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

**CASE NO: 2016/10540**
**REPORTABLE: NO**
**OF INTEREST TO OTHER JUDGES: YES**
**REVISED.**
**31 October 2022**

In the matter between:

**H [....], J [....] E [....]** Applicant / Plaintiff
**(formerly B [....])**

and

**B [....], A [....]** Respondent / Defendant

**JUDGMENT**

**INTRODUCTION**

1. The parties were required to deliver their properly completed Financial Disclosure Forms ("*FDFs*") as far back as September 2019. The defendant failed to do so and was afforded an extension until 25 March 2020. Despite this further directive the defendant still failed to deliver his FDF which resulted in the plaintiff bringing an application to compel compliance.

2. Until then, the only explanation offered by the defendant for failing to serve his FDF was that he required documents from the plaintiff before he could do so. In an earlier judgment the court gave reasons for rejected this explanation; in short the FDF does not require the party making disclosure to deal with the other party's finances save in relation to the standard of living both parties enjoyed during the marriage (para 3.2) and any other circumstances which could affect the matter, including any agreement made between them- and these had been dealt with by the plaintiff under oath on 19 September 2019.

3. The defendant then delivered an unsigned FDF on 1 June followed at the eleventh hour by a signed FDF on 29 June 2020.

4. This court found that the defendant had failed in material respects to complete the FDF. Because of the defendant's persistent failure to properly complete his FDF, the court made the following order on 12 September 2022:[1]

> *2. The defendant shall by no later than Friday 30 September 2022 serve and file a completely new Financial Disclosure Form ("FDF") which shall;*
>
> *a. be in legible printed letters*
>
> *b. contain all annexures;*
>
> *c. be complete in all respects and in particular provide the details required in para 3 and a proper answer to para 4.1*
>
> *d. be duly deposed to*
>
> *e. be uploaded onto CaseLines*
>
> *3. In the event that the defendant fails to comply with para 2 hereof by 30 September 2022 he shall show cause on 12 October 2022 at 10.00 in open*

[1] The reasons for the order are contained in the judgment of 13 September 2022 reported as H v B [2022] ZAGPJHC 823

*court why he should not be held in contempt of court and if so found to be in contempt of court why he should not be incarcerated until such time as he duly completes the FDF*

**DEFENDANT IN CONTEMPT OF COURT FOR FAILING TO DELIVER A PROPERLY COMPLETED FDF AND COSTS OF 26 OCTOBER 2022 HEARING**

5. On 12 October the court considered the FDF which the defendant had delivered in purported compliance with the order of 12 September. After hearing the defendant I was satisfied that the failure to deliver *inter alia* a legible FDF or to deal with his actual expenditure needs (as opposed to writing down what he would like to be able to incur as expenditure) was wilful and *mala fides*.

I then held him to be in contempt of the court order of 12 September 2022 and ordered that:

*"2. The Defendant, Andre B [....] shall by no later than 25 October 2022:*

*2.1 Serve and file and upload load to case lines, a legible copy of his Full Financial Disclosure Form, together with all supporting documentation. The Full Financial Disclosure Form and supporting documentation shall be duly commissioned and signed by the Defendant;*

*2.2 Serve and file a hard copy of the aforesaid Full Financial Disclosure Form on the Plaintiff's attorney of record;*

*2.3 In the Full Financial Disclosure Form provide 12 months bank statements in respect of any and all bank accounts in his name and in which he has an interest in, including but not limited to:*

*2.3.1 The ABSA account of D [....] B [....] – with account number [....].*

*2.4 The Defendant shall in respect of the Investec Bank Account [....], attach to his Full Financial Disclosure Form, 12 months bank statements,*

*failing which a document from Investec to confirm that this account was closed more than 12 months ago and that there are no amounts standing to its credit. The Defendant shall in addition to the above, file a statement in the Full Financial Disclosure Form, providing full details of the financial institution or other institutions and account number/s regarding where the proceeds in respect of any credits to the account/s were transferred.*

*3. A warrant of arrest in respect of the Defendant, Andre B [....] is to be issued forthwith, committing him to imprisonment for contempt of Court for a period of 5 days.*

*4. The warrant of arrest is only to be executed on 26 October 2022, should the Defendant fail to comply with the provisions in paragraph 2 hereof.*

*5. The Defendant shall return to Court on 26 October 2022 at 09h30 to confirm his compliance with paragraph 2 of this order.*

6. On 26 October 2022 the defendant claimed that he had complied with the court order, albeit at the eleventh hour. The plaintiff informed the court that save for the ABSA account in the name of D [....] B [....] the defendant had at face value complied with the requirements of the FDF and the court order.

7. The defendant contended that there was no more money in the ABSA account and that he had received an email on 25 October 2022 from his brother's firm of attorneys, who will be referred to as XY Attorneys, stating that

*"We confirm that our client is not a party to the matter and that you and Me. H [....], also the Plaintiff and Defendant, (furthermore the Applicant and Respondent respectively; hereinafter referred to as "the parties") have not provided our client with sufficient and/or relevant documentation to place our client in a position to:*

*3.1 Respond to any application which has been brought by any party which resulted in our client's account held at ABSA Bank number [....] being frozen.*

*3.2 Provide a background to his fundamental rights that are being infringed upon due to having no notice of the proceedings in the aforesaid matter or divulge any information without having a negative impact on himself and any other interested party.*

8. The defendant confirmed that his brother did not provided him with an affidavit contending that the ABSA account was not controlled by the defendant albeit that it was in the name of his brother nor did the email deal with that at all. the defendant did not himself file an affidavit under oath setting out the attempts he may have allegedly made to obtain the bank statements from his brother.

Furthermore the defendant did not dispute that he had previously informed the court that the ABSA account was used to transfer the proceeds of the sale of one of his properties and that he, not his brother, had directed payments out of that account.

9. The defendant however contended that he had never said when the account was originally opened or that it was always under his effective control.

10. The plaintiff was satisfied that she could secure the ABSA bank statements by way of subpoena at trial stage.

11. The question of whether the warrant of arrest issued against the defendant should be executed against him in terms of para 4 of the order of 12 September 2022 because he has de facto control of the ABSA account and therefore can obtain the statements from his brother as required in terms of para 2.3 of that order remains open.

12. The court has indicated that it intends holding over this issue until the ABSA accounts have been produced and whether it is evident, from the transactions reflected after the proceeds of the sale of the defendant's property were transferred into it, that the defendant's brother was operating the account for and on behalf of defendant or otherwise under the defendant's de facto control during the preceding 12 months.

If that is not the case then the warrant of arrest and detention that was issued in terms of para 3 of the order of 12 September 2022 will be withdrawn, otherwise the warrant will be executed if the defendant, given a further opportunity to do so, shows cause why it should not be executed.

13. The reasons for making the orders of 12 September 2022, including finding the defendant to be in contempt of court are contained in a judgment delivered on the following day and therefore need not be repeated. The judgment is reported in SAFLII as H v B [2022] ZAGPJHC 823 (13 September 2022).

14. Since the defendant had failed to complete the FDF until the very last moment and then still failed to provide any evidence under oath that the ABSA account was not under his control over the past 12 months, he must pay the plaintiff's costs for the hearing on 26 October 2022. The reason provided in the judgment of 13 September for the costs of bringing the contempt of court proceedings to be taxed on the attorney and client scale remain pertinent to the costs incurred on 26 October 2022.

**OUTSTANDING PRE-TRIAL ISSUES**

15. The defendant claims that the plaintiff has not delivered copies of her discovered documents. It is unnecessary to enter into a debate as to whether this was in fact done or at least attempted. The plaintiff has undertaken to do so.

16. The defendant also claims that plaintiff's discovery is not up to date since some two years has passed since it was produced. This is correct. However the reason for this is directly attributable to the defendant's delaying tactics to trial sooner.

17. I therefore direct that both parties must deliver an updated supplementary discovery affidavit to which copies of the additional discovered documents must be produced.

18. There are however cost consequences. The need for updating the plaintiff's discovery affidavit as requested by the defendant is due to him delaying the matter being trial ready when it could have been at least two years ago.

He must therefore bear the costs of updating the discovery affidavits and producing the extra documents so discovered which otherwise would have been unnecessary had he not, through his stratagems, delayed the trial.

These costs will also be on the attorney and client scale because they have been occasioned by the same conduct which resulted in him being required to pay punitive costs for the reasons set out in the reported judgment of 13 September 2022.

**CONDUCT OF ATTORNEY IN WRITING LETTER TO PRESIDING JUDGE AND DEPUTY JUDGE PRESIDENT ON EVE OF HEARING**

19. The court has already referred to the email of 25 October 2022 to the defendant from the attorneys representing his brother, who I have referred to as XY Attorneys.

20. However the email was not only addressed to the defendant. It was emailed to both my registrar and to the secretary of the Deputy Judge President shortly after 16h30 on the day before the hearing of 26 October. The hearing was concerned with the issue of whether the warrant of arrest issued was to be executed on the defendant if he failed to comply with the court order of 12 September.

21. It is evident that my registrar and the secretary of the Deputy Judge President were forwarded the email so that the Deputy Judge President and I would read its contents.

22. The gist of the email from XY Attorneys was that neither the defendant nor the plaintiff had provided the defendant's brother with sufficient or relevant documentation to enable him to respond to any application which had been brought that had resulted in "our *client's account held at ABSA Bank number [....] being frozen*".

This is the same account into which the proceeds of the sale of the defendant's property were transferred and out of which he claimed he had made payments, averring that there was no more money left in the account after making these payments. All of this was stated by the defendant in open court on 22 August 2022.

23. As a result of these statements it was put to the defendant that, since there was no more money in the account, there could be no prejudice if an order was made freezing any sum that might still be there. The defendant agreed and did not contend that the account was no longer operated by him or on his behalf by his brother, as one would have expected if that was the case; the defendant was apparently a practicing advocate at the Pretoria Bar for some twenty years..

The following order was *inter alia* made on 22 August 2022;

> *1. The account of Mr D [....] B [....], held at the following financial institution:*
>
> *ABSA Bank*
> *Account Number: [....]*
> *Branch Code: 632 005*
>
> *Is frozen and no further funds shall be withdrawn from the aforesaid account as of date of this order and until the Court determines otherwise. "*

24. Subsequently an amount of over R20 000 was found standing to the credit of the account and apparently was attached by the plaintiff.

25. The proceedings of 22 August 2022 the proceedings at were recorded. These are the proceedings at which the defendant admitted transferring the proceeds of the sale of his property into an account held in his brother's name and over which he had control and therefore had an interest.

26. The email of 25 October 2022 from XY Attorneys added that the defendant's brother had not been provided with all the relevant facts "*despite our previous submissions that our client is an interested party considering his account has been frozen"*

The concluding remarks in the attorney's email are significant. A director of the firm who signed the emailed letter confirms that:

> *"4.3 In light of the above factors, it is our instructions that no information shall be provided to you and therefore your request is hereby denied with respect".*
>
> *4.4 Our client has not been served in any manner herein, directly or indirectly, through the Sheriff or electronically, or in the alternative in another form of personal manner to present any information, documentation or the like"*

The reference in para 4.3 of the letter to a request made by the defendant is presumably to a request contained in the defendant's letter to his brother of 23 October 2022 which is mentioned in para 1 of the attorney's letter. Despite forwarding the letter to the court, XY Attorneys did not attach the defendant's letter of 23 October to which it was allegedly responding.

27. The first observation is that there is no reason for such a letter to be written on behalf of the defendant's brother to the defendant. There is no reason to believe that the defendant would not have conveyed to his brother the information he provided to the court on 22 August about using the account in question to transfer the proceeds of the sale of his house and then to have effected payments out of that account.

That being the case, then the point was not there being insufficient information to deal with the issue but whether or not the brother denies lending his name to enable the defendant to conceal the proceeds of the sale of his property, as alleged by the plaintiff, by transferring the amount into an account under his brother's name.

28. Furthermore it is evident from these facts that the brother would have to explain why he enabled the use of his name to an account so that the proceeds of the sale of the defendant's property would not go directly into any account bearing the defendant's name or which could be traced back to the defendant by reference to his identity number.

It is difficult to conceive that this would have passed unnoticed by the attorneys if the defendant had informed his brother about what he had told the court on 22 August and his brother had informed the attorneys of these facts before writing the letter of 25 October. The attorneys' letter confirms that they were aware that the ABSA bank account had been frozen by an earlier court order.

There is no suggestion that there was any animosity between the brothers or that they were not speaking to each other. The attorney could simply have picked up the phone and spoken to the defendant regarding the operation of the ABSA account bearing their client's name. This is another reason why no reason appears to exist for writing the letter to the defendant. A phone call would have resolved everything.

29. The next observation is that the letter fails to address the issue on which the attorney should have obtained instructions; namely whether their client was lending his name to an account which was, or had in fact been, operated and controlled by the defendant.

This is the only issue of concern in respect of an FDF. Para 2.3 of the FDF requires a party to disclose details of all personal bank accounts held at any time in the last 12 months "*and which were either in your own name or in which you have had an interest"* irrespective of whether the account is overdrawn or not.

The FDF also requires that all bank statements covering the previous 6 months are to be attached for each account. The court order in the present case extended the period for the ABSA account to 12 months because the FDF was supposed to have been completed by 25 March 2020 in terms of the original extension granted. In retrospect, it ought to have been longer bearing in mind the opportunity to have used the intervening period to transfer the proceeds of the sale out of the ABSA account

into other accounts which, if it did occur, could have been picked up in the narration contained in the bank statement for the relevant payments.

30. The court must therefore ask why the letter was addressed to the defendant as it serves no purpose, since a phone call could have settled that, and which does not address the issue which would immediately arise between them, namely whether or not the brother agrees that he lent his name to an account in which the defendant has an interest (as contemplated in para 2.3 of the FDF).

31. Without an acceptable explanation the conclusion is that the letter was to serve an ulterior purpose; namely to try and influence the court, or in the belief that pressure could be put on the presiding judge seized with a matter by addressing the letter also to the Deputy Judge President in the hope that he may ask the presiding judge to explain.

32. This is not the first occasion that an attorney has sought to put in a letter what should be contained in an affidavit or should be said in open court where assertions can be properly tested and be subject to consequences if incorrect.

33. Practicing attorneys are expected to know that if their client wishes to challenge any matter presently before a court they are to do so by way of affidavit, not an epistle to the judge or the Deputy Judge President. If the client is not a party to the proceeding in respect of which his or her rights are affected then a non-joinder application is to be brought, or if assets attached then an interpleader.

34. There is nothing which presents itself in the present case to suggest that the defendant could not have obtained an affidavit from his brother dealing with the issue of whether the latter lent his name to an account operated by the defendant, save of course the defendant’s own admission, or statement against interest in open court, that this had occurred.

35. Accordingly, it appears that the letter although ostensibly written to the defendant was intended to influence the presiding judge outside the procedures provided under substantive and adjectival law. Furthermore, by addressing the

Deputy Judge President it appears that the intention was to interfere extra-curially with the independence of the court and its presiding judge.

Without an acceptable explanation the conclusion is that the attorney hoped to avoid putting the client's version on oath where it could be tested and have further consequences if incorrect- but rather to write a letter in the hope that the defendant would be able to contend that he cannot be in wilful default or *mala fide* by failing to provide the ABSA bank statements.

36. The issue however is straight forward. The defendant admitted that he had used the ABSA account in the manner described earlier and for that reason had an interest in the account albeit not opened in his name. This triggered his obligation to make the disclosures and provide the statements required at least by para 2.3 of the FDF. It was for him and his brother to explain under oath why that was not possible; not for an attorney to write an extra-curial letter which, particularly by reason of its careful wording of what is said and what is avoided, can have no detrimental consequences to the brother.

37. It is for these reasons that the court is concerned about;

a. whether the writing of a letter between a party to proceedings and one who is not, which is sent to the presiding judge and the leadership of that court during the course of litigation and which may reasonably be expected by a litigating attorney to influence the presiding judge in the decision he or she is to make in court, constitutes unprofessional conduct and whether it is unprofessional conduct in such circumstances not to have complied with the rules of court by filing an appropriate affidavit with or without a suitable application.

b. whether the responsible attorney at the firm did consult with the defendant or ought to have and whether an adequate consultation was held to establish the facts, before writing a letter claiming that details were unknown and whether the true purpose of the letter was to inform the defendant of his brother's position or to address the presiding judge and the

Deputy Judge President in order to extra-curially influence the outcome of court proceedings which were in progress. If there had been any communication between the attorneys and the defendant then one would have expected this to be disclosed, and if not, why there was not an attempt to do so before sending composing the letter in the fashion it was and sending it by email to the court.

**ORDER**

38. The court accordingly orders that:

1. The issue whether the warrant of arrest issued against the defendant should be executed against him in terms of para 4 of the order of 12 September 2022 because he has de facto control of the ABSA account and therefore can obtain the statements from his brother as required in terms of para 2.3 of that order is postponed until such time as the ABSA accounts have been produced and it can be discerned whether or not the transactions from the time when the proceeds of the sale of the defendant's property were transferred into it, reflect that the defendant's brother was operating the account for and on behalf of defendant or otherwise under the defendant's de facto control.

2. The plaintiff and defendant are to update their respective discovery affidavits by filing on or before 23 November 2022 a supplementary discovery affidavit to which copies of all additional documents attached;

3. The defendant is liable to pay to the plaintiff the costs of the hearing on 26 October 2022 and the costs of the plaintiff's supplementary discovery affidavit and the production of copies of such discovered documents on the attorney and client scale payable within in 30 days of taxation or agreement of the amount.

4. The next case manages to be held on 20 January 2023 at 09h30 at which it is the intention of the court to certify the matter trial ready unless there is good reason why it ought not to.

5. The Chief Registrar of the Court is directed to furnish a copy of this judgment to the Director of the Legal Practice Council, Gauteng for consideration of what is set out herein regarding the conduct of one or more of the practitioners at the firm of attorneys representing the defendant's brother and responsible for writing the letter of 25 October 2022 and emailing it at the eve of the hearing to the court.

**SPILG, J**

| | |
|---|---|
| DATE OF JUDGMENT: | 31 October 2022 |
| FOR PLAINTIFF: | Adv. R Andrews<br>HJW Attorneys |
| FOR DEFENDANT: | In person |