REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO: 2012/32900

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

25/9/12 .....

MARK WALTER STEVENS	1ST Applicant
MWS TRUST	2ND Applicant
LINDSAY STEVENS NO (TRUSTEE OF MWS TRUST)	3RD Applicant
MARK WALTERS STEVENS NO (TRUSTEE OF MWS TRUST)	4TH Applicant
PJA VAN LINGEN NO (TRUSTEE OF MWS TRUST)	5TH Applicant
THE CAPITAL PROPERTY FUND	6TH Applicant
ABSA BANK LIMITED	7TH Applicant
PROPERTY FUND MANAGERS LIMITED	8TH Applicant
RESILIENT PROPERTY INCOME FUND LIMITED	9TH Applicant
FORTRESS INCOME FUND LIMITED	10TH Applicant
DESMOND DE BEER	11TH Applicant
BARRY LESTER STUHLER	12TH Applicant
ANDRIES DE LANGE	13TH Applicant
DAVID JOHN LEWIS	14TH Applicant
JACOBUS JOHANN KRIEK	15TH Applicant
NICOLAAS WILLEM HANEKOM	16TH Applicant
ABRAHAM ALBERTUS BORNMAN	17TH Applicant
CRAIG BRABAZON HALLOWES	18TH Applicant

ANDREW EDWARD TEIXEIRA	**19TH Applicant**
JEFFREY NATHAN ZIDEL	**20TH Applicant**

and

INVESTEC BANK LIMITED	**1ST Respondent**
NEDBANK LIMITED	**2ND Respondent**
BOE STOCK BROKERS (PTY) LIMITED	**3RD Respondent**
WARRANT OFFICER STONEY STEENKAMP NO ORGANIZED CRIME UNIT, EAST RAND	**4TH Respondent**
COLONEL STEYN NO – THE COMMANDER ORGANIZED CRIME UNIT, EAST RAND	**5TH Respondent**
COMMISSIONER OF POLICE, GAUTENG GENERAL M PETROS NO	**6TH Respondent**
MINISTER OF POLICE	**7TH Respondent**
NATIONAL PROSECUTING AUTHORITY c/o DPP WLD	**8TH Respondent**

Neutral citation: *Mark Walter Stevens & 19 others v Investec Bank Limited & 7 others* 2012 SA (GSJ)

Coram: SATCHWELL J

Heard: 15th October 2012

Delivered: 25th October 2012

Summary: Interdict granted to preserve bank confidentiality pending review of a section 205 subpoena.

JUDGMENT

SATCHWELL J:

INTRODUCTION

[1] Certain members of the South African Police Services ("SAPS") approached a prosecutor who thereafter requested a Magistrate in Germiston for the issue of subpoenae in terms of section 205 of the Criminal Procedure Act ("CPA") which were then served upon three banking entities (first to third respondents).

[2] It is now known that at least one of these subpoenae[1] requires production of documentation including loan applications, suretyships, financial statements, lease agreements and property valuations involving certain corporate entities, trusts, individuals in their capacity as shareholders or directors in the corporate entities and individuals as trustees and individuals as business persons. It was not seriously in dispute, at the hearing of this application, that the twenty applicants and their clients and their financial or banking affairs are the subject matter of all three section 205 subpoenae.

[3] The applicants have now brought an application, under case number 38742/2012, to have the section 205 proceedings and the decision of the learned Magistrate which gave rise to the issue of such subpoenae, to be reviewed and set aside.

[4] Pending the outcome of the review proceedings, the applicants seek access to those subpoenae not yet disclosed to them as also the affidavit of a Warrant Officer Steenkamp which was utilised to procure the issue of the subpoenae. Further, an interdict is sought restraining the three banking entities ("Investec", "Nedbank", "BOE Bank Brokers") from furnishing the documentation and information required in terms of the subpoenae.

[1] Copy of subpoena at page 60 of the papers.

BACKGROUND

[5] Applicants have dealt, in some detail, in their papers with their suspicion and knowledge of a smear campaign against them which they believe to have emanated from certain competitors. Through the services of attorneys Werkmans, applicants were introduced to a private investigation firm, Specialised Services Group ("SSG") and one of their employees, Phillip Thorne. Whilst a client of SSG, applicants learnt that the procedures available in the CPA, namely the issue of a section 205 subpoena, could be utilised to obtain the identity of the sender of certain emails involved in the smear campaign. This would be done by making a formal criminal complaint to certain members of the SAPS who would then prepare the necessary affidavit, approach a prosecutor who would in turn request a Magistrate to issue the appropriate subpoena. The subpoena would be served on the relevant telecommunications company which would be obliged to disclose the information required by the applicants.

[6] Applicants complain that Warrant Officer Steenkamp and Captain Stolterfoht are now making themselves and their official positions and associated powers available to SSG and/or Phillip Thorne in exactly the same manner. Such *modus operandi* in performing tasks for and on behalf of private investigators is both an abuse of the functions of the SAPS and the provisions of the CPA. A number of reasons have been set out as to why it is *"highly likely that Warrant officer Steenkamp and /or Captain Stolterfoht are operating in a rogue manner and out of line with their duties as policemen"*.[2]

THE INTERDICT

[7] Applicants maintain that the privacy of their and their clients' affairs is at risk of being invaded. Certainly, at least one the respondent banks, BOE, took the view that the information stipulated in the subpoena "may concern some of your clients".

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[2] Paragraph 22 of Applicant's Heads of Argument.

[8] The fourth to seventh respondents do not dispute that the subject matter of the SAPS investigation are "certain high-profile individuals (including the individual applicants)" which has led to the necessity to obtain the documentation.[3]

[9] That the information sought is private and confidential is of no doubt. BOE advised applicants that it could not furnish applicants with a copy of the subpoena by reason of "confidentiality" accruing to those parties who may not be clients of the applicants.

[10] There is no doubt that a banker-client relationship requires the highest *uberrimae fides* and that confidentiality is one of the essential aspects of such relationship of trust as between trustee and trust, director and company, financial advisor/manager and client and between banker and client. Privacy in financial and banking affairs is often an important aspect of successful business enterprise in a competitive economy. As was said by Traverso DJP in *Firstrand Bank Ltd v Chaucer Publications (Pty) Ltd* 2008 (2) SA 592 (C):

> "18] A banker's contractual obligation to preserve the confidentiality has long been recognised in the English Law. The leading case in this regard is *Tournier v National Provincial & Union Bank of England* [1924] 1 KB 461. In this case it was decided that the right of a customer to keep his affairs confidential is a legal right. This is however a qualified right, and arises either *ex contractu* or is implied from the relationship between a banker and a customer. Bankes, LJ stressed that there may be situations where grounds of justification for the disclosure of client information exist. Atkin, LJ confirms this view and states that the duty to disclose goes beyond the state of the account of any particular client and must extend to all transactions that go through an account.
> [19] In the South African context, this duty of confidentiality (or secrecy as it is sometimes referred to) was recognised, *inter alia*, in *Abrahams v Burns* 1914 CPD 452; *GS George Consultants & Investments (Pty) Ltd and others v Datasys (Pty) Ltd* 1988 (3) SA 726 (W). ...The confidential nature of the relationship between a bank and its client has been recognised by several authors and there are also a number of statutory provisions that are based on the assumption that bankers owe a duty of confidentiality to its clients...
> [20] ... It seems to me that for considerations of public policy the relationship between a bank and its client must be of a confidential nature. Equally – for considerations of public policy – this duty is subject to being overridden by a greater public interest. ... Although the duty not to disclose rests with the bank, the privilege not to have the details of its dealings with the bank disclosed belongs with the client. It is therefore the client alone who can invoke this privilege and

[3] Page 112 at paragraphs 16 and 17 of the Answering Affidavit.

insist that the bank keeps the information about its dealings with the client confidential. ..."

[11] Penetration of the banking vault and disclosure of that which is contained therein is not always a breach of confidentiality or unlawful. One needs only have regard to the provision of section 205 of the CPA to realise that there must always be circumstances where the needs of privacy must give way to the needs of the administration of justice.

[12] On the face of it the subpoenae, with which this matter is concerned, were issued by a lawfully appointed Magistrate in pursuance to an approach by a lawfully appointed prosecutor pursuant to an approach by lawfully appointed members of the SAPS. Notwithstanding such apparent lawfulness, persons affected by or who are the subject matter of a section 205 subpoena are certainly not prevented from approaching a court for reconsideration or review of the decision to issue such subpoenae.[4]

[13] If there has been misuse of one's position by any member of the SAPS or abuse of the criminal justice system in the manner alleged in procuring the issue of such subpoenae that would certainly be a further ground for review of the decision of the Magistrate who issued the said subpoenae.

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[4] *S v Matisonn* 1981 (3) SA 302 (A) at 313A–B; P*retoria Portland Cement Co Ltd & another v The Competition Commission & others* 2003 (2) SA (SCA) at para 35: "Review is not directed at correcting a decision on the merits. It is aimed at the maintenance of legality, at the administration of 'the law which has been passed by the Legislature' as Bell J put it on the same page of *Meintjies's* case. And throughout it has been the High Court, and only the High Court, acting through its judges, that has enjoyed the general, inherent jurisdiction to entertain reviews."; *Wasteman Holdings (Pty) Ltd v Serfontein and Others* (3551/2011) [2011] ZAKZDHC 85 (20 December 2011) at 13: "In *Mandela v Minister of Safety and Security* the Court noted that, reasonable grounds for believing does not require grounds that measure up to an objective standard, but rather grounds which in the subjective opinion of the Magistrate are reasonable. Thus, the Court may not interfere with the Magistrate's decision merely because it views his/her conclusion as incorrect. To justify interference, the Court must be satisfied that the Magistrate did not apply his/her mind to the matter. In *Van der Merwe v Minister van Justisie en 'n Ander* The Court held that the Magistrate's decision as to whether or not the required reasonable grounds exists is decisive, and emphasised that it would only interfere where it is of the opinion that the Magistrate has not applied his or her mind. This would occur, for example, where the Magistrate acted *mala fide,* with an improper motive, arbitrarily or grossly unreasonable. It added that the onus would be on the person seeking to set the warrant aside to show that on a balance of probabilities the Magistrate did not apply his mind to the matter."

[14] The respondents have pointed out that the East Rand Organized Crime Unit has received certain information pertaining to allegations that *"may amount to crimes of fraud, corruption, insider trading and contraventions of the Johannesburg Stock Exchange Regulations and the Companies Act"*.[5] Accordingly, this Unit has initiated an enquiry and opened a docket of which the subpoenae comprise part of such investigation and possible prosecution.

[15] On the one hand, I have regard to the issue of privacy to which every client of every bank is entitled whilst, on the other hand, I have regard to the averment that the Directorate for Priority Crime Investigation is tasked with investigating *"serious organised crime, serious commercial crime and serious corruption"*. I have some difficulty in the present case comprehending how "serious" the alleged offences may or may not be. There is obviously a vast degree of moral culpability and societal harm between fraud perpetrated by a R100 cheque and a so-called Ponzi scheme involving millions of Rands and participants.

[16] Opposition to the interdict sought is, in the main, predicated upon the ensuing delay which would be visited upon the SAPS investigations should the three respondent banks be precluded from furnishing information required in terms of the subpoenae pending the outcome of the review application.

[17] Of course there will be delay. Delay is axiomatic to the very concept of interdictory relief. But there is nothing before me to suggest that the criminal investigation apparently under way will be completely halted by reason of the absence of the information sought under subpoena from the banks. Further, there is no reason to think that any delay would be any longer than it takes for Answering Affidavits and Replying Affidavits to be filed and matters to be set down for hearing in the opposed Motion Court of this Division. In the scale of things, criminal investigations and prosecutions which may result therefrom are visited with delays of an excruciating range – vacation or sick leave for members of the SAPS, the time it takes to photocopy documents, interlocutory litigation, rejection of a docket by a prosecutor who requires

[5] Page 112 at paragraph 14 of Answering Affidavit.

further information, the availability of prosecutors or legal representatives of the accused etc etc etc.

ACCESS TO STEENKAMP'S AFFIDAVIT

[18] Applicants maintain that they require the affidavit purportedly deposed to by Warrant Officer Steenkamp and presented to the learned Magistrate in Germiston in order to demonstrate the abuse on the part of the SAPS which has resulted from either the SAPS working hand-in-glove or being manipulated by SSG for their own purposes ie an ulterior purpose other than that envisaged in section 205 of the CPA.

[19] Understandably, the fourth to seventh respondents have pointed out that what is contained in such affidavits is the nature of and scope of the investigation underway as also the identity of the "informer" who apparently supplied such information. These respondents contend that the information in Warrant officer Steenkamp's affidavit is "privileged".

[20] Such information may indeed be "confidential" at the present time but its ultimate status as "privileged" remains to be determined. It will of course be the court which hears the application for reconsideration and review of the section 205 proceedings and issue of the section 205 subpoenae which would examine the background to this entire saga as averred by the applicants, the *modus operandi* it is claimed is now being repeated by "rogue" policemen, the allegations concerning a former service provider, SSG and Thorne, to the applicants and the abuse of process by Thorne and SSG and of Warrant Officer Steenkamp, Captain Stolterfoht and any other, as yet unnamed, business competitors of the applicants. In the review application in terms of Rule 53 of the Supreme Court Rules, the applicants will obviously seek or have sought a full record of the proceedings before the learned Magistrate to be produced and made available to the applicants.

[21] Such documentation (including Warrant Officer Steenkamp's affidavit) may be produced or there may be opposition to its production. If there is such opposition, then the review court

would of course make the appropriate determination based upon all evidence before it. It is possible that the review court will order production of the entire affidavit or only a portion thereof or that certain details will be blocked out. It is possible that the review court will decide that no portion of the affidavit is to be produced. I do not presume to anticipate the result.

[22] I can appreciate that it could be very inconvenient for the applicants to find themselves in the position of a two-stage review proceeding: in the first place litigating to obtain Steenkamp's affidavit and secondly litigating the review of the subpoenae issue. I do however feel that it is appropriate for the review court to examine, assess and adjudicate all the issues rather than be confronted, as has this court, with a slowly emerging series of revelations.

[23] The 8th respondent, the National Prosecuting Authority, has opposed this application. The NPA was correctly cited since it has an interest in the interaction of its employee, a prosecutor, both before the learned Magistrate in Germiston and in dealings with Warrant Officer Steenkamp and the other members of the SAPS. However, in argument I was told that the reason why the NPA had filed opposing papers was because the NPA would be unable to comply with the orders sought by the applicant because the NPA does not have in its possession a copy of the affidavit of Warrant Officer Steenkamp. However, the NPA failed to categorically state this or even to allude to this difficulty in its answering papers.

INTERIM RELIEF

[24] The original application was brought as one of urgency and, by agreement between the parties on the matter of urgency alone and not the merits of the application, it was arranged that an order be made by his Lordship Mr Justice Kgomo on 31st August 2012. The documents requested in the section 205 subpoenae have been sealed and delivered to the Registrar of this court for safekeeping and neither applicants nor respondents have had access to such documentation pending the outcome of this application.

COSTS

[25] I have no doubt that issues of privacy as presented before this court by the applicants are deserving of protection and that there can be no bar to persons in the position of applicants proceeding to have section 205 subpoenae reviewed and set aside. In the present case, the only ground for review to which I have been referred are those of the alleged "abuse" on the part of "rogue" policemen acting for and on behalf of private investigators. These allegations may or may not turn out to be with or without foundation. That is a decision for the court hearing the review application.

[26] I do not think it appropriate to make a costs order at the present time. This application was not brought upon grounds of all-encompassing banker/client privilege or confidentiality or an ever-enduring banker/client privilege or confidentiality which can never be interrupted. It was brought upon the basis of the abuses to which I referred. If it turns out that the reviewing court is not satisfied there are grounds of abuse that would justify setting aside the subpoenae, then this application should not have been brought.

[27] Accordingly, the costs of this application (which I believe did necessitate the costs of employment of senior counsel and where I do not think it inappropriate for the applicants to have utilised two counsel) are reserved for decision at the hearing of the application for review.

ORDER

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[28] In the result an order is made as follows:

1. Pending finalisation of the review proceedings launched under case number 2012/38742:
    a. The Registrar of the South Gauteng High Court shall retain for safekeeping under seal the documentation delivered to him by the first, second and third respondents which documentation was required to be produced by them in terms of the section 205 subpoenae;

b. Neither the respondent nor applicants shall have any access to this said documentation;

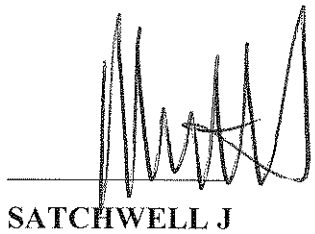
c. The first, second and third respondents are interdicted from disclosing any information and/or document or divulging any information to fourth, fifth and sixth respondents requested under a section 205 subpoena issued by the Germiston Magistrate Court, 3rd December 2012.

2. Each of the first, second and third respondents, who have as yet failed to furnish the subpoenae to the applicants are directed to furnish the applicants therein identified and affected by the subpoenae with copies thereof.

3. The application that the fourth to eighth respondents make available to the applicants the affidavit placed by the SAPS before the National Prosecuting Authority and a Magistrate at Germiston is refused.

4. The costs of this application are reserved.

DATED AT JOHANNESBURG ON THIS 25th DAY OF OCTOBER 2012.



SATCHWELL J

JUDGE OF THE HIGH COURT

APPEARANCES:

APPLICANTS:	M Hellens SC with DJ Joubert
	Instructed by BDK Attorneys, Johannesburg
4th – 7th RESPONDENTS:	D Dorfling SC with HW Sibuyi
	Instructed by the State Attorney, Johannesburg
8th RESPONDENT:	RT Marueme
	Instructed by the DPP, Johannesburg