REPUBLIC OF SOUTH AFRICA

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

CASE NO: **2020/3730**

REPORTABLE: NO / ~~YES~~
OF INTEREST TO OTHER JUDGES: NO / ~~YES~~
REVISED.
6/2/2022

In the matter between

BROMPROP (PTY) LTD	**First Applicant**
BROMBERG INVESTMENTS CC	**Second Applicant**
ZINGARO TRADE 112 (PTY) LTD	**Third Applicant**
B[....], H[....] P[....]	**Fourth Applicant**
V[....], L[....] (BORN B[....])	**Fifth Applicant**
HILL, DAVID	**Sixth Applicant**

and

V[....], K[....]	**Respondent**

JUDGMENT

ABRAHAMS AJ

Introduction

[1] This is an application to set aside three subpoenas in terms of section 36 (5) of the Superior Courts Act 10 of 2013.

Background

[2] The First and Third Applicants are Companies, and the Second Applicant is a Close Corporation under the control of the Fourth Applicant.

[3] The Fourth Applicant is the 81 years old father of the Fifth Applicant.

[4] The Respondent and the Fifth Applicant were married to each other on 26 October 1997, out of community of property with the inclusion of the accrual system.There are two children born of the marriage, E[....] P[....] born on 23 November 1999 who is 21 years old, a full-time student and not self-supporting and E[....]2 P[....]2, born on 16 February 2004, who is 17 years old ("the children").

[5] The Sixth Applicant, David Hill, is an accountant at Cohen Hill Funk and Company Chartered Accountants (SA), the auditing firm performing auditing and accounting services for the First Applicant.

[6] On 6 February 2020 the Respondent, as Plaintiff instituted divorce proceedings against the Fifth Applicant, as the First Defendant and against the Fourth Applicant as the Second Defendant under case number 3730/2020.

[7] The relief sought in the divorce action as against the Fifth Applicant is *inter alia* a decree of divorce, an order that both parents obtain full parental responsibilities and rights with regards to the children born of the marriage relationship, a determination of the accrual and maintenance for the two children.

[8] The relief sought against the Fourth Applicant is for the payment of maintenance for the two children born of the marriage between the Fifth Applicant and the Respondent.

The Subpoenas duces tecum

[9] The three subpoenas were served on the Sixth Applicant, in terms of the subpoenas the Sixth Applicant has been directed to produce the following documents in respect of the First, Second and Third Applicants :

A copy of the Shareholders' Agreement and any amendments and addendums and/or addendums thereto;

A copy of the Share Register;

A copy of the Share certificates;

The entity's Founding statement;

Copies of annual returns submissions to CIPC;

A copy of the cash books;

Copies of the audited financial statements;

Copies of the balance sheet;

Copies of the income statement;

Copies of any and/or all management accounts;

Copies of all IRP5 certificates and/or submissions in respect of all employees;

Copies of any and/ or IT34 documents or assessments;

Copies of any other tax assessment received from the South African Revenue Services;

Copies of any and/ or all VAT returns;

Copies of any and/ or all VAT assessments;

Copies of any and/or all bank statements held by or on behalf of the entity;

Copies of pay slips in respect of any and/or all employees;

Copy of the entity's Memorandum of Association;

Copies of all minutes of meetings and resolutions passed in respect of the entity; and

Details and documentary proof of any and/or all loan accounts held in the entity by either L[....] V[....] and or H[....] P[....] B[....].

Issues

[10] The Applicants contend that the affairs of the First, Second and Third Applicant have no relevance to the maintenance claim or to the accrual claim in the divorce proceedings.

[11] The Applicants claim that the subpoenas are intended to be used for an improper purpose, the documents are irrelevant and an abuse of the process of the court.

[12] The Respondent argues that the subpoenas sought are relevant and necessary for trial to the issue of the existing means of the parties in relation to:
(1) The determination of the amount of maintenance payable by the Fourth Applicant for the children;

(2) For a proper calculation of the accrual of the estates of Fifth Applicant and Respondent.

Applicable legislation
[13] **Section 35(1)** of the **Superior Courts Act 10 of 2013** empowers a party to secure the attendance of witnesses and the production of documents at proceedings:
'35 Manner of securing attendance of witnesses or production of any document or thing in proceedings and penalties for failure
(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.'

[14] The relevant part of rule 38 provides 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 subpoenas 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 in 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 the court at the trial.
(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.

(2) The witnesses at the trial of any action shall be examined *viva voce*, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet:
Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit.'

[15] In support of his claim that the subpoenas should be set aside, The Applicants rely on **section 36(5)** of the **Superior Courts Act**, which reads as follows:
'(5) When a subpoena is issued to procure the attendance of any person as a witness or to produce any book, paper or document in any proceedings, and it appears that —
(a) he or she is unable to give any evidence or to produce any book, paper or document which would be relevant to any issue in such proceedings; or
(b) such book, paper or document could properly be produced by some other person; or
(c) to compel him or her to attend would be an abuse of the process of the court, any judge of the court concerned may, notwithstanding anything contained in this section, after reasonable notice by the Registrar to the party who sued out the subpoena and after hearing that party in chambers if he or she appears, make an order cancelling such subpoena.'

General applicable case law

[16] The Fourth Applicant who deposed to the founding affidavit has set out facts which is not denied relating to ongoing litigation between him, the Respondent and the Fifth Applicant. He alleges that the Respondent is intent of harassing him and the Fifth Applicant and that the issuing of the subpoenas is a further attempt to intimidate them.

[17] In *Mvelaphanda Holdings (Pty) Ltd and Another v JS and Others* **2016 (2) SA 266 (GJ)** *the* court had to deal with an application for the setting aside of a subpoena duces tecum against Mr Steenkamp, a chartered accountant. The subpoena called for the production of documents relating to the company and included its annual financial statements and all working papers relating to its investments, loans receivable, borrowings and other assets. I am in agreement with the court where it held that it was not open to the applicants to be prescriptive about the manner in which a party should go about gathering evidence for the trial.

[18] The importance of disclosure in court proceedings was explained by the Constitutional Court in *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa and Another* **2008 (5) SA 31 (CC)** as follows in paragraph 25:
'Ordinarily courts would look favourably on a claim of a litigant to gain access to documents or other information reasonably required to assert or protect a threatened right or to advance a cause of action. This is so because courts take seriously the valid interest of a litigant to be placed in a position to present its case fully during the course of litigation. Whilst weighing meticulously where the interests of justice lie, courts strive to afford a party a reasonable opportunity to achieve its purpose in advancing its case. After all, an adequate opportunity to prepare and present one's case is a time-honoured part of a litigating party's right to a fair trial.'

[19] In *Beinash v Wixley* **1997 (3) SA 721 (SCA)** the Supreme Court of Appeal considered the question whether a subpoena had to be set aside, *inter alia*, on the

ground that the documents called for were not relevant. At 734I -735At he Supreme Court of Appeal said:
'Ordinarily, a litigant is of course entitled to obtain the production of any document relevant to his or her case in the pursuit of the truth, unless the disclosure of the document is protected by law. The process of a subpoena is designed precisely to protect that right. The ends of justice would be prejudiced if that right was impeded. For this reason, the Court must be cautious in exercising its power to set aside a subpoena on the grounds that it constitutes an abuse of process. It is a power which will be exercised in rare cases, but once it is clear that the subpoena in issue in any particular matter constitutes an abuse of the process, the Court will not hesitate to say so and to protect both the Court and the parties affected thereby from such abuse.'

[20] In *PFE International and Others v Industrial Development Corporation of South Africa Ltd* **2013 (1) SA 1 (CC)** the Constitutional Court held at paragraph 29 that rule 38 must be interpreted generously, in a manner that promotes the interests of justice in terms of s 39(2) of the Constitution, and said:
'It seems to me that access must precede the formulation of an opinion regarding whether a particular document would have any evidential value at the trial.
Limiting the scope of the rule to documents that are to be tendered as evidence and persons who are going to testify results in an absurdity.'

[21] A court should not lightly exercise its power to set aside a subpoena, as the following was said in *Sher and Others v Sadowitz 1970 (1) SA 193 (C)* at 195D:
'The Court must be satisfied, before setting aside a proceeding [i.e., a subpoena], that it is obviously unsustainable, and this must appear as a matter of certainty and not merely a preponderance of probability.'

[22] When an applicant alleges that a subpoena must be set aside on the basis that it is an abuse of process, such applicant bears the onus of proving the abuse. It is not easy to discharge such onus, as in *South African Coaters (Pty) Ltd v St Paul Insurance Co (SA) Ltd and Others* **2007 (6) SA 628 (D)** the court said that *'the onus of proof borne by an applicant in such a case is not an easy one to discharge'*.

Maintenance payable to the minor children

[23] In *De Klerk v Groepies NO and Others* **(31156/2012) [2012] ZAGPJHC 205 (28 August 2012)** Kgomo J stated:

"[46] It is a well-established principle of the common law that although grandparents may have a reciprocal duty to support their grandchildren, such a duty does not come into operation or give rise to a claim in law, unless and until it is established that the parent(s) of those minor children are deceased or are unable to support them.

[47] A dependant may thus not claim support from a more remote relative such as grandparents before he/she has gone against the closer relative, in this case, their father, FW de Klerk Jnr. Such a claim against a far removed relative in my view only kicks in once a competent court has found that the parent is unable to support his children."

[24] In the particulars of claim in the divorce action the Respondent alleges that the Fifth Applicant and he has since the birth of the children not been financially able to provide for all the maintenance requirements of the two children born of the marriage and that they are still not financially able to provide for all the maintenance requirement of the children.

[25] However, in his answering affidavit the Respondent admits that he is a driver, and the Respondent further does not deny that he earns R40 000.00 per month, he alleges that his income is irrelevant for the purpose of adjudicating this Application. This is an issue to be determined by the trial court.

[26] The Respondent refers this court to the unreported judgment of *N v B* **2014 JDR 1511 (WCC)** where the court disagreed with the decision of Kgomo K in *De Klerk* and confirmed that it was not necessary to first obtain an order against the parent prior to proceeding against the grandparent. The court held that the directive issued by a maintenance officer was valid and the application to set decided the directive was dismissed with costs. That judgment followed a review application by a grandmother who had been requested by a maintenance officer to provide certain documents for the purposes of a claim against her in respect of maintenance for her grandchildren.

[27] Butler AJ went on to say about *De Klerk* :
"If this were to be correct it would mean that in instances where one or other period is already financially destitute and obviously unable to maintain a child, it would nonetheless be necessary to go through the process of issuing proceedings against the parents and obtaining a judgment before being able to proceed against the grandparent. There would be an inevitable waste of costs, a delay, and the possibility of the process being regarded as an abusive court. The draining of financial resources that we could would also not be in the interest of the child"

[28] The facts of *N v B* can be distinguished from the facts of this matter. **Section 6 (1) (a)** of the **Maintenance Act 98 of 1999** states that:

(1) *Whenever a complaint to the effect-*
(a) that any person legally liable to maintain any other person fails to maintain the latter person;….

has been made and is lodged with a maintenance officer in the prescribed manner, the maintenance officer shall investigate that complaint in the prescribed manner and as provided in this Act.

[29] In the matter before me there is no such complaint. Ultimately the trial court will have to decide if the Fourth Applicant is legally liable to pay the maintenance for the children.

[30] Should the trial Court find that the Fourth Applicant is liable there would as I see it be no need for an investigation. It is common cause that the Fourth Applicant has since the birth of the children contributed to the maintenance of the children and he has pledged under oath in the papers before this Court that he is able and is currently maintaining the children he will continue to contribute towards their maintenance. His contribution to the maintenance of the children is in excess of the R35 000.00 per month per child that the Respondent claims.

A proper calculation of the accrual of the estates of Fifth Applicant and Respondent

[31] The Respondent argues that he also needs the information of the First, Second and Third Applicants for a proper calculation of the accrual of the estates of the Fifth Applicant and in particular an investigation into the allegations of alleged donations from the Fourth Applicant to the Fifth Applicant.

[32] Clause 7(b)(iii) of the Antenuptial contract between the Fifth Applicant and the Respondent excludes from the accrual any donations made to any of the spouses, as it stipulates the following:

"Bequests, legacies and donations which accrue to either of the spouses as well as any other assets which a spouse acquires by virtue of his or her possession or former possession of such bequests, legacy or donation, during the subsistence of the marriage, will not form part of the accrual in his or her estate."

[33] The Respondent alleges that the Fifth Applicant is a shareholder of the First, Second and/or Third Applicants and thus the documents are germane to the issues in dispute. The documents will also reflect whether the Fifth Applicant derived any financial benefit from the First, Second and Third Applicants for the purposes of the accrual.

[34] It is not disputed that on 23 June 2011 the Fifth Applicant signed a declaration of Trust and Indemnity to the effect that the 49% of the entire issued share capital of and all shareholders loans in the name of the First Applicant (the interests) is not for the Fifth's Applicant's property but is rather the property of Fourth Applicant. Fifth Applicant declared that she has no beneficial right or interest in the interest.

[35] The Applicant argues that there is no apparent relevance of almost every single document and type of document sought, to the issues of divorce as there is no connection of the Fifth Applicant to the Second and Third Applicant.

[36] The relevance of a document sought to be produced pursuant to a subpoena must be given careful consideration. This is even more so given that a subpoena *duces tecum* may well intrude on the privacy rights of persons who are not party to

the underlying litigation, and who may have little or no knowledge of the issues in dispute in it.

[37] The case law makes it clear that the test for relevance is the same as that for whether a document is discoverable under rule 35. In *Antonsson and Others v Jackson and Others* 2020 (3) SA 113 (WCC), the Court held:

> *"[48] A generous approach is taken towards relevance in the sense that documents will be relevant if they contain information which may, either directly or indirectly, enable the party who seeks them to advance his or her case or damage the opponent's case."*

[38] In *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) *the* following was said at 564 A-B

'After remarking that it was desirable to give a wide interpretation to the words "a document relating to any matter in question in the action", BRETT LJ stated the principle as follows:

"It seems to me that every document relates to the matter in question in the action which, it is reasonable to suppose, contains information which may — not which must — either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary.

I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences."

[39] The Fourth Applicant avers in paragraph 30 of the founding affidavit that he "*is the beneficial shareholder of all the shares in the First, Second and Third Applicants*". No evidence of this allegation is attached with respect to Second and Third Applicants.

[40] In paragraph 35.2 the Fourth Applicant avers that any information relating to <u>who owns what shares</u> in respect of the Applicants relates to his private, personal and business interest. (My emphasis) If the Fourth Applicant owns the shares why

does he refer to “information relating to who owns what shares”?

[41] It is therefore not clear to me if Fourth Respondent is the beneficial holder of all the shares or if there are other shareholders.

[42] Further in paragraph 14 of the Answering Affidavit the Respondent avers:

> *“I have also called for a full disclosure from the Applicants in that I am aware that the First Applicant is a shareholder in the First, Second and/ or Third Applicants...”*

[43] The Applicants when replying to paragraph 14 alludes to the signed Declaration and Indemnity Trust in relation to the Fifth Applicant’s shares in the First Applicant but does not deal with the allegations relating to the Second and Third Applicant. I would have expected the Applicant to state what the factual position is.

Conclusion

[45] Based on the reasons as set out above I find that:

[45.1] the Fourth Applicants has made out a case for the relief that it sought in relation to the documents being needed for the maintenance claimed in the divorce action.

[45.2] The shares of the First Applicant is not relevant to the calculation of the accrual of the estates of the Fifth Applicant and the Respondent.

[45.3] In my view the equitable order as to costs is that there is no order to costs which means that each party will have to pay their own costs were both successful in part and unsuccessful in part.

I make the following order:

1. The subpoena against the First Applicant is set aside.
2. The application in relation to the Second and Third Applicants is dismissed. The Sixth Applicant must provide all the documents listed in the two subpoenas in so far as those documents exist.
3. No order as to costs.

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L C ABRAHAMS

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF HEARING:	8 November 2021
DATE OF JUDGMENT:	7 February 2022