REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 2012/38742

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

15/08/2013
DATE

SIGNATURE

In the matter between:

MARK WALTER STEVENS & 19 OTHERS	Applicants
and	
MAGISTRATE THERESA SWART NO – MAGISTRATE GERMISTON	First Respondent
WARRANT OFFICER STONY STEENKAMP – ORGANISED CRIME UNIT, EAST RAND	Second respondent
CAPT, PETER ALAN STOLTERFOHT - ORGANISED CRIME UNIT, EAST RAND	Third Respondent
COL. STEYN, N.O., THE COMMANDER - ORGANISED CRIME UNIT, EAST RAND	Fourth Respondent
MINISTER OF POLICE N.O.	Fifth Respondent

NATIONAL PROSECUTING AUTHORITY, c/o DIRECTOR OF PUBLIC PROSECUTIONS, SOUTH GAUTENG	Sixth Respondent
INVESTEC BANK LIMITED	Seventh Respondent
NEDBANK LIMITED	Eighth Respondent
BOE STOCK BROKERS (PTY) LIMITED	Ninth Respondent

J U D G M E N T

FISHER AJ:

[1] This is an application by the Applicants in terms of Rule 30A of the Uniform Rules of Court. The Applicants seek thereby to compel the First to Sixth Respondents, in terms of Rule 53(1)(b) of the Rules, to dispatch to the Registrar the full record of proceedings comprising the material that served before the First Respondent, Magistrate Theresa Swart, when she made her decision to issue four subpoenae in terms of section 205 of the Criminal Procedure Act 51 of 1977. It is contemplated that such record will, in due course, form the subject matter of a review application launched by the Applicants on 12 October 2012 in terms of Rule 53.

[2] The First Respondent ("*the Magistrate*") authorised the issue in terms of section 205 of the subpoenae, which call upon the Seventh to Ninth Respondents, which are all financial institutions ("*the Bank Respondents*") to provide what the

Applicants contend, is private and confidential information and documentation concerning them.

[3] The Second to Fourth Respondents are members of the South African Police Services (*"the Police Respondents"*) and they allege that they are investigating certain offences involving the Applicants, or certain of the Applicants. It is alleged further that the subpoenae were required by them to further their investigation of these offences. The Sixth Respondent is the National Prosecuting Authority (*"the NPA"*) and thus has a direct interest in any investigation.

[4] In answer to the application in terms of Rule 30A and on 13 November 2012, the Magistrate delivered an affidavit in terms of which she stated the following:

1. the application in the review application was not served upon her personally or on her offices and the State Attorney had accepted service of the review application on her behalf on 12 October 2012;

2. she subsequently became aware of this application, by way of correspondence received from her head office, whereafter she requested a copy of the application papers to be made available to her;

3. she returned from leave on 5 November 2012 and, on 7 November 2012, received a copy of the Rule 30A application from the State Attorney;

4. she had no independent recollection of having issued the section 205 subpoenae in issue;

5. on average, she signs more than a hundred section 205 subpoenae every week and, as a matter of course, she entertains these applications in chambers;

6. in the normal course, a member of the South African Police will approach her in chambers and will present her with the necessary documentation in support of the application in terms of section 205;

7. she will then consider a written request drawn up by the public prosecutor, the sworn affidavit of a police official setting out the facts on which the application is based, and also the relevant information relied upon by the police official in his/her affidavit in support of the application;

8. she requires of police officials that they have all the aforesaid information available for her to consider, before issuing a subpoena;

9. she does not keep any record of the subpoenae issued in terms of section 205;

10. after the consideration of the matter and the due exercise of her discretion, she will usually hand all documents, including the subpoena, over to the police official in attendance for his/her further action;

11. she was not possessed of a record of the proceedings in relation to the issue of the subpoenae in issue;

12. she was not, at the time of making her answering affidavit, in a position to apply her mind to whether or not to oppose the relief sought by the Applicants and she would be able to take a final decision in this regard only once the documents placed before her when she issued the subpoenae were made available to her;

13. she thus reserved the right to supplement her affidavit and to make an election whether or not to oppose the relief sought once placed in possession of all the documents which were before her at the time she issued the subpoenae.

[5] The Applicants contend that they are entitled to all the documents to which the Magistrate had reference in issuing of the subpoenae and that these documents constitute the record that they seek to review.

[6] It is not in dispute that the documents that were placed before the Magistrate are not in her possession, but are in the possession and under the control of the Police Respondents.

[7] Warrant Officer Steenkamp, the Second Respondent (*"Steenkamp"*), made affidavits in this matter on behalf of the Police Respondents. He indicated initially in his answering affidavit in this matter that his affidavit having approximately 300 pages of annexures had been put before the Magistrate in support of the section 205 application in question. He stated further that the entire enquiry docket in the matter had also been placed before her when she heard the application and that she had had reference thereto.

[8] In a supplementary affidavit filed in this matter he indicated, however, that, in fact, he had been mistaken in relation to the documents placed before the Magistrate and that, in fact, the affidavit that was placed before the Magistrate had annexures that ran only to 14 pages. He alleged further that it was, in fact, the enquiry docket itself that ran to approximately 300 pages.

[9] There is thus some inconsistency and confusion in the evidence of Steenkamp in relation to which documents were placed before the Magistrate.

[10] The Magistrate also made a supplementary affidavit, in terms of which she stated the following:

1. she does not oppose the Rule 30A application or the review application and that she would abide by whatever decision the Court reached in both applications;

2. at a consultation with Steenkamp and the Police Respondents' legal representative held subsequently to the making of her answering affidavit in this matter and on 13 May 2012, Steenkamp had allowed her to have reference to an affidavit, which she believed had been the affidavit which was placed before her in support of the application in terms of section 205. (I shall refer to this as "*the Steenkamp affidavit*");

3. each page of the six annexures to the Steenkamp affidavit reflected the official stamp of her office and her name;

4. generally, when an application in terms of section 205 is placed before her, after satisfying herself that the affidavit placed before her discloses the commission of an offence or offences, she will grant the application and the affidavit will then be handed back to the policeman;

5. in certain instances, she will insist that the policeman furnish her with the enquiry docket, not necessarily to peruse the entire docket, but to satisfy herself that there are indeed pending criminal investigations and that the reference number of the enquiry docket accords with the one referred to in the affidavit deposed to by the policeman seeking the

order and placed before her;

6. there are instances where she will put questions to the policeman to seek clarity about aspects referred to in the affidavit deposed to in support of the application;

7. if the issues raised are based on an affidavit or affidavits contained in a police docket, she will insist on the perusal of such further affidavits;

8. she has never previously perused the entire docket in a matter;

9. she will refuse to grant an order when the affidavit placed before her is devoid of the necessary details and she will then advise the police to seek further information if they intend to persist with the application;

10. the order, which is the subject of dispute, was granted by her on 27 July 2012, which was almost ten months prior to her making the affidavit, and that this was why it was difficult for her to remember exactly how she had dealt with the application in terms of section 205;

11. there was no recordal of the section 205 proceedings, either by hand or mechanically, as it not the standard procedure to record such proceedings, because they do not constitute criminal proceedings;

12. on the basis of the Steenkamp affidavit, she can confidently state that the facts deposed to therein disclose the suspected commission of the offences of fraud, insider-trading and contravention of the Johannesburg Stock Exchange regulation and that the persons subpoenaed to appear before her or another magistrate, are likely to give material or relevant information to such alleged offences;

13. during the consultation, the legal representatives of the Respondents drew to her attention the fact that, in the answering affidavit in these proceedings, Steenkamp stated, *inter alia*, that she had perused the enquiry docket prior to the granting of the order in terms of section 205;

14. such reference to the docket could have had taken place in the context only of her wanting to confirm that there were, in fact, pending criminal investigations which were being conducted by Steenkamp;

15. she could not have perused the enquiry docket, because the Steenkamp affidavit, on its own, disclosed the commission of suspected criminal offences and she had no reason to seek any additional information from the enquiry docket or elsewhere;

16. in her contention, the Court should decide the review application on the basis of the Steenkamp affidavit;

17. even if she were furnished with a docket at this stage, she would not be in a position to indicate to the Court exactly which document or documents she relied upon;

18. furthermore, even if the entire docket was furnished, it would, in her opinion, not be of any assistance to the Applicants because of the fact that there had been an on-going investigation by the police which made it difficult to say with certainty what information was contained in the enquiry docket at the time that the application was made before her.

[11] Accordingly, the Magistrate was furnished by the Police Respondents with the Steenkamp affidavit and was told that this is the affidavit that formed the basis of the application before her in terms of section 205. The Steenkamp affidavit is produced by her as an annexure to her supplementary affidavit. Pertinently, the affidavit, which has so been provided to her and annexed to her affidavit, has certain deletions which have been made by the Police Respondents. She confirms, however, that she had reference to the Steenkamp affidavit in its complete form for the purposes of making her supplementary affidavit.

[12] The Police Respondents and the NPA refuse to produce to the Magistrate or to allow the production of any documents other than the Steenkamp affidavit in its deleted form.

[13] It is contended, on behalf of the Police Respondents, that the Applicants are not entitled to the affidavit in its undeleted form, in that the deletions constitute privileged and/or confidential information that may not legally be disclosed to the Applicants. They make the same objections in relation to disclosure of the docket. They state that the disclosure of these documents would prejudice the investigation, in that they reveal the identity of confidential sources of information and information pertaining to methods employed in the investigation.

[14] As aforesaid, the Applicants contend that the docket and the affidavit, without its deletions, constitute the record to which they are entitled in terms of Rule 53.

[15] There are thus disputes in this application in relation to the composition of the record and whether any portions of the record may or should be withheld on grounds of privilege, confidentiality or the protection of the interests of third parties. There are also matters of relevance in relation to parts of the alleged record that arise. These disputes are not capable of determination in the context of these or, in my view, the Rule 53 proceedings.

[16] Rule 53(1) reads as follows:

> "***Review***
>
> *(1) Save where any law otherwise provides, all proceedings to bring under review the decision of proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed*

and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or the officer, as the case may be, and to all other parties affected –

(a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and

(b) calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to dispatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so"

(My emphasis)

[17] Accordingly, Rule 53(1)(b) expressly provides only for the presiding officer/tribunal whose decision is sought to be reviewed, to be called upon to produce the record. No provision is made thereby to seek documents alleged to be the record or portions thereof from third parties. No possible construction of the Rule lends itself to an interpretation to the effect that notice to produce these documents can go to anyone other than the presiding officer/tribunal concerned.

[18] It is not unreasonable to expect of a presiding officer who is not in possession of a record, that he/she will cooperate in attempting to secure possession of such record and even to reconstruct same where possible (See: **Rex v Wolmarans and Another** 1942 TPD 279 at 283; **S v Joubert** 1991 (1) SA 119 at 122). It cannot, however, be expected that such presiding officer resort to the bringing of legal proceedings or the employment of other extraordinary measures in an attempt to

obtain the record from third parties. One would expect also that such an officer would act in good faith in this regard and would not seek to impede the review process. To the extent that bad faith was apparent from the conduct of the officer, an applicant would have remedies against such an officer.

[19] As aforesaid, Rule 53(1)(b) makes it clear that it is the magistrate or other presiding officer, as the case may be, who may be called upon to produce the record under Rule 53(1)(b). Rule 30A has, as its purpose, the enforcement of compliance with the Rules or a request made, or notice given pursuant thereto. To the extent that a request has been made of parties other than the Magistrate to produce the record, this is not in accordance with Rule 53(1)(b) and accordingly a failure by such other Respondents to comply with such request does not constitute non-compliance with the Rules.

[20] The procedure set out in Rule 53 does not lend itself naturally or properly as a mechanism for obtaining documents from third parties. Attempts to seek documents in this manner are bound to bring about objections to production and disputes as to whether the documents in question indeed constitute the record, as have indeed arisen here. The Rule 53 process is not properly equipped to accommodate and deal with these disputes.

[21] The Applicants are not without their remedies in the face of what they allege to be the recalcitrance of the Police Respondents and the NPA. The Production of Access to Information Act, 2 of 2000 ("*PAIA*"), creates sophisticated machinery

which allows for the obtaining of documents required by a party in the exercise or protection of any right (see section 9(a), read with section 11).

[22] Furthermore, this machinery is equipped with processes which properly take account of objections to the production of the information of the nature raised in this matter. In this regard, whilst PAIA deals with mandatory protections of the privacy of third parties and the protections of police dockets (see sections 34 and 39), these are balanced against provisions providing for mandatory disclosures in the public interest (see section 46). It may well be that there are also certain apposite common law principles which would assist the Applicants in seeking access to the documents in question.

[23] Thus, I find that the Applicants are not entitled to employ the provisions of Rule 30A in purporting to compel compliance with Rule 53(1)(b) against any Respondents, other than the Magistrate.

[24] The Magistrate has, to the extent that she is able, produced the record, or such portion thereof as has been placed at her disposal. She has furthermore provided all information available to her in relation to the nature of the record, its composition and its whereabouts. Accordingly, I am satisfied that she has complied, to the extent that she can, with the provisions of Rule 53(1)(b) and to the extent that she has not been able to comply, she has explained her non-compliance. It must be implicit in the provisions of Rule 53(1)(b) that the presiding officer in question can only be called upon to provide so much of the record as he/she is able to provide.

There is thus no basis for an order to be made against her in this matter.

[25] As to the costs, it is not placed in dispute that the main application in terms of Rule 53(1)(a) and (b) was not delivered to the Magistrate personally. On receipt thereof and on receipt of this application, she dealt therewith to the extent that she was able and without undue delay. She has not opposed this application and abides the decision of this Court. In all the circumstances of this matter, I am not minded to make an order against the Magistrate in relation to any part of the costs of the application. The major portion of the costs have, in any event, been expended as a result of this application having been brought against the other Respondents. Accordingly, I see no compelling reason why the costs should not follow the result.

[26] The matter was dealt with by senior and junior counsel on both sides. Given its relative novelty and the fact that there is some legal complexity therein, the employment of senior counsel was not unwarranted.

[27] In the circumstances, I make the following order:

> The application is dismissed with costs, such costs to include the costs of two counsel.

DC FISHER
Acting Judge of the High Court

APPEARANCES:

For the Applicant:

Mr M Hellens, assisted by DJ Joubert, instructed by BDK attorneys

For the 2nd to 6th Respondents:

Mr Nr NK Dukada SC, assisted by H Sibuyi, instructed by the State Attorney, Johannesburg

DATE OF HEARING

29 May 2013

DATE OF JUDGMENT

15 August 2013