IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED. ✓

13-11-2014
DATE SIGNATURE

CASE NO: SS26-2014

DATE: 2014-10-13

10

In the matter between

THE STATE

And

RADOVAN KREJCIR	Accused 1
DESAI LUPHONDO	Accused 2
SAMUEL MODISE MARUPING	Accused 3
JEF NTHOROANE GEORGE MACHACHA	Accused 4
20 SIBONISO MIYA GQAMARE NDABASINHLE	Accused 5
LEFU JAN MOFOKENG	Accused 6

J U D G M E N T
STATUS OF SUBPOENAS

LAMONT, J: In this matter I have prepared a judgment as a matter of urgency, having regard to the fact that there is a degree of urgency attached to the need to conclude this trial and that this really relates to an interlocutory

There are a number of similar matters before me. Each of them concerns the status of a subpoena and there are a number of documents which were provided to accused 1's attorneys pursuant to the subpoena. Each of the subpoenas for present purposes is identical to the other and the principles applying to the one are the same principles which apply to the other. To the extent that there are certain principles which apply in addition to certain of the subpoenas, such matters, if necessary, will be dealt with separately.

At the time when the trial against the first accused was proceeding before me and prior to the closing of the State's case, accused 1 caused the Registrar to issue a number of subpoenas which were served by the Sheriff. Each subpoena required the person subpoenaed to appear at the trial before me and to produce at the time of appearance, various specified documents. Each subpoena contains a paragraph informing the witness that:

> *"Should she produce the above requested information to [accused 1's attorneys] by [a time] she would not be required to attend the hearing of the matter at the abovementioned time and place at the behest of the accused, and on the strength of this subpoena."*

The subpoena afforded the witness an opportunity to either come to court at the specified date with the documents, or to produce documents to accused 1's attorneys by a specified date. Each of these subpoenas was addressed to only one person and required compliance with the subpoena by that particular person.

Pursuant to these subpoenas, certain witnesses provided documents required by the subpoena to accused 1's attorneys, others sought to apply to have the subpoenas set aside. At one stage one of the persons subpoenaed indicated an intention to abide the decision of the court, which subsequently did not take place.

Accused 1 brought an application at a point in time seeking condonation for any technical deficiency relating to the subpoenas issued, particularly those relating to the cell phone records of Messrs. Paul O'Sullivan ("O'Sullivan) and Nkosana Sebastian Ximba
10 ("Ximba"). That application was later abandoned.

Messrs. O'Sullivan, Ramahala and Ximba, brought substantive applications to set aside the subpoenas served upon them and to obtain relief in respect of the documents which had been furnished to the attorneys of accused 1, by other persons (service providers), who had been subpoenaed and who possessed the documents. By consent, interim relief was afforded which resulted in all the documents which had been furnished to the attorneys of accused 1, remaining sealed and not seen by accused 1 or the attorneys of accused 1.

Before I deal with the particular submissions made in respect of the
20 subpoenas, it is necessary to deal with the general framework of the Acts and Rules pursuant to which subpoenas are issued and documents obtained for production during criminal proceedings.

The Superior Courts Act 10 of 2013 ("Superior Courts Act"), provides for the manner of securing attendance of witnesses or production of any document in Section 35. That section reads as follows:

"35. (1) A party to proceedings before any Superior Court in which the attendance of witnesses or the production of any document or thing is required, may procure the attendance of any witness or the production of any document or thing in the manner provided for in the rules of that court.

(2) Whenever any person subpoenaed to attend any proceedings as a witness or to produce any document or thing [the rule then deals with irrelevant material].

(3) A person arrested ... may be detained [the rule does not have any bearing on the present matter].

(4) Any person subpoenaed to attend any proceedings as a witness or to produce any document or thing who fails without reasonable excuse to obey such subpoena, is guilty of an offence ...

Section 35 is of general application to any proceedings, either civil or criminal. Section 35(1) invokes the Uniform Rules of Court. The relevant rules of court are contained within the Uniform Rules of Court which are still of application and in particular in Rule 38 and Rule 54, read together with Form 16. The relevant portions read as follows:

"38. Procuring evidence for trial:

1(a) Any party desiring the attendance of any person to give evidence at a trial, may as of right, without any prior proceeding whatsoever, sue out from the office of the Registrar one or more subpoenas for that purpose, each of which subpoena shall contain the names of not more than four persons, and service thereof upon any person therein named shall be effected by the Sheriff in the manner prescribed by Rule 4, and the process for subpoenaing such witnesses shall be, as nearly as may be, in accordance with Form 16 of the First Schedule. If any witness has in his possession or control any deed, instrument, writing or thing which the party requiring his attendance desires to be produced in evidence, the subpoena shall specify such document or thing and require him to produce it to court at the trial.

1(b) Any witness who has been required to produce any deed, document, writing or tape recording at the trial, shall hand it over to the Registrar as soon as possible, unless the witness claims that the deed, document, writing or tape recording is privileged. Thereafter the parties may inspect such deed, document, writing or tape recording and make copies

or transcriptions thereof, after which the witness is entitled to its return."

Rule 54 provides:

"54. Criminal proceedings: Provincial and Local Divisions :

1. The process for summoning an accused to answer any indictment shall be by writ sued out by the Chief Clerk to the Attorney General who presents the indictment, or in the case of a private prosecution by the prosecutor or his attorney and shall be directed to the Sheriff: Provided that in the case of the Witwatersrand Local Division the writ may be sued out of the Office of the Registrar of that division by the Deputy Attorney-General Johannesburg ...

5. The subpoena or process for procuring the attendance of any person before a Superior Court (other than a Circuit Court) to give evidence in any criminal case or to produce any books, documents or things, shall be sued out of the Office of the Registrar of that court, by the Chief Clerk to the Attorney-General (or where the prosecution is at the instance of a private party (by himself or his attorney); and the same shall be delivered to the Sheriff, at his office, for service thereof, together with so many copies of the subpoena or process as there are persons to be served. In the case of the

Witwatersrand Local Division the process may also be sued out by the Deputy Attorney-General Johannesburg and delivered to the Sheriff concerned."

The form which is provided for in the rules is Form 16. It provides for the service of one subpoena on more than one person. It reads as follows in respect of the relevant portion:

"To the Sheriff or his Deputy.

Inform:

(1)

(2) (State name, sex, occupation, race and place

(3) of business or residence of each witness)

(4)

that each of them is hereby required to appear in person before this court at ..... on ..... the..... day of .....19 ..... at..... (time) in the forenoon and thereafter to remain in attendance until excused by the said court, in order to testify on behalf of the above-named plaintiff/defendant in regard to all matters within his knowledge, relating to an action now pending in the said court and wherein the plaintiff claims(1) ..... (2)..... (3)..... from the defendant.

And inform him that he is required to bring with him and to produce to the said court..... (here describe accurately each document, book or thing to be produced.....

And inform each of the said persons further that he should on no account neglect to comply with this subpoena as he may thereby render himself liable to a fine of R300, or to imprisonment for three months."

In addition to the aforegoing Sections and Rules relating to proceedings in the Superior Courts, there is a section in the Criminal Procedure Act, 51 of 1977 ("CPA") dealing with the issue. That section, Section 179 reads as follows:

"179. Process for securing attendance of witness:

1(a) The Prosecutor or an accused may compel the attendance of any person to give evidence or to produce any book, paper or document in criminal proceedings by taking out of the office prescribed by the rules of court the process of court for that purpose ...

2. Where an accused desires to have any witness subpoenaed, a sum of money sufficient to cover the costs of serving the subpoena shall be deposited ...

4. For the purposes of this section "prescribed officer of the court" means the Registrar, Assistant Registrar, Clerk of the Court or any officer prescribed by the rules of court."

In theory, in my view, the Promotion of Access to Information Act (PAIA), 2 of 2000, could be used to obtain discovery. However, in the light of the ruling in *PFE International & Others v Industrial Development*

Corporation of South Africa Limited, 2013 (1) SA 1 (CC) it appears to me that where there is a rule dealing with the matter PAIA is not to be used. It was held that where there is pending civil or criminal proceedings, by reason of the provisions of Rule 38 of the Uniform Rules of Court, PAIA could not be used to obtain access to information.

The issues before me are how to get documents from a witness and get them to Court, to enable them to be used by persons who require them for use at the trial. The statutes (Superior Court Act and Criminal Procedures Act) set out two substantive law routes available to obtain evidence. There is no need for me to characterise the fair trial rights provided for in the Constitution, which suggests of themselves that the exercise of those rights might be a third route.

The statutes to which I have referred invoke the rules, by reference to the rules in each of the statutes. The procedures set out in Rule 38(1)(b) and Rule 54, the Form and Statutes, must be considered. Rule 38(1)(b) allows for the subpoena to require the person subpoenaed, to produce documents required to the Registrar. The other rule does not.

The Uniform Rules of Court are to be interpreted and applied flexibly. The provisions of Rule 38 were considered in *PFE International supra* at paragraph [28], without comment as to whether or not the Rule was constitutional. This is not a question to which that court was required to address its mind.

It is necessary, briefly, to deal with why rule 38(1)(b) is framed in the way in which it is. It was thus framed to reflect a Cape practice which was sought to avoid delays at trials, which occurred when documents were

presented by a witness subpoenaed, and who appeared with the documents for the first time at the hearing. The purpose of the rule was to try to set up a streamlined procedure where documents, which both parties were satisfied with upon inspection, could be obtained in advance of the hearing, to be used at the hearing. See *Trust Sentrum (Kaapstad) (Edms) Beperk & Another v Zevenberg & Another* 1989 (1) SA 145 (C) at 149F-J.

The rule was not devised with a view to compelling the production and inspection of documents in advance of the hearing where claims by witnesses and parties exist relating to the admissibility of the documents or the contents of the documents or to override any right of objection which may exist, based on the exercise of constitutional rights.

The existence of the rule does not create a procedure where the production of documents to the Registrar results in the person who provides the documents to the Registrar, losing control over them. The person who produces the documents in advance of the court hearing, at all times maintains control and possession through the Registrar of the documents. See *Picked Properties v NorthCliff Townships (Pty) Limited*, 1972 (3) SA 770 at 771.

The production to the Registrar does not confer rights of access to the documents on anyone. Rights to access will be determined at the hearing. Hence this Rule has no effect on the reasoning set out above. Until a court ruling permitting access to the documents is made, the witness is entitled to refuse access to them. See *King v Margau* 1949 (1) SA 661 (W).

The rule requiring production to the Registrar, requires production to a special type of person. The Registrar is a person duly appointed in terms

of the law, to act as a Registrar of the Superior Courts and is a person who has skills, status and qualifications in order to be appointed. The Registrar can in no way be equated to, for example, an attorney of one of the parties. It is not unknown in this court and there are rules which require a Registrar to perform particular acts for example, even judicial acts, in the sense that a Registrar may grant default judgments in certain cases.

The purpose of the rule is accordingly to provide for documents to be produced to a special person who can maintain the rights of parties to prevent rights of disclosure and production in evidence of the documents if the person relinquishes any right of control over access and right of control over production and can come to Court and raise his objection. Until a ruling permitting access to documents is made, the witness is entitled to refuse access to them. See *King v Margau,* 1949 (1) SA 661 (W). The requirement of production to the Registrar is no different in principle than a requirement to production to court.

The excursus in respect of Rule 38(1)(b) was necessary so that the reasoning which follows, can be equally applied to all the Rules.

The first question to be decided is what the status of the rule is. The rule is invoked by sections which set out substantive law. The substantive law is set out in section 35 of the Superior Courts Act and section 179 of the CPA. These sections empower the rule maker to produce a rule dealing with a procedural issue in the rules of court. As was pointed out by Counsel, in fact the CPA which provides a mechanism of subpoenaing a witness contemplates the rules both of the Magistrate's Court and the Superior Court.

The section does not provide for any particular Rule framed in any particular manner. Hence, notwithstanding the fact that there is a reference to the Rules contained within the statute, the status and characteristics of the Rule qua Rule does not change. The Rule does not become a statutory provision because it is referred to in the statute. The statute itself contemplates that the Rule to which reference is made in the statute, can change. The very nature of the Rules is that they are varied otherwise than by way of Parliament, varying them. They are varied at the instance of the rule makers who, while they are appointed statutorily, in fact make such rules as they deem fit.

The need to deal with the state of the rule as a rule is necessary as the substantive law does not empower a rule maker or a court to make rules at variance with the substantive law. At all times the requirement is that the rule shall be sanctioned by the substantive law and shall be enforceable in terms of the substantive law. If the rule contains provisions which are not in line with the substantive law, then such rules are of no effect. See for example, *United Reflective Converters (Pty) Limited v Levine*, 1988 (4) SA 460 (W) and the *PFE* case to which I have referred.

It is accordingly my view, that if the substantive law requires the production of documents to take place in a particular way and for noticing them then rules in conflict with the substantive law are ineffective and can be ignored.

If the rule sets up a procedural mechanism, for this is all that the rule purports to do, by which documents can be obtained and that mechanism is not in accordance with the substantive law, the consequence is that the rule

fails, not the statute. The Statutes and Rules must be interpreted with due regard to this principle.

The provisions of the CPA and the Superior Courts Act provide for the production of evidence at a hearing. Section 179 of the CPA provides a process for securing the attendance of a witness, together with documents, at a hearing. The words *"may compel the attendance of any person"* govern the clause *"to give evidence"*, and also the clause *"to produce any book ..."* in criminal proceedings. Similarly section 35 of the Superior Courts Act provides the right of a party to require the attendance of any witness or the production of any document or thing. What the statutes provide is that documents or things accompanied by the person producing them appear at court with the documents.

In particular the criminal section with which we are dealing with directly, section 179, contemplates that a person can be called during criminal proceedings to come to the hearing together with various documents, identified in the subpoena. It does not deal with what is to happen to the documents at the hearing. Whether or not the witness should be compelled to disclose the contents of the documents, or the documents themselves to the court or anyone else is an issue which the court hearing the proceedings, must consider once the witness is at court and the issue arises.

The purpose of the rule, it seems to me, expressly removes from the person whose attendance is sought, the right to make any decisions in relation to the documents in advance of attendance. The witness must simply come to court with all the documents sought. Once he has done so,

the court, if and when he appears, will deal with each of the documents and make rulings on whether or not there are reasons, constitutional or otherwise, why the documents or their contents, cannot be revealed or admitted into evidence.

It seems to me that the sections would not want to clothe a witness with a right to make decisions in relation to the document in advance of the hearing at court. That would always provide a witness with a right to say, *"I am here and I did not bring the document, because I claim whatever the privilege or rights of refusal, are".*

10 The function of the subpoena is to enable the trial to proceed in an orderly manner, and to enable the trial court, once documents are ordered to be produced, to see the documents and deal with them immediately. The requirement that all documents be brought and their admissibility be debated at court avoids the trial stuttering forward, as the witness stops and fetches each particular document, as and when the court orders its production. The section logically, in my view, requires all documents to be present at one time, so that they may be dealt with cohesively albeit one by one, as and when the need arises.

The submissions made that this interpretation of the section does
20 not alleviate the problem of who should get notice of the impending production of documents by the witness at the trial, as the party subpoenaed is not necessarily the party who would naturally claim rights of non-disclosure or non-production, or who would forward reasons why documents should not be admitted.

The submission was made that as the Sections and Rules are currently framed, a person who may be entitled to exercise rights in respect of the document, may not be subpoenaed as the person who has the documents, the possessor of the documents, alone has been subpoenaed and he will alone appear in the absence of a person who has an interest in the disclosure of the contents or the documents themselves.

This submission raises the question of notice. The questions to be answered in respect of the notice issues are:

1. Does constitutional compliance with the substantive law require notice?
2. Does the existing legislation implement the notice requirement?

It appears to me that a person whose constitutional rights are potentially infringed should, as a matter of principle, be entitled to have an opportunity to be protected against that potential infringement. The only manner in which this could take place properly, is if the person has knowledge as to what is taking place. This knowledge would require information of the risk which he faces and an opportunity to make such submissions as he may wish, at the time when decisions are made which may potentially infringe those rights.

This being so, the possessor of rights of objection to disclosure of documents and the information contained within those documents, is entitled to be apprised of when and where orders in relation to disclosure, are likely

to be made and to be afforded an opportunity, (including an appropriate time frame), to formulate his objection to appear and articulate that objection.

I was referred to a possible procedure which recognises this right in the Canadian case of *R v O'Connor* [1995] 4 SCR 411. The procedure in Canada is different to the procedure in this country, in that decisions as to admissibility and disclosure are made in advance of the hearing of the trial, by a jury. The reason for this appears to me to be, the need to remove from the jury documents, the contents of which may be discussed during the course of the admissibility. To the extent that this case deals with a right in advance of the trial, to obtain access to knowledge concerning the rights which may be infringed, the judgment is of application in our courts. To the extent that it sanctions a debate in advance of the hearing, it seems to me it has in mind the process of determining the question of production in advance of the hearing it deals with a different procedure than in the Republic to cope with what documents are to be available for the jury.

The substantive legal statutes which enable the rights of a subpoena to be exercised, contemplate as I have set out earlier, the production of the documents at the trial and a subsequent dealing with them there. In my view, accordingly the answer to the first question which I posed namely: Does constitutional compliance with substantive law, require notice? Is, yes.

The remaining question is whether the substantive law affords the possessor of the right, the right to prevent disclosure and production of the documents and an opportunity to exercise it. This involves a consideration of the sections.

Section 35 provides a party to proceedings with the right to procure the production of a document required. That is the substantive right conferred. The procedure and implementation of the right is to be that which is set out in the Rules. The section does not stipulate what the word "procurement" means and does not, as a matter of substantive law, determine the procedure precisely, because the rules can vary as and when they need to, for the reasons which I have debated above.

Section 179 provides that an accused may compel the attendance of any person to procure a document. It provides that the process, by which such production is to take place, is what is set out in the Rules.

For the same reasons which I have earlier stated in relation to section 35, in my view the section similarly, does not stipulate what "procurement" means and does not as a matter of substantive law, determine the procedure by which implementation of the right is to be exercised.

Neither the Statutes nor the Rules in any way limit the identity of the person who is to be subpoenaed to the possessor of the document alone, or to the owner of the right to prevent production or the owner of the right to prevent disclosure or to any or more of the aforegoing rights. The Statutes do not define who a *"person"* is. The word *"person"* must accordingly be interpreted to ascertain what the legislature intended.

In the interpretation of the Statute, the spirit of the Constitution and the Constitution itself must be given effect to. If the Constitution creates a right in a person other than the possessor of the document, then the legislation must be interpreted to mean that such person's rights are protected. The

sections, in my view, must be construed accordingly to mean that *"any person"* means any person with a legal interest.

I have resorted to the terminology of joinder as it seems to me that there is a similarity in the manner in which the process to enforce rights by way of summons and the process to enforce rights by way of subpoena are similar to an extent. When a summons is issued seeking relief against persons, there is no substantive law identifying who the persons are who have to be joined and whose rights are affected by the relief sought in the summons. There is nothing contentious in that. Our laws deal separately with what ... who the appropriate persons are and who a person with a legal interest, is.

It seems to me that there is a great deal of similarity in the case of a subpoena. The word *"person"* in the subpoena does not identify a person and there is no strain in the language, to find it to mean a person with a legal interest, in the same way as persons with legal interest are required to be joined in actions which affect their legal interests but are not identified in a Statute.

There is accordingly, in my view, no strain in the interpretation of the word *"any person"* in the statutes, to include both the person with the physical possession, as well as the person who has rights in relation to the document in the sense of a legal interest in relation to the document, its production as a document, or its production as to contents. It is apparent from the aforegoing analysis that, in my view, the sections provide for the issue of subpoenas against relevant people who have a legal interest.

It is noteworthy that the rules which are formulated, make provision for a single subpoena to be served on a multiplicity of people. There is a limit of four in the one rule and no limit in the other rule.

It is accordingly my view that the substantive law requires notice to be given both to the person in possession of the document, for it is he who will bring the document to court, and to the person who has a legal interest in respect of the document.

It remains to consider whether or not the subpoenas in the present case met that standard. I repeat: leaving aside the provisions of the rule, it
10 is apparent that the legislation uniformly directs that any person may be subpoenaed to produce documents at a hearing. There is no prior requirement in relation to the issue of the subpoena. The accused, who is issuing it, is not required to disclose the nature of the evidence the witness will be required to give, or to motivate the right to issue the subpoena at all. See *S v Nkomo* 1975 (3) SA 598 (N).

In addition, the indication that the documents are to be produced at court and decisions made in relation to them there, is consonant with cases such as for example, *R v Heard,* 1937 (CPD) 401, which holds that a witness is compellable and can only claim rights of non-disclosure of the contents of
20 rights to refuse the document, when access is sought to it. These are matters which go to the right of the accused in the present matter, to have sought to seek access to documents by way of disclosure to the attorneys ... his attorneys, in advance of the hearing.

In my view, the subpoena requires only the attendance of the witness with the documents sought and no more. Rights of access to the document

and production of it are issues to be dealt with at the trial court. See for example, the rulings made in *Hull v Minister of Justice,* 1932 (TPD) 139 at 140.

To return to the notice issue: it is apparent that no notice was given to all persons who had a legal interest in respect of those subpoenas, which were served on persons who only had possession of them. To the extent that there was no notice given to persons who have legal interest in the present case for example, Messrs. O'Sullivan, Ximba and others, these subpoenas are not sanctioned by the Statutes.

10 Insofar as there is a requirement in each of the subpoenas in the following terms ... in the terms set out in paragraph 2 *supra*, "*namely that should the person subpoenaed supply the requested information to accused 1's attorneys by a specified time, that person would not be required to attend the hearing of the matter at the abovementioned time and place at the behest of the accused*" and on the strength of the subpoena, such requirement is similarly not sanctioned by the provisions of the statutes.

That requirement does two things which are not sanctioned.

1. It requires disclosure of the documents and it requires the disclosure of the contents of the documents.
2. *20* It requires disclosure of the actual documents.
3. It gives the witness an option as to when and where the witness will produce it and how the witness will produce it.
4. It does away with the rights of notice, which I have dealt with previously, to persons who have a legal interest in the document.

5. The major contentious portion of the subpeona is that it avoids the need for the witness to attend the hearing of the matter with the documents, to enable rulings to be made in respect of those documents.

There is one additional feature which is worthy of mention, in my view, which has a bearing both on the right of accused 1 to have required the production albeit at the option of the witness, to his attorneys as opposed to requiring the right of appearance in court and that is this: there is no substantive law giving a party right of access to documents in the possession of a person who is not a party to, or a witness to the litigation concerned. See *Northcliff Townships* which I have cited *supra*. I will recite it: it's name is *Picked Properties (Pty) Ltd v Northcliff Townships (Pty) Limited*, 1972 (3) SA 770 (W).

This raises two interesting issues, neither of which I need to deal with any further in any particular detail at present.

1. The right of the person issuing the subpoena to require sight of documents and contents of documents, in advance of the hearing of the matter. I have dealt extensively with this issue already.
2. The mechanism by which such documents in due course will be produced, i.e. does the person subpoenaing the witness have the right to require that witness to appear during a different portion of the trial, when such witness would ordinarily appear? For example, if accused 1 during the course of the State case subpoena's a witness, is he entitled to require the court to put that witness in the box, to deal only with the issue of the admissibility of

documents, the production of documents, or is he required to wait until his own case is dealt with and then to put the witness in the witness box and deal with the documents in an orderly fashion?

It follows from what I have said that, in my view, all these subpoenas are irregular in that they do not comply with the substantive law requirements. All the information which in this case is the documents obtained pursuant to the subpoenas, is unlawfully obtained.

The fact that various of the persons subpoenaed complied with the subpoenas and produced documents does not, in my view, amount to any waiver by any of them of any of the rights and, the fact that they are produced does not entitle the accused to demand that the documents be dealt with at the hearing, notwithstanding that they were produced pursuant to an unlawfully issued subpoena.

I have deliberately not dealt with issues which appear to me to be unnecessary to decide. For example, who is required to issue the subpoena, how the subpoena is to be issued and other procedural matters which, in my view, have no impact once the findings which I have made above with regard to the substantive law, have been made.

Insofar as there is a constitutional requirement that persons with a legal interest are served and there is a constitutional standard requiring notice, it is necessary to consider whether or not factually there is a legal interest created by the Constitution vesting in the persons who have not been joined. This requires a superficial dealing with the facts under the exercise of the constitutional rights raised by Mr O'Sullivan in the O'Sullivan matter. The rights largely are the same in respect of the other persons.

In the modern day, persons who use electronic equipment, leave electronic traces of their activities. These electronic traces are captured by various entities including the persons who provide services which enable the electronic use, which results in the trace coming into being. In the present matter, simply put, such persons are the service providers in relation to cell phones and devices which track vehicles. Necessarily when these devices are in existence, persons who use cell phones or motor vehicles to which they are fitted, leave traces as to where they have been, what they have done, when and where they used their cellphones, who they spoke to by way of identifying a phone call, who spoke to them and in the case of message texts, what the actual texts are.

The submission was made in respect of such recordings, that they are in the public domain as the entities that make the recordings, make them only with a view to requiring payment for the services which are rendered. In my view, this submission was incorrect and persons who make use of electronic devices, whether by tracker or by phone, are entitled reasonably to expect that the recordings and information reflecting the traces of their uses electronically are kept private.

The test as to privacy which was indicated in the Constitutional Court in the matter of *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Limited & Others* 2001 (1) SA 545 in relation to search and seizure. That test considered that, if a person has the ability to decide what he or she wishes to disclose to the public and the expectation is reasonable that such decision will be respected, there is a right of privacy. If that test is applied to the usage of tracker devices in cars

and cell phone records then the result, in my view, is that the right to privacy comes into play. That would apply in respect of all the persons who were subpoenaed, who have legal interests to the matters and who are entitled to notice.

It is not necessary to deal with the matter in any greater depth than that for present purposes. Suffice it to say without going into the detail of each of the matters; it appears to me that there was significant merit that the disclosure of the information, both the fact and the nature of the information, leads to serious invasions of the constitutional rights of the persons. Accordingly such persons would be interested parties, entitled to notice, which was not given.

It is unfortunate that this matter turns on such a narrow issue, as a large amount of time has been wasted in determining issues which could have been dealt with differently by accused 1. Accused 1 at the time that the first challenges were made in relation to the subpoenas cannot but have been aware, in my view, of the fact that there were persons who had interests, whose rights were not protected. The fact that a condonation application was brought, is indicative of that realisation.

This is a matter which impacts on the costs of these proceedings. A submission was made that these are criminal proceedings, notwithstanding the fact that they have been framed as being civil. It was urged upon me that I should look at the true nature of the proceedings, namely, that they are a portion of a criminal case in which a witness whose rights are affected and who has a legal interest to appear and deal with matters, has appeared and dealt with matters. I was referred to *Harksen v President of the Republic of*

South Africa & Others, 2000 (2) SA 837 (CC) and the *Hyundai* matter as far as the basic principles are concerned.

Before I deal in detail with that matter, I must deal with the question of the two postponements. There were submissions that the two postponements should be dealt with specially as the first postponement was occasioned because the fifth respondent for the Minister, requested a postponement and should have been ready. I disagree with that submission. The Minister had entered an appearance and was busy filing papers. In my view the costs of the postponement should be costs in the cause.

10 As far as the second postponement is concerned, the parties agreed to the postponement. After that agreement had been entered, the State indicated that it wished to make submissions and to be properly served in the matter. As at that date it had not been properly served, and was entitled to be served and it was entitled to make submissions on the face of it.

I regarded the State's conduct with some antagonism, as it appeared to me the State had had ample opportunity to deal with the matter and could have made submissions without taking the stance it did. The fact that it took the stance, in my view, in no way impacted on the costs and the costs of the second postponement should also be costs in the cause.

20 As to the striking out application, that application dealt with issues and in consequence of there being no prejudice, in my view, there should be no order on the striking out application. However, the costs which, in my view, appear to be minimal, should be costs in the cause.

It remains to return then to the issue of whether the costs should be paid by anyone. As far as the 5th respondent is concerned, he was joined as

a necessary party to deal with the questions of unconstitutionality and, in my view, no costs order should be made for or against him.

As far as the 1st respondent's attorneys are concerned, in my view, they are entitled to act on behalf of 1st respondent, accused 1, and are obliged to carry out his instructions. The fact that the acts which they carried out have resulted in a failure to achieve the result they had hoped for, does not mean that they personally should be liable to pay costs. In my view, claims that costs should be paid by them, are wrongly made.

As far as the 1st respondent is concerned, namely accused 1, there is however a different position. Accused 1 persisted, in my view, to advance what was a hopeless position. His persistence in advancing that case, in my view, should not go unpunished by a costs order. I have a wide discretion in matters concerning for costs orders. In my view, although the matters form part of criminal proceedings, there are serious civil implications for the persons who are involved. The witnesses are entitled to appear. They are entitled to obtain legal representation, and they are entitled to deal with the matter on a proper basis to protect all the rights which they have, at a civil level. The question arises, if these are criminal proceedings, why should they be disentitled to recover costs from persons who have caused them to incur such costs, particularly where in the course of those costs being incurred, the person who was causing the incurring of the costs, was pursuing a hopeless cause.

I find in the wide discretion which is given to me, that accused 1 is responsible for the costs of the litigants.

It remains only to consider whether accused 1 should pay the costs in respect of two counsel, namely a senior and junior counsel. No direct submissions were made to me in this regard. All the litigants, save one, appeared through two counsel or a Silk on his own. In my view, witnesses, particularly witnesses who are potentially exposed to revealing information which materially impacts not only on their privacy, but their lifestyle and potentially even their very lives, are entitled to employ more than one counsel, including in the present case in respect of O'Sullivan, a senior and a junior counsel. Where multiple counsel were employed, or Silks were employed, accused 1, (the 1st respondent), should be ordered to pay the costs of both senior and junior counsel.

It remains then to deal with the impact of what this order means, before the formulation of the order and its ambit takes place. The ruling which I propose to make has a bearing only on the very documents and information which have been released by the persons who released such information, to the first accused's attorneys. In no way does this order impact upon or in any way, seek to limit the rights of the attorneys to properly seek implementation of such rights as they may be advised, against such persons as they may be advised, in respect of those documents, otherwise than in respect of those very documents which have been sealed by the Registrar. The rulings made in respect of the subpoenas and the interdicts which I propose to make interdicting the rights of access to those documents, must be seen in that light.

The arguments which were addressed to me by the various parties, deliberately did not encompass arguments relating to the obligation of

witnesses appearing in the witness box, to produce such documents as accused 1 may be entitled to receive, as and when such requests are made and, as and when rulings in relation to those documents are made.

It seems to me that the entirety of the documents produced pursuant to the illegal subpoenas, are illegally obtained and that accused 1, should in perpetuity, be prevented from seeing such documents. Bearing in mind what I have said earlier, that does not prevent accused 1 from seeking in some other way, to obtain the information. In addition it seems to me appropriate that notwithstanding that the information which was produced by, in particular the service providers, be returned to the service providers as contemplated by the O'Sullivan notice of motion.

The only further direction that I need give as to the formulation of the order, concerns the costs which is that accused 1 should pay all the costs of all the relevant proceedings, such costs to include senior and junior counsel, where employed.

Order:

I made the draft order an order of Court.

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Counsel for The State	:	Adv. Mashiane
Counsel for Accused 1 and 2	:	Adv. A Van Den Heever
Counsel for Accused 3, 5, and 6	:	Mr. Grove
Counsel for Accused 4	:	Adv. Spanenberg
Date of hearing	:	7 October 2014
Date of judgment	:	13 October 2014.

Legal Summary

LAMONT J

Criminal law- Trial within a trial – Interlocutory Applications- Subpoena

The accused, during his trial, caused the Registrar to issue subpoenas to a number of people to appear in court or produce certain documents to his attorneys. Some of the parties complied and furnished the said documents to his attorneys while others applied to the court to have those subpoenas against them set aside.

Held, the purpose of rule 38 of the rules of courts was to set up a streamlined procedure in order for the parties to have access to documents, secured through a subpoena, before the hearing day in order to avoid delays that occurred when the parties saw the documents for the first time in court. The intention was never to compel production and inspection of the documents even when a third party had rights in information contained in those documents. Further, even when the rule is employed and the documents are furnished to the Registrar, an official that occupies a special position with the duty to maintain the rights of parties in those documents; the owner of those documents continues to have control over them. It is the duty and responsibility of the court to determine and order permission to access the furnished documents that are in the possession of the Registrar, during the hearing.

Held that; the rules of court are sanctioned by statute, and therefore vary from time to time as per need and their application by the court. However, the rule cannot in itself function without substantive law sanctioning it. If the rule contains provisions against substantive law such a rule is of no effect. The Superior Courts Act and the CPA requires the production of documents secured by a subpoena to be done at court during the hearing. The function of the subpoena is to enable the trial to proceed in an orderly manner. It requires all documents to be present at one time so that they may be dealt with cohesively.

Further held, both the possessor of the document and the person whose rights are affected by a subpoena have a constitutional right to be notified and protected against the potential infringement. In this matter the affected parties were found to not have been given notice. Therefore the subpoenas were not sanctioned by the statute. Further, production of the documents to the attorneys of accused 1 was not sanctioned by statute. The statute requires the documents to be produced at court during the hearing. Furthermore, the court added that there is no legislation that gives a party a right to access to documents in possession of a person who is not a witness or party to the litigation concerned

Consequently the court found all subpoenas issued by accused 1 to be irregular and the documents that were already received from other parties to constitute information unlawfully obtained.