

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

Case Number: **20916 / 2018**

In the matter between:

J[...] **P[...]** **R[...]** **D[...]**

Applicant

and

L[...] **S[...]** **D[...]**

Respondent

Coram: Wille, J

Heard: 16 November 2023

Delivered: 23 November 2023

JUDGMENT

WILLE, J:

Introduction

[1] This was an opposed application concerning an order for a temporary stay of proceedings pending the determination of an application to set aside a subpoena by a third party.¹ The respondent is the applicant's estranged wife. The parties have

¹ Mr da Silva.

three minor children who reside with the respondent in the former marital home owned by the applicant.

[2] It seemed a straightforward and averagely unpleasant case. However, the issues in this matter were simple to state but more complex to answer. This matter came before me in the urgent fast lane for determination. Initially, I held the view that I should issue an order regulating the further conduct of this matter as the matter primarily concerned procedural and not substantive relief. Upon reflection, I decided to write a judgment to explain my findings so they were fully understood. This matter was and is very case-specific, and thus, it is imperative to set out the context in detail.

Context

[3] The applicant and the respondent are estranged and embroiled in regrettable divorce proceedings and have been involved in various interlocutory applications for several years. Indeed, one of these pending applications is highly relevant to these proceedings. The applicant issued a subpoena against the third party (and one of his companies) about ten months ago, requesting the discovery of specific documentation which the applicant deemed necessary to advance his case in the divorce action with the respondent.

[4] Thus, it is regrettably necessary to record some of the sordid details that went before this subpoena to fully appreciate the specific discovery required by the applicant from the third party and his company. About five years ago, the respondent preferred criminal charges against the applicant, culminating in the applicant's arrest at his former marital home in the named third party's presence. Before his arrest, the applicant resided with the respondent and their children in their matrimonial home. Following the applicant's arrest, he was released on bail after being held in custody for several days.

[5] After that, he was prohibited from entering his own home as this was one of his imposed bail conditions. Some months later, the respondent withdrew the criminal charges she had preferred against the applicant. Notwithstanding this turn of events, the respondent had steadfastly refused the applicant access to his home despite the passage of over five years. As a direct result of his 'forced removal' from his home, most of his personal belongings remained at the family home and in the respondent's possession.

[6] It was alleged that these belongings included: (a) several very expensive wristwatches; (b) gold and silver jewellery inherited from the applicant's late father; (c) items historically kept in a safe, including various collectable coins, a gold chain, a gold bracelet, several rings and various ladies' watches, inherited from the applicant's late grandmother; (d) R1.3 million in cash and, (e) R2.5 million in cash and a set of 'Mandela Coins' which belonged to a discrete company.²

[7] Because the applicant was barred from his marital home, he requested his then attorneys of record to make arrangements with the respondent's erstwhile attorneys to attend at the marital home to collect his personal belongings. Upon appointment, a candidate attorney employed by the applicant's erstwhile attorneys attended at the marital home to collect the applicant's belongings. Still, the respondent would not allow this attorney to enter the marital home as the respondent had packed the applicant's clothes and other personal belongings in plastic garbage bags and stacked them at the entrance to the family home. These bagged items were then catalogued and photographed.

[8] These expensive items and the money referenced above were not included in the catalogued items collected from the marital home. It was alleged that various subsequent attempts were made to attend at the marital home to collect these items and that all these requests fell on deaf ears. After that, an agreement was concluded in a pre-trial minute granting the applicant the right to enter the former marital home.

² Tripax Displays CC (the applicant was the sole member of this Close Corporation).

Correspondence followed between the respective attorneys, proposing several dates for the applicant to access his home. Again, it was alleged that the respondent and her legal team conveniently ignored these requests.

[9] When the applicant was eventually granted access to the marital home, he discovered that his valuable items and money were nowhere to be found. During this time, the applicant averred that his twin daughters told him the respondent was wealthy as she had money adorned with "Cheetahs". The applicant says this undoubtedly refers to the R200,00 banknotes he left in the former marital home.

[10] The applicant's case was that the respondent had utilized his money in the safe and had sold some, if not all, of the other valuables belonging to him and that the third party had assisted the respondent in doing so. In summary, if true, it was, I suppose, an unusual way to furnish the respondent's bottom drawer. The applicant asserts that the third party is complicit because (a) he admitted to selling jewellery on behalf of the respondent in his founding affidavit in the subpoena application; (b) when the applicant was arrested, the third party was present at the marital home and, (c) the third party and the respondent are 'close' friends.

[11] Just over a year ago, the applicant issued a discovery notice to the respondent in the divorce proceedings and requested specific documentation relating to several deposits made into the respondent's bank account. Discovery was summoned in connection with the following deposits that reflected in the respondent's bank account: (a) several deposits labelled as 'First Rand' loans, (b) several deposits labelled as 'Capitec' loans, and (c) a deposit labelled as a 'Cgf Finance' loan.

[12] In response to the discovery notice by the applicant in connection with these deposits, the respondent stated that these deposits relate to amounts lent to her by a friend and that no loan applications or agreements existed regarding these payments to her. Undoubtedly, this led to the issue of the subpoena by the applicant regarding

the respondent's bank account to obtain the source documentation in connection with these loans.

[13] Subsequently, the documents furnished by the respondent's bankers exhibited that these monies deposited into the respondent's bank account under the label of these 'loans' came from two bank accounts. One of these accounts belonged to an entity styled 'City Gold', controlled by the named third-party friend of the respondent. The other account belonged to the third party in his own right. It was also alleged that when these loans were advanced, the third- party had been listed with a credit bureau.

[14] Notwithstanding this listing and possible financial difficulties, the third party was able to advance several substantial unsecured loans to the respondent. In addition, the applicant alleged that he saw his daughter recently wearing a gold chain that he believed belonged to his late grandmother. Upon enquiry, his daughter confided in him that the respondent gave her this piece of jewellery.

[15] Forging ahead, about ten months ago, and after considering this information, the applicant issued a subpoena against another financial institution to obtain copies of the bank statements and information regarding all the bank accounts held in the name of the third party and the bank account of City Gold. It is this subpoena that the third party and his company are vigorously opposing. An application has been piloted to set aside this subpoena because it is alleged that this process constitutes a 'fishing expedition', and this setting-aside application will be heard early next year.

[16] The applicant opposes the setting aside application because (a) he avers that the documents called for in the subpoena are highly relevant to the issues in dispute in the divorce proceedings, and (b) he avers that the respondent's maintenance claim against him and their respective accrual claims are hotly disputed in the divorce proceedings.

[17] The applicant argues that it is highly relevant to the issues in the divorce proceedings to determine the source of the funds deposited by the third party and his company into the respondent's accounts. Thus, the applicant needs to establish if these unsecured loans originate from selling his belongings that were previously housed in the safe in the marital home. The applicant's case is that the subpoena is a *bona fide* attempt to secure documentary evidence in connection with these loans and is not too broad as the applicant only seeks specific documents relating to these bank accounts from the commencement of the divorce proceedings. The respondent in the setting-aside application wanted it to be heard urgently. The applicants in the setting-aside application do not want this application to be heard urgently. The applicant in this application communicated with the office of the Acting Judge President regarding allocating an expedited hearing date for the setting-aside application. The best that could be achieved was a hearing date for early next year.³

[18] The divorce action is currently in the pre-trial phase, and at the previous pre-trial hearing, the matter was postponed for a further pre-trial management hearing next year.⁴ The current variation interim maintenance application was piloted at the beginning of this month despite the previous interim maintenance application being determined about four years ago.

Consideration

[19] The applicant argued that the respondent excessively delayed proceeding with its fresh variation interim maintenance application. I agree. The applicant's core complaint was that he could not file a comprehensive opposing affidavit regarding the variation application before the determination of the subpoena application, as the documents called for in the subpoena are highly relevant to the respondent's new interim maintenance complaints.

³ On 8 February 2024.

⁴ In March 2024.

[20] By elaboration, the applicant advanced that for purposes of evaluating the respondent's claim for increased maintenance and a further contribution towards her legal costs, he be placed in a position where he can determine with some degree of certainty the source of the funds deposited into the respondent's bank accounts by way of these labelled loans.

[21] The respondent asserted that if I granted a stay of the proceedings as requested by the applicant, this would open a floodgate of applications being piloted for discovery applications during interim maintenance applications, which would be impermissible and unworkable. I do not see it this way. I say this because this matter is very different.

[22] It is different because (a) it is a fact-specific case, (b) the subpoena was issued about ten months ago, (c) the subpoena was not issued out to facilitate or influence any interim maintenance application, (d) the applicant was already subject to an extant interim maintenance order and, (e) the interim maintenance variation order was and is at the instance of the respondent and not the applicant. Further, from a proper reading of the papers, the third-party seemingly intends to delay the hearing of the setting aside application for no apparent reason.

[23] I find some support for my view in the reasoning adopted in *HG*.⁵ I say this because the information and documentation sought by the applicant is, in this case, undoubtedly incidental to the interim maintenance variation application and, as such, cannot be 'labelled' as an abuse of the court process. Further, one of the main complaints by the respondent is that to permit a stay of the proceedings would violate the purpose of an interim maintenance application because these applications must be dealt with as inexpensively and expeditiously as possible.

[24] This argument is as pale as death itself because (a) in this case, the interim variation maintenance application has been delayed for at least six months; (b) the

⁵ *HG vs AG* 2331/2017; 3487/19 [2019] ZAWCHC 125 (20 September 2019 at para [52])

interim maintenance application is a variation application which could and should have been launched at a much earlier stage; (c) the initial interim maintenance order was granted about four years ago and, (d) the interim variation maintenance application was pre-maturely enrolled and has now been removed from the roll. No plausible explanations are advanced for the delays in this connection. Put another way, when the applicant advanced the subpoena process, he was unaware that an interim variation application would be launched shortly after that. No such application had even been threatened. There was no talk of such an application.⁶

[25] Further, on behalf of the respondent, it is argued that a party to application proceedings is not entitled to discovery save with the leave of the court. Undoubtedly, this may be a general proposition in application proceedings. However, this interim maintenance variation application is governed by the rules which allow, among other things, for a court to:

‘...hear such evidence as it considers necessary and may dismiss the application or make such order as it thinks fit to ensure a just and expeditious decision...’⁷

[26] Logically, this rule would permit the court to call for the evidence to be tendered (at the variation maintenance hearing) by the third party connected to the documents forming part of the subpoena issued against him. Thus, if the court in the subpoena application orders that the requested and specified documents must be produced, they may be utilized by the applicant in his opposition to the variation application.

[27] Thus, a stay of these proceedings could prevent the proliferation of litigation and make the variation application expeditious and less expensive. Turning now to the issue of a stay of the proceedings. The court's rules should be used sensibly to ventilate the core issues between the parties. A balanced approach needs to be struck

⁶ The pre-trial meeting at which this was raised for the first time only took place on 8 March 2013.

⁷ Rule 43 (5) of the Uniform Rules.

between the ventilation of the genuine issues between the parties and an unnecessary formalistic approach to litigation. However, this court is also not a court of equity, and rules are to be followed to, among other things, protect and uphold the integrity of the court system.

[28] Undoubtedly, the court possesses the power to regulate its process. This is even more so when the relief contended for is procedural relief and not substantive relief. Thus, I must be influenced by fairness, equity and what is in the best interests of justice. It is alleged that the first available date for the variation interim maintenance application hearing is at the very start of next year's court term. The setting-aside application is set down for hearing shortly after that date. Thus, the potential prejudice to the respondent is slight. The context of the possible prejudice to the respondent is that the initial interim maintenance order was granted about four years ago.

[29] The argument by the applicant, given these peculiar circumstances, is that it cannot be in the interests of justice that he be obliged to answer allegations regarding the respondent's financial circumstances (in opposition to her variation application) while being precluded from having insight into documents which may have a direct bearing on her financial position. It was argued that such a situation would be manifestly unjust, and it is in the interest of justice that the variation application be stayed. On this, I also agree.

[30] The *status quo* is that the applicant is paying maintenance in respect of the respondent and his children following the extant interim maintenance order, which includes hospital plan premiums, additional medical expenses, school fees, additional education expenses, including extra-mural activities, the running expenses in respect of the marital home, fuel for the respondent's car as well as a cash contribution in the amount of R32000,00 per month. Thus, the prejudice to the respondent is minimal when considering the possible prejudice the applicant may suffer. As alluded to earlier, it is so that this court is not a court of equity and that rules need to be adhered to.

[31] In this context, the answer to this vexed question may be found in the reasoning adopted in *Mokone*.⁸ In this case, it was held that if it were in the interests of justice to suspend proceedings before, pending the determination of a material issue in other proceedings, the court had an inherent power to do so. This must even be more so when the relief contended for is essentially procedural and not substantive relief.

[32] I also find some further support for my views in *Feldman*.⁹ In this case, It was held, among other things, as follows:

‘...the Court Rules are not there to hamper a Court in dispensing justice, but to assist a Court in doing so. Where it becomes necessary to deviate from those Rules in order to dispense justice and to see that justice is done, it is absolutely necessary for a Court, if good cause is shown, to grant the indulgence...’

[33] For all these reasons, the application by the applicant to suspend the interim maintenance variation proceedings must succeed.

Costs and order

[34] Turning now to the issue of costs. The application for the setting aside of the subpoena may not be met with success. The documentation may be made available for inspection. This may reveal what happened to the applicant’s belongings, or it may not. It may be that the setting aside application is met with success, and the applicant is not granted access to the bank accounts of the third party and his company.

[35] Thus, it is difficult, if not impossible, to properly and judicially evaluate the issue of costs despite the limited procedural success obtained by the applicant in this

⁸ *Mokone v Tassos Properties CC and Another* 2017 (5) SA 456 CC at paras [66] - [70].

⁹ *Feldman v Feldman* 1986 (1) SA 449 (TPD) at page 455 A-B.

application. Thus, all the cost issues should be held over for determination by the trial court.

[36] In all the circumstances, an order is granted in the following terms:

1. That the proceedings in terms of Rule 43(6) in the above Honourable Court under case number 20916/2018 are with this stayed until the subpoena application, under case number 5133/2023, is disposed of, being either dismissed or within ten days of compliance with an order upholding the subpoena.

2. All costs, including costs of senior counsel (where so employed) on the scale as between party and party, shall stand over for determination by the trial court.

E.D.WILLE
(Cape Town)