Court in his application to suspend the maintenance order granted by the maintenance court. The first respondent averred 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, which amounts to over R1,000,000 a year.

[13] The first respondent contended that the applicant did not provide proof to support his claim that he cannot afford to pay maintenance as ordered, nor did he present any evidence to show that his financial position had deteriorated since the order was made. To the contrary, the first respondent argued that the applicant's IRP5, together with the applicant's March 2025 salary advice, will provide incontrovertible evidence that the applicant could 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. The first respondent stated that the maintenance court ordered the applicant to pay her R172,188.63 for their eldest child's tuition, effective from 26 March 2025. This decision was based on the applicant's receipt of a million rand in bonuses on 26 March 2025, which was not taken into account by the urgent Court when it suspended the maintenance order.

[14] The first respondent issued a subpoena *duces tecum* to establish that the applicant provided false information in his founding affidavit concerning his application to suspend the maintenance order. In that affidavit, the applicant asserted that he was unable to afford the amount ordered by the maintenance court. Furthermore, the first respondent sought to use the information received from the applicant's employer to have the interim order suspending the operation of the maintenance order discharged, as, according to her, it was based on false information.

[15] On the other hand, the applicant sought an order to set aside the subpoena *duces tecum*. The applicant stressed that the documents the first respondent sought are irrelevant. Furthermore, the applicant averred that if the second respondent were to provide the applicant's financial documents to the first respondent, there would be irreparable harm, as there is no way to reverse the disclosure. In the applicant's view, the documents sought by the first respondent related to the maintenance matter that the maintenance court finalised. The applicant implored the Court to set aside the subpoena *duces tecum* and to order the first respondent to pay the costs of this application, including the costs of counsel on scale C.

[16] After considering the matter, I decided to dismiss the applicant's application. I found that setting aside the subpoena *duces tecum* would have serious consequences for the first respondent, particularly their children. The applicant requests permission to appeal the court's ruling before either the full court of this division or the SCA.

Discussion

[17] As explained above, in the present application, the applicant contends that this Court erred in finding that setting aside the subpoena would have a deleterious effect on the first respondent and the children. According to the applicant, the maintenance order was not suspended but rather substituted by an interim order that suspended the maintenance order. This contention, in my view, overlooks the fact that the lump sum award was intended to cover significant expenses for the children's tuition and school fees that were due as of 26 March 2025. The maintenance order was granted after the Court satisfied itself that the applicant was financially able to pay that amount. The maintenance court also took into account the bonus payable to the applicant during March of each year.

[18] The deferral of the lump sum obligation meant that the first respondent and the children had to wait for the full payment or potentially go without, unless and until the appeal is resolved. The deferral or delay of payment of the educational and

maintenance expenses was likely to prejudice the children's financial support, particularly the timely payment of their tuition or other related maintenance needs.

[19] Furthermore, the staggered payment arrangement made by the urgent court inherently carried the risk for the children's welfare if the applicant failed to meet the interim obligations or if the reduced form of payment proved insufficient for their immediate needs. Clearly, the suspension of the maintenance order infringed on the best interest of the parties' children. Significantly, the final suspension of the maintenance order would undermine the very purpose of the maintenance appeals rules, which is that maintenance is meant to continue despite an appeal, absent truly exceptional justification.

[20] One of the applicant's primary objections is that disclosing his salary advice and IRP5 tax certificate would be sensitive and prejudicial to him. This ground, in my view, is not substantive enough for the granting of an application for leave to appeal. As correctly pointed out by the first respondent's counsel, when a litigant's financial capacity is directly in issue, as it is here, by the applicant's own design, that litigant cannot claim unfair prejudice merely because he is required to produce financial records. Such disclosure is a typical incident in litigation, especially in matters of maintenance, where full and frank financial disclosure is not only routine but also expected.

[21] I must stress that in cases of maintenance where the interests of minor children are at stake, as is the case in the present matter, the applicant's vague assertions of privacy and personal dignity must necessarily recede into the background. The best interest of the children, in terms of their maintenance and tuition fees being paid on time, must be the primary consideration. In my view, quashing the subpoena would have prejudiced the first respondent and the children by concealing evidence and delaying the proceedings.

[22] The applicant argues in his grounds of appeal that the subpoena *duces tecum* was impermissible because the matter in question before this Court were motion proceedings, and yet no court order had been obtained under Rule 35(13) to

authorise the discovery of documents. The applicant contended that Rule 38, which governs subpoenas, is geared towards trials, not motions, and that this Court failed to consider this correctly and erred by placing weight on the first respondent's layperson status instead of enforcing the rules.

[23] The applicant particularly relies on the principle that Rule 35(13) requires a court's directive or order before discovery or analogous procedures can be used in motion proceedings. The applicant also cited authorities affirming that discovery in application proceedings is exceptional and only permitted when a court has expressly ordered it (*Rustenburg Local Municipality v ARE Direng Transport* (NWM, High Court, 26 August 2021). Since no such direction was sought or given in this case, the applicant contended that the subpoena was a nullity and the court should have set it aside as a matter of law.

[24] I must emphasise that this Court was mindful that subpoenas *duces tecum* are utilised in action proceedings and that there is no discovery in applications proceedings. It is only possible for discovery to apply in applications if, in terms of Rule 35(13), a court has been approached to make the Rules relating to discovery applicable and makes an order to this effect. However, this Court was mindful that it has a discretion to allow discovery in applications. This Court was further aware of the procedural irregularity resulting from the first respondent issuing a subpoena *duces tecum* in motion proceedings without the Court's leave. However, considering the circumstances of this matter, the Court believed that setting aside the subpoena *duces tecum* in these circumstances would be putting form over substance. The circumstances of this case were exceptional and involved the interests of the minor child and the dependent child of the parties. The Court exercised its discretion to condone such irregularity in the extraordinary circumstances of this case.

[25] This Court refused to allow form to triumph over substance where the welfare of the children and the interests of justice were at stake. In my opinion, this pragmatic and realistic approach is consistent with long-standing authority cautioning that technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and fair

disposal of cases on merits (*Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 278F-G). The rules of Court exist to serve the Court in achieving justice, not to furnish litigants with point-scoring weapons. The Court dismissed that applicant's application to prevent an injustice.

[26] This case, in my opinion, is a quintessential example where strict adherence to Rule 35(13) formalities would have accomplished little except to delay the production of plainly relevant documents. That delay would only serve the applicant's interest in obstructing the truth, while harming the first respondent and the children whom he is obligated to support financially. Section 28(2) of the Constitution underscores the paramountcy of the child's best interests. It provides that a child's best interests are of paramount importance in every matter concerning the child. Notably, section 32 of the Constitution provides the right of access to information held by the State, or by private bodies, if it is required for the exercise or protection of a right. Section 39(2) of the Constitution requires the courts to interpret Rules in such a way that the spirit, purport and objects of the Bill of Rights are promoted.

[27] It was very clear in the present matter that the circumstances were exceptional, especially when the following is considered: The application to suspend the maintenance order was brought on an urgent basis. The interim order suspending a maintenance order was granted without the version of the first respondent placed on record in the form of an answering affidavit. The order suspending the maintenance order pending appeal, conflicted with section 25 of the Maintenance Act 99 of 1998.

[28] Moreover, the relevance of these documents to the case at hand is patent. As the counsel for the first respondent posited, the subpoena *duces tecum* was narrowly tailored to specific documents: the applicant's pay slip from January 2020 to March 2025 and his IRP5 certificates for the tax years 2020 to 2025. These are narrowly defined categories of documents, identified with sufficient precision to avoid any fishing expedition concerns.

[29] The applicant has asserted that he cannot afford the lump sum maintenance payment ordered on 14 February 2025. The first respondent disputed this, believing that the applicant's own financial records would dispel the notion of his alleged inability to pay. The evidence of the applicant's income, including bonuses over the past years, was directly probative of whether the maintenance court order was in line with his means and whether his claim of sudden impecuniosity in March 2025 is truthful or not. Evidently, the subpoena *duces tecum* was issued to rebut the applicant's averments, leading to the suspension of the maintenance order.

[30] I have considered all the grounds of appeal raised by the applicant, and I am of the view that they do not reveal any error of law or a misdirection that would induce a court of appeal to interfere. As correctly pointed out by the respondent, the applicant's complaint essentially boils down to disagreement with this Court's balancing of interests and its pragmatic procedural ruling, neither of which constitutes a viable basis for appeal. In the circumstances, an application for leave to appeal to the SCA or the full Court of this division will be a waste of judicial resources. I am not persuaded at all that there are any reasonable prospects that the applicant's assertions would (or, for that matter, might) be upheld by another court. On a conspectus of all the facts placed before this Court, there are no prospects of success in granting leave to appeal.

ORDER

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

31.1 The applicant's application for leave to appeal is hereby dismissed.

31.2 The applicant is ordered to pay the costs of this application on a party and party scale, including the costs of counsel on scale B.

LEKHULENI JD

**JUDGE OF THE HIGH COURT
WESTERN CAPE DIVISION**

APPEARANCES

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

For the First Respondent: Adv Tait
Instructed by: Maurice Phillips Wisenberg