REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2019/5883

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

16.7.2019

In the matter between

PROTÉGÉ PARTNERS LP	First Applicant
PROTÉGÉ PARTNERS FUND LIMITED	Second Applicant
PROTÉGÉ PARTNERS LLC	Third Applicant
PROTÉGÉ PARTNERS QP FUND LIMITED	Fourth Applicant
MACGRECOR INVESTMENTS LLC	Fifth Applicant

and

FIRSTRAND BANK LTD	First Respondent
SAMIR SHAH	Second Respondent
SATTVA INVESTMENT MANAGEMENT COMPANY LIMITED	Third Respondent
SATTVA ASIA OPPORTUNITIES FUND	Fourth Respondent
SATTVA ASIA OPPORTUMITIES MASTER FUND	Fifth Respondent
SATTVA ASIA OPPORTUNITIES FUND LLC	Sixth Respondent
SRI SPECIAL INVESTMENTS LLC	Seventh Respondent
KENNETH JEFFERSON J.P. N.O.	Eighth Respondent
SATTVA INDIA OPPOPRTUNITIES FUND	Ninth Respondent

J U D G M E N T

LAMONT J:

[1] During February 2019 the applicants brought an urgent application against the respondents seeking to urgently freeze the proceeds of the sale of shares. It sought that the monies be held pending the final determination of proceedings already instituted or to be instituted by the applicants against some or all of the respondents.

[2] The first respondent opposed the proceedings and filed an affidavit dealing with urgency only. In the affidavit the first respondent set out that it had given an undertaking to the applicants concerning the monies, that the applicants had accepted the undertaking; and that accordingly the matter was not urgent. The undertaking which was given by the first respondent was in the following terms,

"12.....the first respondent furnished an undertaking that as soon as it received the proceeds of the shares that are subject to the terms of the Total Return Swap Agreement it would notify the applicants and retain such proceeds for a period of 60 days. It is common cause that it is these proceeds which form the subject matter of the application." The undertaking furnished in the affidavit was a reiteration of the undertaking the first respondent had furnished the applicants in a letter dated 6 December 2018 which was sent to them. Although the shares are subject to the terms of the agreement, the proceeds of the shares were received pursuant to a contract for sales of shares known as ARCIL. The use of the words "Total Return Swap Agreement" is used to describe the shares.

[3] The applicants filed no further affidavits and the matter was heard on 5th March 2019. It was struck off the roll on the basis that it was not urgent. It appears that the first respondent's comment that the undertaking related to "common cause proceeds" was accurate as there was no dispute between the parties concerning the parameters of the undertaking. Everyone understood the ambit of the undertaking pursuant to the description furnished namely the proceeds of a sale of shares.

[4] On the same day the matter was struck from the roll, the applicants served a notice in terms of Rule 35(12) requiring the first respondent to produce the agreement referred to in paragraph 12 within a period of five days of receipt of the notice. The basis on which the agreement was sought was that the first respondent had referred to it in the answering affidavit dealing with urgency. It

is immediately apparent that the applicants did not require the agreement to deal with the application at the hearing concerning urgency. They neither sought production with a view to obtaining it then nor did they apply at the hearing for its production. The applicants were content that the description identified the shares sold under the ARCIL agreement.

[5] During April 2019 the applicants launched an application seeking relief pursuant to the provisions of Rule 30(A). In that application the applicants sought to compel the respondents to produce the Total Return Swap Agreement (hereafter referred to as the "agreement". The applicant claimed prejudice on the basis that the agreement was needed to establish the quantification of the funds sought to be frozen as also that it cast light on gaps in the applicants' knowledge of facts relevant to proving the applicants' claims being prosecuted in a New York court.

[6] The urgent application was brought to obtain an order freezing the funds which were the proceeds of an ARCIL transaction. The ARCIL transaction is the transaction dealing with the sale of shares which generated the proceeds which were the subject of the urgent application. The agreement is not alleged to be, neither is it, a sale of shares contract. No monies will be received in consequence of its existence. Hence there is no question of it being relevant to the quantification of monies. The monies have in any event now been received by first respondent which pursuant to its undertaking retains them. There is no issue between the applicants and the first respondent concerning that matter. As far as the first respondent and applicants are concerned the application is

at an end save possibly insofar as the duration of the undertaking is concerned. The duration of the undertaking, as I was advised by counsel, has become indefinite as the first respondent has no intention of disposing of the proceeds at all.

[7] The agreement is irrelevant to the current application. The fact that the applicants seek to obtain sight of the agreement to advance a case in a different jurisdiction does not change the irrelevance of the evidence sought to be produced to any issue in this jurisdiction.

[8] The original submission of the applicants was that as the agreement had been referred to in an affidavit, the applicants were entitled to see it as of right and that admissibility privilege and relevancy played no role in the obligation the rule imposed on the first respondent to produce it. Later the applicants conceded that the rule does not impose an obligation related to questions of admissibility relevance and privilege. I was referred to *Centre for Child Law v Hoërskool Fochville and Another*[1]. In that case it was held:

> *"[17] In general terms, the rules exist to regulate the practice and procedure of the courts. Their object is to secure the 'inexpensive and expeditious completion of litigation before the courts and they are not an end in and of themselves. Ordinarily, strong grounds would have to be advanced to persuade a court to act outside the powers provided for specifically in the*

[1] 2016 (2) SA 121 (SCA)

rules.....In compelling production of the questionnaires, Sutherland J 'sum[med] up the law thus:

'25.1 *There is clear authority that confidentiality does not trump the rule.*

25.2 *There is some authority for the proposition that rule 35(12) must be literally interpreted, and irrelevant and privileged documents must be disclosed. I am in firm disagreement with such a view.*

25.3 *There is some authority, which is nevertheless obiter, to support the idea that an irrelevant or privileged document, if referred to in a pleading or affidavit, cannot be subjected to compulsory disclosure in terms of rule 35(12). I am in firm agreement with this view.*

25.4 *Therefore, I hold that, upon a proper interpretation of rule 35(12), a party called upon to comply with rule 35(12) is excused from so doing, if that party shows that the document sought is irrelevant to the issues in the matter, or is privileged, but cannot refuse on the grounds of confidentiality.'*

[18] .....

In Gorfinkel v Gross, Hendler & Frank 1987 (3) SA 766 (C) Friedman J ..... took the view that the rule should be interpreted as follows:

'[P]rima facie there is an obligation on a party who refers to a document . . . to produce it. That obligation is, however, subject to certain limitations, for example, if the document is not in his possession and he cannot produce it, the Court will not compel him to do so. . . . Similarly, a privileged document will not be subject to production. A document which is irrelevant will also

not be subject to production. As it would not necessarily be with the knowledge of the person serving the notice whether the document falls within the limitations I have mentioned, the onus would be on the recipient of the notice to set up facts relieving him of the obligation to produce the document (774G).'

Friedman J's approach found favour with Thring J in Unilever plc and Another v Polagric (Pty) Ltd 2001 (2) SA 329 (C). For my part, I entertain serious reservations as to whether an application such as this should be approached on the basis of an onus. Approaching the matter on the basis of an onus may well be to misconceive the nature of the enquiry. I thus deem it unnecessary to attempt to resolve the disharmony on the point. That notwithstanding, it is important to point out that the term onus is not to be confused with the burden to adduce evidence (for example, that a document is privileged or irrelevant or does not exist). In my view the court has a general discretion in terms of which it is required to try to strike a balance between the conflicting interests of the parties to the case. Implicit in that is that it should not fetter its own discretion in any manner and particularly not by adopting a predisposition either in favour of or against granting production. And, in the exercise of that discretion, it is obvious, I think, that a court will not make an order against a party to produce a document that cannot be produced or is privileged or irrelevant."[2]

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[2] Ibid, para 17-18

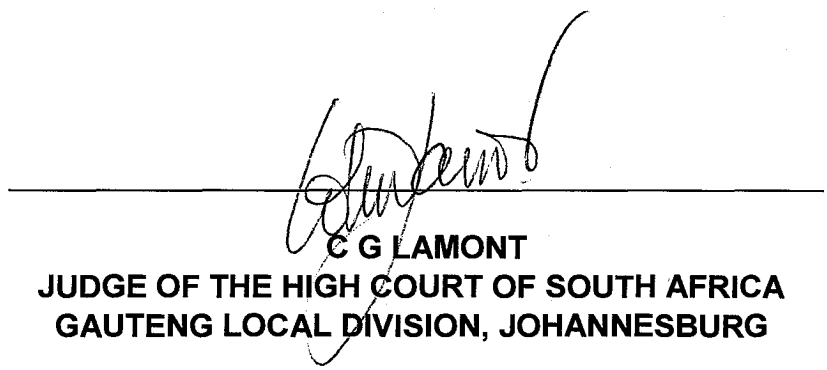
[9] If the document is irrelevant it need not be produced. The onus is not relevant for present purposes. I have held the agreement to be irrelevant.

[10] The application falls to be dismissed.

[11] I make the following order:

1 The application is dismissed.

2 The applicants are jointly and severally to pay the first respondent's costs including the costs consequent upon the employ of senior counsel.



C G LAMONT
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF HEARING:	27 June 2019
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