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

JUDGMENT

Reportable

Case Number: **2026-072786**

In the matter between:

JOHANNES KRIEL	**FIRST APPLICANT**
SCANDANAVIAN AUTO WORKS (PTY) LTD	**SECOND APPLICANT**

And

ROBERT JOHN SWIERSTRA	**FIRST RESPONDENT**
FIRST NATIONAL BANK	**SECOND RESPONDENT**
THE REGISTRAR OF THE HIGH COURT WESTERN CAPE DIVISION	**THIRD RESPONDENT**

<u>In re: The main application between:</u>

ROBERT JOHN SWIERSTRA	**APPLICANT**

And

JOHANNES KRIEL	**FIRST RESPONDENT**
SCANDANAVIAN AUTO WORKS (PTY) LTD	**SECOND RESPONDENT**
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	**THIRD RESPONDENT**

Neutral citation: Johannes Kriel & 1 Other v Robert John Swierstra & 2 Others *(Case No:* 2026-072786*) [2026] ZAWCHC… (11 August 2026)*

Coram: **MTHIMUNYE AJ**
Heard: **7 August 2026**
Delivered: **Electronically on 11 August 2026**

Summary: Procedural irregularity – Incorrect process – Interdictory final relief to set aside subpoena duces tecum issued by registrar - No application to court to show exceptional circumstances why subpoena should have been issued - An abuse of process – Respondent aware that there is a dispute of fact in main case- Documents sought to prove the existence of an disputed agreement in pending application – Bank statements by their very nature confidential - Application granted

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ORDER

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1. Condoning, in terms of Uniform Rule 6(12), the Applicants' non-compliance with the forms, service and time-periods prescribed by the Uniform Rules of Court and directing that the application be heard as one of urgency.

2. That the subpoena duces tecum dated 7 May 2026, issued by the Registrar on 23 June 2026 at the instance of the First Respondent and directed to the Second Respondent, First

National Bank, a division of First Rand Bank Limited, is declared irregular and an abuse of process of this Court and set aside.

3. That the First Respondent be ordered to pay the costs of this application on an attorney and client scale.

JUDGMENT

Mthimunye AJ:

Introduction

[1] This is an urgent application brought by the First Applicant, the sole director of the Second Applicant, Scandanavian Auto Works (Pty) Ltd, pertaining to a subpoena duces tecum dated 7 May 2026, issued by the Registrar on 28 June 2026 at the instance of the First Respondent, and directed to the Second Respondent, First National Bank, a division of First Rand Bank Limited ("FNB"), for said subpoena to be declared irregular and an abuse of the process of this court, and to be set aside.

[2] This application is opposed by the First Respondent only, whereas the Second Respondent is not opposing this matter provided no cost order is sought against them. For purpose of this judgment I will be referring to the First Respondent as the respondent.

Background

[3] On 15 April 2026, the respondent's main application was struck off the roll for lack of urgency. The Applicant in that application raised a dispute of fact denying an alleged agreement was ever concluded between the parties. Subsequently to the matter being struck off the roll the respondent re-enrolled the matter on the opposed motion roll. No order was made for the issues to be referred in terms of Rule 6(5)(g) for oral evidence or for trial.

[4] Likewise there has been no order under Rule 35(13) directing that the discovery mechanism in terms of Rule 35 be complied with in the main application. The respondent in the interim also filed an application for the joinder of Braait Investments (Pty) Ltd to the main proceedings, however no order has yet been granted for the joinder.

[5] It is common cause after the motion proceedings had closed in the main application, the respondent on 7 May 2026, without leave from this court, procured a subpoena from the Registrar, compelling FNB to deliver the banking records for a period of more than two years of the second applicant, Scandanavian Auto Bodyworks (Pty) Ltd, to be inspected by the respondent's attorneys. The subpoena seeks copies of all bank statements for over two years and expressly extends beyond the nominated current account of the applicant to every credit card, savings, cheque, money-market, current, notice or other account held in the second applicant's name.

[6] On 3 August 2026, FNB confirmed with the applicant in writing that absent a court order by 13 August 2026, they would have to comply with the subpoena. It is against this background that the applicant approached this court on an urgent basis to seek interdictory relief that the subpoena duces tecum be declared irregular, an abuse of process, and be set aside.

Applicant's case on urgency

[7] Applicant in his founding papers avers that he first became aware of the subpoena on 31 July 2026. On that same day his attorney's requested certain undertakings from the Respondent's attorneys' to either suspend or withdraw the subpoena. Consequently, to the request his attorney's received a response from FNB legal department informing his attorney's that they intended to comply with the subpoena served on them by 13 August, unless the applicant supply them with a court order setting aside or suspending the subpoena. Furthermore, his attorneys were also informed by the respondent's attorneys that they are required to proceed with litigation. In support of these averments the applicant attached copies of the respondents' emails correspondence marked "FA3" and "FA5", to his founding papers.

[8] The applicant further avers that upon receiving these emails from the respondents' they immediately approached this court for the relief as sought in their notice of motion. Furthermore, if this matter is not heard urgently there will be no substantial redress available to him in due course, as after the 13

August 2026 once bank statements is handed over to the respondents, the applicants' confidentiality will have already been compromised irreparably. Furthermore, only a court order can preserve the position.

Respondent's case on urgency

[9] The respondent on the other hand in their answering papers alleged that the urgency is overstated and self-created in that the urgency relied upon flows from the ordinary operation of a lawful court process. Respondent further submitted that FNB should be allowed to comply with the subpoena in the interim and that the parties may subsequently argue whether the bank statements is relevant or necessary to the respondent's case.

[10] The respondent in his answering papers conceded that the bank statements are confidential but avers that confidentiality is not absolute. In addition, that the prejudice to be suffered by him if barred from obtaining relevant evidence materially outweighs the speculative prejudice alleged by the applicant. Further that the applicant has failed to establish a clear right for the relief sought, and that the alleged injury relied upon by the applicant is speculative and overstated.

[11] The respondent further avers that the applicant does have alternative remedies available to him by objecting to the admissibility of the documents

during the proceedings. Additionally, that the documents form part of the dispute to be determined in due course. Furthermore, that the applicant's application is not directed at any real right to be protected, but rather at preventing potentially relevant evidence from becoming available to this court. Accordingly, the respondent seek this court to find that the applicant has failed to establish the requirements for either interim or final interdictory relief to be granted and that application should be dismissed for lack of urgency.

Evaluation on Urgency

[12] Before entertaining the merits of this application before me, I will first have to satisfy myself that the application before me is indeed urgent and warrants deviation from the ordinary court roll. The test for urgency is set out in the locus classicus, *Luna Meubels Vervaardigers (Edms) Bpk v Makin & Another (t/a) Makin's Furniture Manufacturers* 1977 (4) SA 135, where the court held;

"Mere lip service to the requirements of Rule 6(12)(b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down. "

[13] In *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd and Others* (2011) JDR 1832 (GSJ), it was held that in determining whether a matter should be treated urgently an applicant must state why he claims he cannot be afforded substantial redress in due course if the application is not heard immediately.

[14] Having considered the affidavits, oral submissions and case law cited, I am satisfied that the applicant has made out a proper case for urgency. Not only has he set out explicitly the circumstances which renders his matter urgent, he also set out the reasons why he cannot obtain substantial redress in due course. He also set out explicitly in his papers if relief sought is not urgently granted he will suffer irreparable harm, as not only will there be a breach of his confidential financial affairs but also to those of his employers and third parties' whose financial information are reflected on those bank statements. It is apparent that the disclosure of this confidential financial information cannot be cured at a later stage by substantial redress in due course as once the damage is done it would be irreversible.

[15] I therefore find that the matter is urgent and condone in terms of R6(12) the applicant's non-compliance with the forms, service and timelines presented by the Uniform Rules of Court, and directs that this application be heard as one of urgency.

[16] I now turn to deal with the merits of this application in determining whether the applicant has satisfied this court for final or interim interdictory relief to be granted.

Clear right

[17] The applicant avers that he has established a clear right to protect the integrity of the Court's process and to prevent unlawful disclosure of the Second Applicant's confidential banking information. Further that the terms, scope and purpose of the subpoena are apparent from the subpoena itself as the applicant allege it is not dependent upon the resolution of any material dispute.

[18] The respondent in defence avers that the applicant has failed to establish a clear right or even a prima facie right to the relief sought. That the subpoena was lawfully issued by the Registrar in the ordinary course. The respondent further denies that the applicant possess a clear right to prevent the production of the documents sought pursuant to a valid subpoena. Further that the applicant cannot simply state that the subpoena constitutes an abuse of process and rely upon that assumption to establish the rights necessary for interdictory relief.

Irreparable harm

[19] The applicants avers that injury is both actual and imminent in that FNB has stated in unequivocal terms that they will comply with the subpoena by 13 August 2026 unless restrained by a court order. Furthermore, that once the

banking records of the second applicant have been disclosed and inspected, their confidentiality cannot be restored. Furthermore, the threatened disclosure by FNB is concrete and imminent.

[20] The respondent in opposition avers that the extent to which the applicant relies on the confidentiality of the documents can adequately be addressed by appropriate directions relating to the use of the documents within the litigation. In addition, that the mere production of documents pursuant to a lawful subpoena does not, without more establish irreparable harm.

Alternative remedy

[21] The applicant in their founding papers avers that they have no adequate alternative remedy, in that FNB cannot disregard a subpoena issued by the Registrar. In addition, a claim for damages or exclusion of documents at a later stage as remedy against the respondent's refusal in withdrawing the subpoena will not reverse the disclosure. Only an order by this Court can preserve the position of the confidentiality of the documents.

[22] The respondent rejects this contention by the applicant in that he avers in his answering papers that the applicant has failed to establish the absence of an adequate alternative remedy. Furthermore, the applicant remain entitled to object to the admissibility of the documents during proceedings on the grounds of the documents being irrelevant, inadmissible or being improperly obtained. In addition, that the application by the applicant is not directed at protecting any

legitimate legal right but rather at preventing potentially relevant evidence becoming available to this Court. They further averred that the applicants has failed to establish the requirements for either final or interim interdictory relief.

Applicant's submissions

[23] The applicant submitted during argument that the subpoena in question was submitted irregularly in pending motion proceedings which is enrolled to be heard in February 2027. That pleadings had already closed in the pending main matter as all affidavits had already been filed. That there is no reason why the respondent now wants the second applicant's bank statements other than to supplement his case where a dispute of fact had been raised by the applicant pertaining to the existence of an alleged agreement.

[24] Furthermore in order for the respondent to be able to place these bank statements before the court, the respondent first had to bring an application to be allowed to file a supplementary affidavit pertaining to the presentation of these bank statements. The applicant further referred the court to the case of this division *Wentzel v Banxso (Pty) Ltd and Others* (23249/2024) [2025] ZAWCHC 376 (22 August 2025) in which Le Grange J, held that;

"Rule 38 makes provision for the manner in which evidence would be adduced at a trial. In addition, Rule 38 does not ordinary deal with motion proceedings, as Rule 6(5) (g) does not permit a party on his own authority to cause the Registrar to subpoena a witness to appear at the hearing of the application. That authority only vests in the court, which may grant leave for a person to be subpoenaed.”

[25] Applicant further submitted that the general rule is that Rule 35 does not apply to application proceedings, further that only in exceptional circumstances can a subpoena be issued in application proceedings, subject to an applicant providing an explanation as to why a court should deviate from the general principles lais down in Rule 38, as was stated by Lekhuleni J, in *SP v SB and another* [2025] ZAWCHC 528 (14 November 2025).

[26] It is submitted by the applicant that the respondent failed to articulate explicitly their exceptional grounds in their answering affidavit why this court should deviate from the general principles in terms of Rule 38. Further that they have disputed from the onset the existence of an oral agreement which resulted in a material dispute of fact as the respondent has to prove the existence of this alleged oral agreement. Further whether the bank statements is needed by the respondent is neither here nor there as the respondent was obligated to approach the court in terms of Rule 35(13) for an order and permission of this court to discover these bank statements. In addition, the respondent was well aware that the process of Rule 35(13) needed to be adhered to, as evidenced by the correspondence received from the respondent attached and marked as “RS5” to their answering papers.

[27] The applicant submitted that the respondent had two alternatives available to him upon realizing that a dispute of fact arose in the main application. Firstly, the respondent could either withdraw the pending main application and place the matter back on roll by action proceedings, alternatively the respondent could have applied to this court and provided an explanation as to what is so exceptional that this court has to go against the general rules predicating Rule 38 and allow that a subpoena be issued in application proceedings.

[28] Applicant further submitted that the respondent failed to explain why Rule 38 has to be bend for him as in April 2026 the respondent was made aware by the applicant of his intention not to make these documents available to the respondent. Upon receipt of the subpoena on 31 July 2026, they immediately wrote to the respondent's attorney's explaining that there was no exceptional circumstances which entitled the respondent to make use of this extraordinary method in application proceedings, but instead of withdrawing the subpoena his attorneys were informed by the respondent's attorneys to proceed with litigation. Thus, he seeks a punitive cost order to be granted against the respondent.

Respondent's submissions

[29] During argument the respondent submitted that the court has to look at the conduct of the parties when they entered into an oral agreement and what the probabilities are to be reasonably assumed under the circumstances. That the respondent had previously been given monthly financial updates on the progress of the business by the applicant. That this situation changed at the end of 2025.

[30] He conceded that he brought an urgent application to enforce the agreement between himself and the applicant and that the applicant in their answering affidavit denied the existence of the agreement between them. He further confirmed that there is a joinder application to join the shareholders to the pending main application but that the joinder application has yet to be enrolled.

[31] He further conceded during argument that the manner in which he was supposed to have obtained access to the bank statements was via discovery but submitted that his request for these bank statements was denied by the applicant. Furthermore, that he need these bank statements to see what money went into the business and the profits that were made, in order for him to prove the conduct of the agreement relied upon by him in the pending main application.

[32] He further submitted that under appropriate circumstances subpoenas can be obtained in application proceedings to get evidence. He referred the Court to the unreported matter of *Desert Oil (Pty) Ltd v Ashwina Raja and Others*

(22845/2019) WCHC (14 December 2020), which dealt with arbitration proceedings. He submitted that it was held in this matter that when dealing with payments in arbitration proceedings a litigant has the right to seek the support of a subpoena to be able to prove its case. That the court has to look at the facts and circumstances of each case individually. I pause to point out that the case of Desert Oil [supra] is distinguishable from this matter as it involved an arbitration process where proceedings provides for subpoenas.

[33] The respondent further submitted that they require the bank statements to prove that he is entitled to reclaim his company. That by using the subpoena to obtain access to these bank statements is not an abuse of process, as the applicant denied the existence of the agreement, leaving him with no alternative but to prove the existence of this agreement by way of these bank statements. In addition, these bank statements belong to the second applicant who does not have any conceivable rights that can be infringed if the respondent together with his attorney is allowed to go through the bank statements. Thus, the subpoena must stand and the application to set aside the subpoena must be dismissed with costs.

Applicable Legal Principles and Discussion

[34] As foreshadowed above, the applicant seeks an order for the subpoena *duces tecum* to be set aside. The subpoena was issued under case 2026-072786

which is still pending in this court. The pending application has been enrolled for hearing in February 2027. The applicant raised a material dispute of fact in that matter relating to the existence of an agreement between the parties.

[35] I first turn to deal with the issue of an abuse of process. In the matter of *S.P v S.B (*2025/054457) [2025] ZAWCHC 253 (19 June 2025) it was stated that;

"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"

[36] This general principle pertaining to Rule 38 was reaffirmed in the case of *Wentzel v Banxso (Pty) (Ltd) and Others* (23249/2024) [2025] ZAWCHC 378 (22 August 2025), where it was held that;

"[21] …Rule 38 makes provision for the manner in which evidence would be adduced at a trial. It does not ordinarily deal with motion proceedings, since Rule 6(5)(g) does not permit a party on his own authority to cause the Registrar to subpoena a witness to appear at the hearing of the application. The authority vests solely with the Court, which may grant leave for a person to be subpoenaed."

[37] It is trite law that in application proceedings an applicant has to make out his case in his founding papers. It is common cause that there is an alleged agreement between the parties which existence is disputed by the applicant. It is further common cause that the main application is motion proceedings. That the matter has already been enrolled on the opposed roll to be heard in February 2027. No order has been granted by the court under Rule 35(13) for discovery of any documents in the main application, neither has the main application been referred for oral evidence or trial in terms of Rule 6(5)(g) of the uniform rules of this court. Furthermore, in the application for the subpoena there are no witnesses identified and no hearing date specified.

[38] I agree with the submissions of the applicant that the general rule is that Rule 35 does not apply to motion proceedings. A subpoena may only be granted under exceptional circumstances in application proceedings. The obligation is on the applicant seeking the subpoena to explain the exceptional circumstances clearly and succinctly in his papers for it to be allowed by a court. It is clear in this matter before me that the issuing of this subpoena amounts to a procedural irregularity as this subpoena has been issued by the Registrar of this court in pending motion proceedings to the respondent without the leave of this court. The respondent further in his answering affidavit does not set out any exceptional grounds why this court should deviate from the general principles prescribed by Rule 38. I am thus of the view that a subpoena may not be used to

compel a non-party to provide a litigant with pre-hearing access to confidential documents so that a litigant may investigate whether he need to substitute or make out his case, even more so in application proceedings. I am this of the view that this subpoena was obtained with ulterior procedural purpose and falls beyond the proper function of Rule 38 and as such the respondent won't suffer any prejudice if it is set aside by this court.

[39] The respondent in his answering affidavit conceded that he must demonstrate the existence of an oral agreement in the main pending application. Further that he needs the bank statements to do so. The necessity of these bank statements is irrelevant, as they cannot substantiate his claims in application proceedings, as he had to make out his case in his founding papers. Further in terms of Rule 35(13) the respondent is obligated to approach this court for an order to discover the disputed bank statements. Especially since he and his attorney are aware of the process to be followed as evidenced from the email correspondence sent to the applicant's attorney, annexed and marked "RS5" to the respondent's answering papers,

"3. We kindly request the aforementioned documents by close of business, 10 April 2025 failing which we hold instruction to proceed with an application in terms of Rule 35(13), the costs of which your client will be held liable for."

[40] It is patently clear that the respondent knew which procedure to use but instead elected to ignore it and chose on his own authority to cause the Registrar to issue a subpoena to obtain these bank statements. Which according to *Wentzel v Banxso (Pty) (Ltd) and Others* [supra] it was held that it is not permitted as the authority to grant leave for a person to be subpoenaed only vests in the Court.

[41] For all the reasons set out above, I am inclined to agree with the applicant that ignoring the general principles of Rule 35(13) and Rule 38 of the uniform rules of this court is a clear abuse of court process. The respondent is aware that there is a dispute of fact and the process to be used open to him is to either withdraw the matter from the opposed motion roll and enroll it in action proceedings or apply to this court and explain why a subpoena is needed in application proceedings, which the respondent has failed to do. Rule 35(13) does not automatically operate in application proceedings as it requires a court order. Therefore, only after the respondent has followed the correct court process, this court will exercise its judicial discretion to determine whether there are exceptional circumstances to grant the respondent leave for a subpoena to be issued in application proceedings.

[42] It is further my considered view that if this court were to allow litigants not to observe court Rules, which are important in the administration of justice, this Court will be opening the door for an abuse of court process. It is clear from

the facts stated above that the respondent failed to comply with court process by not complying with the general principles of Rule 35(13) and Rule 38. The Supreme Court of Appeal in *Beinash v Wixley* 1997 (3) SA 721 (SCA) confirmed that the Court has inherent power to prevent abuse of its process and may set aside a subpoena that is so wide that it becomes oppressive, or where it is used for an improper purpose. The subpoena is expressed in the widest terms in that it wants every statement for every account, including information relating to persons who are not party to the litigation. Furthermore, it is obvious from the respondent's answering papers that the subpoena is not intended to secure the attendance of witnesses in action proceedings, but rather a means of obtaining information to supplement his case in the pending matter, which has been enrolled for hearing in February 2027.

[43] I further find that the applicant will suffer prejudice in the event that these confidential bank statements are disclosed and inspected by the respondent and his attorney, as it amounts to an irregular intrusion into the privacy of the applicants' financial affairs without a proper court order. Further, once these banking statements have been disclosed and inspected, their confidentiality cannot be restored. The burden and prejudice the applicant will suffer is thus grossly disproportionate to any articulated evidential value.

[44] I am further satisfied that a proper case has been made out by the applicant in that the applicant has established a clear right to protect the integrity of the court's process and to prevent the unlawful disclosure of the second applicant's confidential banking accounts. That in the event that this court does not grant the relief sought as in the Notice of Motion the applicant will suffer both actual and imminent harm. I am inclined to agree with the applicant that once the banking records have been disclosed to the respondent and in the process inspected, the confidentiality of those records cannot be restored.

[45] I am further of the view that there is no adequate alternative remedy available to the applicant as FNB is obliged to comply with an order of court and thus cannot disregard a subpoena issued by the Registrar. I am also inclined to agree with the applicant that a subsequent claim for damages or exclusion of the documents will not reverse the disclosure.

Conclusion

[46] Whilst I find that the applicant has satisfied the requirements for both interim and final interdictory relief, I also find under these circumstances and for the reasons already stated that it will be in the interest of justice to grant final relief as the applicant has satisfied that he has a clear right, that he will suffer injury reasonably apprehended and that he has no alternative remedy.

Costs

[47] It is trite that costs follow the event. The main applicant was afforded an opportunity to withdraw the subpoena as evidenced from emails attached to the papers, but elected not to do so, despite being aware of the correct court process to follow. I am therefore inclined to grant a cost order in favour of the applicant in this urgent application. The First respondent is ordered to pay the costs of this application on an attorney and client scale.

Order

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

1. Condoning, in terms of Uniform Rule 6(12), the Applicants' non-compliance with the forms, service and time-periods prescribed by the Uniform Rules of Court and directing that the application be heard as one of urgency.

2. That the subpoena duces tecum dated 7 May 2026, issued by the Registrar on 23 June 2026 at the instance of the First Respondent and directed to the Second Respondent, First National Bank, a division of First Rand Bank Limited, is declared irregular and an abuse of process of this Court and set aside.

3. That the First Respondent be ordered to pay the costs of this application on an attorney and client scale.

S MTHIMUNYE

ACTING JUDGE OF THE HIGH COURT

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