reportable

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO 1574/04

In the matter between:

JACK MEYERS **Applicant**

and

JONATHAN DALE MARCUS **First Respondent**

JANICE MARCUS
(born Meyers) **Second Respondent**

JUDGMENT: DELIVERED 16 APRIL 2004

GRIESEL J:

Introduction

1]The applicant, Mr Jack Meyers *(Meyers)* applies for an order setting aside a subpoena *duces tecum* that has been served on him at the behest of the first respondent in a pending divorce action under Case No 4923/03 *(the main action)* between the latter and his wife, the second respondent. For convenience I refer to the first and second respondents by their designation in

the main action, viz as 'defendant' and 'plaintiff', respectively.

2]The trial of the divorce action is set down to commence on 3 May 2004. On 13 January 2004 Meyers was served with a subpoena requiring him, on the above-mentioned trial date, *'to appear in person before this Court … and thereafter to remain in attendance until excused by the said Court, in order to testify on behalf of the above-named defendant in regard to all matters within your knowledge relating to an action now pending in the said Court…'*. He is further required *'as soon as possible to produce and deliver to the said Registrar of the Court in terms of Rule 38(1)*(b) *the documents specified in the schedule of documents annexed hereto marked "A", to enable the defendant and/or the defendant's attorneys to inspect such documents …and make copies or transcriptions thereof, after which the witness shall be entitled to the return thereof*'. I shall refer in more detail to the nature of the documents specified in Annexure *'A'* later in this judgment.

3]Meyers now applies to this court to have the subpoena set aside on a variety of grounds, *inter alia* that the subpoenaed documents are irrelevant to the issues in the main action and that the issue of the subpoena amounts to an abuse of the process of the court. In order to appreciate the issues, the following background is relevant.

Factual Background

4]The plaintiff and the defendant were married to each other out of community of property and by antenuptial contract in 1978. Three children were born of the marriage, two of whom are still minors. It is common cause that the marriage relationship between the parties has broken down irretrievably. Although the exact reasons for such breakdown are not relevant for present purposes, the divorce litigation between the parties has become very acrimonious.

5]At issue between the parties in the divorce action is the plaintiff's claim in terms of s 7(2) of the Divorce Act 70 of 1979 *(the Act)* for personal maintenance at a rate of R35 000 per month, as well as her claim in terms of s 7(3) of the Act for a redistribution of assets accumulated by the defendant during the course of the marriage.

6]Meyers is the father of the plaintiff and hence the father-in-law of the defendant. He is not a party to the main action. By all accounts, he is 'a man of extreme wealth', whose assets, held through various companies and trusts locally and offshore, runs 'into hundreds of millions of Rands' (according to the defendant). Although Meyers says that the defendant 'substantially overstates the extent of my wealth', he concedes that he has 'a very substantial

estate which consists of assets in Monaco, South Africa and elsewhere'. He has been permanently resident in the Principality of Monaco since 1986, but remains a South African citizen.

7]The trial of the divorce action was originally set down for hearing on 8 December 2003. A month prior to the trial date, a subpoena *duces tecum (the first subpoena)* was issued on behalf of the defendant and served on Meyers' accountant in Port Elizabeth, Mr Clem Morris *(Morris).* In terms of the subpoena, Morris was required to produce *(inter alia)* documents relating to Meyers' financial position and assets, including financial statements for the past three financial years relating to Meyers' 'Primary Trust'; eight different companies and trusts in which the latter has an interest; as well as a final catch-all category, relating to 'any companies, close corporations, trusts or other entities, be they local or offshore, in which [Meyers] holds an interest, either directly or indirectly'.

8]In a letter dated 27 November 2003 addressed to Morris, the attorney acting on behalf of the defendant, Mr Wille *(Wille)* explained the relevance of the required documentation as follows:

> *9]'…(T)he wealth of the Meyers family in general is incredibly relevant to the trial, as this goes to the prospective or existing means*

of the Plaintiff herein, namely Janice Marcus.

10]In this regard we refer you to the Divorce Act which specifically states (as explained previously) that the existing and prospective means of a party to a divorce action is incredibly relevant when the Court has to decide upon issues which have been set out in the particulars of claim, as in this particular matter.

11]We place on record that unfortunately you cannot decide which documents are relevant and which documents are not relevant, and in terms of the Divorce Act, the documents which have been stipulated and listed in the annexure to our subpoena are all relevant and, under the circumstances, we would ask you to telefax all the documents through to us immediately.'

12]This elicited a response from the attorney acting on behalf of Meyers and of Morris, Mr Spilkin *(Spilkin)*. Spilkin claimed that the subpoena served upon Morris was an abuse of the process of the court and that it also related to irrelevant matter. He demanded that the subpoena be withdrawn, failing which an application would be brought at the trial to set aside the subpoena. To the extent that it may be relevant to the divorce, Spilkin stated that he had been instructed by Meyers to place on record 'that he is a wealthy man and controls trusts and companies that run into millions of rands'. It was also stated that the

only documents referred to in the schedule to the subpoena which could conceivably have been relevant were documents relating to two trusts in respect whereof the plaintiff is a discretionary beneficiary. In this regard it was pointed out that detailed information had already been provided to the defendant's legal representatives concerning the plaintiff's interests in such trusts. Notwithstanding his objections to the subpoena, a copy of one of the documents required was annexed to the letter namely the computer printout of the plaintiff's loan account in Meyers' primary trust.

13]On 1 December 2003 Wille replied to Spilkin's letter, reiterating the purpose of the subpoena, as stated earlier. As an alternative, however, Wille suggested that if certain 'particulars' were supplied by Meyers, it might prove unnecessary to persist in the subpoena. These 'particulars' related to that part of the schedule to the subpoena which concerns the entities in South Africa in which Meyers holds an interest.

14]Spilkin responded by way of a telefax transmission the next day, pointing out that full details had already been supplied of all entities in respect of which the *plaintiff* had an interest whether direct or contingent and that no further particularity regarding Meyers' assets was relevant.

15]In the interim a consultation was arranged with the defendant's counsel and

Morris, also to be attended by attorneys and counsel who represented Meyers and Morris. The defendant's legal representatives had undertaken that, although Morris would attend at the trial on 8 December 2003, he would not be required to give any evidence concerning Meyers' affairs or estate, nor would he be required to make available any further documentation relating to Meyers' estate.

16]A telefax transmission sent on 5 December 2003 by Spilkin to Wille shows that the only outstanding issue related to the form of an affidavit which Morris was requested to prepare and sign. The affidavit related entirely to the affairs of the defendant and was duly transmitted to the defendant's attorneys.

17]As noted above, the trial did not proceed on the appointed date and, by agreement between the parties, it was postponed to 3 May 2004. It appears that one of the reasons for the postponement was the fact that certain documents pertaining to the defendant's offshore assets were made available by Meyers to the plaintiff's legal team on the morning of the trial.

18]Just over a month later, the present subpoena was served on Meyers. The documents listed in the schedule are virtually identical to those listed in the earlier subpoena served on Morris, save for a new category relating to 'any and all documents reflecting the assets and liabilities of the defendant, be they

local or offshore'.

19]This elicited a response from Spilkin, recording the previous developments, as outlined above. He also reiterated that 'all documentation and information which could conceivably be relevant to the divorce action between Mr and Mrs Marcus has been made available by Mr Clem Morris and you have copies thereof'. He asserted, furthermore, that the additional documentation sought in the subpoena served upon Meyers was 'entirely irrelevant to any dispute which may arise from the pleadings in the pending divorce action'. As such, Spilkin continued, 'the subpoena is an abuse and must be withdrawn forthwith', failing which an application would be brought, on a semi-urgent basis, to have the subpoena set aside.

20]When no agreement could be reached, the present application was launched and is being vigorously opposed on behalf of the defendant. The plaintiff adopts a more passive stance, although she too was represented at the hearing before me by senior and junior counsel.

In Limine

21]Two preliminary issues must be dealt with briefly. The first relates to a point raised – albeit somewhat tentatively – on behalf of the defendant. In his

answering affidavit the defendant states that 'only the trial court seized with the knowledge of the disputes between the [plaintiff] and [defendant] can make a just decision regarding this application'. During the hearing before me, counsel for the defendant persisted with this argument.

22]A similar objection was rejected by MAHOMED CJ in *Beinash v Wixley*, [1] where it was held as follows:

> *23]'I am unable to appreciate why a Court cannot at any stage set aside a subpoena if it is satisfied, even before the commencement of the trial, that the issue of the subpoena indeed constituted an abuse of the process of the Court. Were it otherwise the witness who is subpoenaed would have to continue to endure the oppressive consequences of the demands made in the subpoena under the threat of criminal sanctions until he or she was relieved of that obligation by the trial Court in the future, however distant or uncertain it may be. Moreover, Rule 38(1) now obliges him to do so "as soon as possible".*
>
> *24]… I am therefore of the view that Wixley was entitled, in the circumstances of the present case, to ask the Court to set aside the impugned subpoena on the ground that it constituted an abuse of the process of the Court, notwithstanding the fact that that application was made before the commencement of the main proceedings in which the documents demanded by the subpoena were allegedly required by Beinash.'*

1 1997 (3) SA 721 (SCA) at 738H – 739B.

In my view, exactly the same reasoning applies to the case before me. In the circumstances, I am satisfied that there is no merit in this point.

25]The second preliminary point relates to Meyers' objection to the jurisdiction of this court, based on the assertion that he is neither domiciled nor permanently resident in South Africa. Apart from the factual dispute on the papers as to his precise residential status and domicile, his counsel was unable to refer me to any authority requiring either domicile or permanent residence as a prerequisite for the exercise of the court's jurisdiction over a witness, nor was I able to find any such authority. *Prima facie,* the objection appears to fly in the face of the clear and unambiguous provisions of sec 19(1) *(a)* of the Supreme Court Act 59 of 1959, which extends the court's jurisdiction in unqualified terms to 'all persons residing or being in … its area of jurisdiction'. Be that as it may, in the view I take of the other points raised on Meyers' behalf, it is not necessary to come to any firm conclusion in relation to the objection to the court's jurisdiction and I refrain from doing so.

Legal Position

26]Rule 38(1) of the Uniform Rules provides as follows:

> *27]'(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…*
>
> *28] 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.*
>
> *29](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.'*

30]Our courts have repeatedly emphasised the importance of the general duty resting on all members of society to give whatever evidence they are capable of giving, coupled with the concomitant right of litigants to command such assistance.2 Nonetheless, wide as the right to subpoena a witness may be, it is not untrammelled. Should the court be satisfied in any particular case that the issue of a subpoena indeed constitutes an abuse it is quite entitled to set it aside. In *Beinash v Wixley,*3 MAHOMED CJ quoted with approval from the

2 See e.g. *S v Wessels* 1966 (3) SA 737 (C) at 739E – G; *Mattheys and another v Coetzee and another* [1997] 3 All SA 675 (W) at 678*b* – 679*g*; *Beinash v Wixley, supra* n at 734G – 735A.
3 *Supra* n at 734E.

judgment in *Hudson v Hudson and Another,*4 where the following was said:

> *31]'When … the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse.'*

The learned Chief Justice thereupon proceeded as follows:5

> *32]'What does constitute an abuse of the process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of "abuse of process". It can be said in general terms, however, that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective. … A subpoena* ***duces tecum*** *must have a legitimate purpose. …*
>
> *33]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*

4 1927 AD 259 at 268.
5 At 734G – 735A (references to other authorities omitted).

> *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.'*

34]On behalf of the defendant, strong reliance was placed on the *dictum* by CORBETT J in *Sher and others v Sadowitz*6 to the effect that the court can, in the exercise of a general power to prevent an abuse of its process, set aside a subpoena 'where it is certain as a matter of certainty that the witness who has been subpoenaed will be totally unable to be of any assistance to the Court in the determination of the issues raised at the trial'.

35]In my respectful view, this *dictum* is not authority for the proposition that, where a witness is able to be of *some* assistance to the court, he or she is invariably also compellable as a witness. As the above extract from the judgment in *Beinash v Wixley* clearly shows, a subpoena may amount to an abuse of the process of the court notwithstanding the fact that the subpoenaed witness may be able to give relevant evidence or produce relevant documents. To put it differently, the issues of relevance and abuse of the process, though possibly inter-related, are separate and distinct. Thus, a subpoena issued in respect of a witness unable to give relevant evidence or to produce relevant

6 1970 (1) SA 193 (C) at 195C – E.

documents will ordinarily amount to an abuse of the process of the court. However, the converse is not necessarily true: the evidence sought to be obtained may be relevant and yet amount to an abuse of the process. This will be so, *inter alia*, where the subpoena is issued for an improper purpose.

36]Against this background, I now turn to consider the issues of relevance and abuse of the process in the present scenario.

Relevance

37]The professed purpose of the subpoena under discussion, according to the defendant, is twofold: firstly, it is proposed 'to extract from him [Meyers] documents and elicit evidence relevant to his financial position'. Secondly, the defendant claims that Meyers has in his possession 'a number of my private and confidential documents which he [Meyers] intends to use at some stage of the trial at the appropriate selected moment which he refuses to make available to me via the discovery procedures which I have invoked against the second respondent'.

38]As far as the first point is concerned, Meyers takes the stance that his personal financial position is irrelevant to the disputes between the plaintiff and the defendant. The defendant disagrees, contending *inter alia* that 'it is the

extent of Meyers' estate and what the [plaintiff] is due to inherit which is germane to the trial'. This is so, according to the defendant, because in terms of s 7(2) of the Act one of the factors to be taken into account by the court in considering personal maintenance for a plaintiff is 'the means or prospective means' of such party.

39]In *Beira v Beira*7 it was held that the rights under a trust, the assets of which had not yet vested in the plaintiff, should be classified as a *spes*, which is not relevant to an inquiry for the purposes of a redistribution order in terms of s 7(3) of the Act. The inquiry in terms of s 7(2) of the Act for purposes of a claim for maintenance is, however, wider: it requires the court to have regard, not only to 'existing means', but also 'prospective means' of a party. It was argued on behalf of the defendant that a potential inheritance is included under the latter concept.

40]In my view, this argument is misconceived. In the first place, Meyers has complete freedom of testation. As he puts it in the founding affidavit herein:

> *41]'Whilst I have no reason, at present, to disinherit my daughter and have no intention of doing so, I cannot state categorically that this will never happen nor am I obliged to make such a categoric statement.'*

7 1990 (3) SA 802 (W) at 808E.

42]It is pointed out, furthermore, that Meyers is presently 70 years of age and appears to be in good health. It would seem likely that he will live for quite a number of years to come. Any prospect that the plaintiff might inherit from her father, could thus lie in the distant future. In these circumstances, the plaintiff's prospect of inheriting from her father is not, in my view, a relevant factor to be taken into account at this stage. Counsel was unable to refer me to any authority for the contrary position.

43]Should the plaintiff eventually inherit from her father, the position may well be different once her inheritance has vested. In that event, the defendant will, no doubt, be at liberty to approach the appropriate court with an application to reduce or terminate any maintenance obligation he has towards her.

44]In any event, even should the plaintiff's prospect of inheritance be a factor which the trial court could legitimately take into consideration (which Meyers denies), it is completely unnecessary for the defendant to insist upon full disclosure of *all* Meyers' financial affairs in order to establish such a possibility. Based on the evidence as a whole, it may be accepted that, *should* the plaintiff eventually inherit from her father, such inheritance may well render her financially independent for the rest of her life, thereby obviating the need

for any contribution towards her maintenance by the defendant. Without wishing in any way to bind the trial court in this regard, I cannot imagine that such court needs to know more than this about the extent of Meyers' personal wealth in order to assess the plaintiff's 'prospective means'.

45]The fact of the matter is that, on the evidence which is common cause, the issue around personal maintenance for the plaintiff is of peripheral importance in the total scheme of things. Apart from anything else, it is a well-recognised principle in matters of this nature that the courts ordinarily try to effect a 'clean break' between the parties 'if the circumstances permit'.8 In the present case it is clear, not only that the financial position of the parties would permit this course to be followed, but that it would be the preferable option – especially in view of the very acrimonious relationship between the parties. It follows, therefore, that the claim for personal maintenance for the plaintiff may well fall away in its entirety, depending on the extent of the eventual award in terms of s 7(3) of the Act. It is for these reasons that I disagree with the sentiments, repeatedly expressed on behalf of the defendant, that *precise* details of Meyers' personal financial position is 'incredibly relevant' to the issues at the trial of the main action.

8 See e.g. *Beaumont v Beaumont* 1987 (1) SA 967 (A) at 993B – H; *Katz v Katz* 1989 (3) SA 1 (A) at 11C – D.

46]As for the second ground relied upon by the defendant, it is likewise misconceived. The defendant appears to suggest that Meyers is in possession of some of his (defendant's) own personal documents. It is significant that the defendant does not allege that he requires such documents for the purpose of preparing for the trial action. He does not even allege that he himself does not have copies of those documents in his possession. His main concern appears to be to prevent a 'slow leak' of such documents to the plaintiff, as happened on the previous trial date. As it was graphically put by his attorney in a recent letter:

> *47]'Your client must understand that one of the main reasons for issuing out the subpoena was to assist our client in proving the prospective means of Janice Marcus [the plaintiff] and further was to prevent your client, Mr Jack Meyers [the applicant], from slowly at opportune times selectively delivering documentation to Janice Marcus on a "piece meal" basis in order to obtain postponements of trials and the like (like slow poison).'*

48]I am unpersuaded that the defendant has made out a case for a subpoena in respect of his own documents. Insofar as the defendant may have any proprietary interest in such documents, he has certain well-established possessory remedies available to enforce those rights; he does not require Meyers to produce such documents at the trial of the main action under threat of criminal

sanction, nor does he require Meyers' personal attendance at the trial for such purpose.

49]In any event, the defendant himself is obviously the person best placed to inform the court about his own financial position, including his offshore assets. I find it difficult to understand why the defendant requires Meyers' evidence concerning his own (defendant's) financial position.

50]For these reasons, I conclude that the bulk of the subpoenaed documents are irrelevant to the disputes in the main action.

Improper motive / Abuse of the process

51]Even if some of the subpoenaed documents were found to be relevant (which it is unnecessary to decide), it is clear from what I have said above9 that the subpoena may nonetheless be set aside if the court, in the exercise of its discretion, was satisfied that it amounts to an abuse of the process. Having regard to the background facts as outlined above, the question for determination is whether the issue and attempted enforcement of the impugned subpoena constitute a *bona fide* exercise by the defendant in terms of the Rules of Court to pursue and ventilate the truth in the dispute between the parties to the main action. It is to a consideration of this aspect that I now turn.

9 Para above.

52]The first point to note relates to the issue of the first subpoena. It will be recalled that the first subpoena, in *virtually identical terms,* had been issued against Meyers' accountant, Morris, prior to the previous trial date. Following negotiations between the parties, certain documents relating to two trusts in which the plaintiff is a discretionary beneficiary were made available to the defendant's attorneys with the consent of Meyers. It was eventually agreed that Morris need not produce further documents, nor testify at the trial.

53]Just over a month later, the subpoena presently under consideration was issued against Meyers, again requiring production of the same documents earlier required from Morris, in addition to a further category relating to the defendant's own documents.

54]Against this background, it was argued on behalf of Meyers that the first subpoena had been withdrawn. This was strenuously denied on behalf of the defendant.

55]In my view, the defendant finds himself on the horns of a dilemma with regard to the first subpoena: either he has abandoned or withdrawn it, as claimed on behalf of Meyers, thereby conceding that the documents have either been obtained or are no longer necessary; or the subpoena has not been withdrawn, in which event there is no need whatsoever to issue a fresh

subpoena *in virtually identical terms* against Meyers.

56]On my assessment of the situation, Spilkin is correct where he contends:

> *57]'There can be no doubt whatsoever that the undertaking given by your client that Mr Morris would not be called to reveal any of Mr Jack Meyers' personal affairs, as above, amounts to an unequivocal acknowledgement that all relevant details pertaining to your client's wife have indeed been furnished by Mr Morris on behalf of Mr Meyers.'*

58]What is also highly relevant in the present context, to my mind, is the personal relationship between the parties. The defendant himself concedes that the relationship between himself and Meyers (as well as between himself and the plaintiff) is at this stage 'acrimonious', to put it no higher. He blames Meyers entirely for this state of affairs, describing Meyers as the single biggest 'stumbling-block' to a settlement of the main action, as 'he [Meyers] is controlling the litigation' and 'he wants to "destroy" me financially'. The defendant accuses Meyers of causing 'turmoil amongst my children'. He has threatened to lay criminal charges against Meyers with the Scorpions for unspecified offences, relating (presumably) to exchange control contraventions committed by Meyers in the past. Notwithstanding this background, the defendant wishes to call Meyers as a witness, 'even though he is hostile to

my cause'. In my view, the prospect of Meyers in these circumstances being called as a witness *for the defendant* indeed promises to provide a spectacle for which 'tickets could be sold', as it was put by Meyers' counsel.

59]A further factor casting doubt over the sincerity of the defendant's desire to call Meyers as a witness is his reticence to disclose the nature and content of the evidence to be elicited from the latter. The defendant asserts in this regard:

> *60]'I am not obliged to furnish "chapter and verse" as to the questions which will be put to the applicant when he testifies.'*

All that the defendant is prepared to reveal in this regard is the following:

> *61]'The applicant has a good deal of knowledge concerning my estate and he will be required to testify in that regard.'*

And elsewhere:

> *62]'I do not wish to highlight the evidence which will be extracted from the Applicant at the trial, but in simple terms point out that he has a good deal of knowledge of my financial affairs and is well aware of the fact that the Second Respondent, probably on his instructions, is attempting to put up a false scenario before the Court, particularly in regard to off-shore assets.'*

63]The defendant's reluctance to take the court into his confidence as to the evidence required from Meyers means that he cannot be heard to complain if the court declines to come to his assistance to secure necessary evidence. To the extent that the defendant does reveal his intentions regarding Meyers' evidence, it does not persuade me that he reasonably requires Meyers as a witness to testify as to his own (defendant's) financial position or for any other legitimate purpose.

64]Moreover, the decision to call Meyers as a witness for the defence appears to be an afterthought on the part of the defendant and his legal team, formulated after the postponement of the trial during December 2003. It is apparent from the evidence before me that Meyers placed certain documents at the plaintiff's disposal relating to the defendant's undisclosed offshore assets, which had not been discovered by the defendant up to that stage. It can be accepted that these developments caused the defendant some considerable inconvenience and annoyance. Not only did it result in the postponement of the trial; it also necessitated a supplementary application by the defendant to the Revenue authorities for amnesty in respect of such undeclared assets. It is not farfetched to see in these developments an important ulterior motive for the issue of the present subpoena.

65]Insofar as the defendant might fear that Meyers will (again) 'feed' further financial documents relating to the defendant to the plaintiff, the short answer is that the plaintiff will be unable to use any such documents at the trial unless there has been proper discovery thereof.

66]The defendant has also referred to certain passages in the judgment of VAN ZIJL J in *S v Wessels,*10 to the effect that there is a general duty resting upon every member of the public to give what evidence he is capable of giving and –

> *67]'If the courts are prevented from arriving at the truth there can be no justice. It is for this reason that the court will allow no one to stand between it and the truth'.*

In my respectful view, those sentiments cannot not assist the defendant in the present scenario. The search for the truth – vital as that quest undoubtedly is – must, in the context of litigation and in the interests of justice, be confined to evidence that is relevant to the issues in any particular case. In the present case, the trial court does not require evidence as to the full extent of Meyers' wealth in order to come to a just decision on the disputes between the plaintiff and the defendant; on the contrary, a full investigation of those matters is certain not only to prolong the proceedings considerably, but also to obfuscate

10 *Supra* n at 739E – G.

the issues. As far as the plaintiff's own financial position is concerned, sufficient information is available from other sources. It goes without saying that the defendant also has all the information he requires in relation to his own financial position. This is not a case, therefore, where the truth would be withheld from the court unless Meyers were compelled to produce the subpoenaed documents and to give *viva voce* evidence.

68]In the final analysis, Meyers has a constitutionally protected right to privacy. As he is not a party to the pending litigation, the impugned subpoena constitutes a gross invasion of such right to privacy. Before such an invasion will be sanctioned, the party seeking to infringe such right bears an onus of persuading the court that it is justified. In all the circumstances, I find that the defendant has failed to discharge that onus.

Conclusion

69]Having regard to the overall picture, I am of the firm view that the service of the subpoena upon Meyers in the circumstances of this case was both misguided and high-handed. The irresistible inference is that it was designed to operate *in terrorem,* so as to embarrass, intimidate and inconvenience Meyers. Or, as it was put by MAHOMED CJ:11

11 *Beinash* n above, at 736I.

70]'The impugned subpoena appears to me to be intended as a missile to oppress and harass [the witness].'

71]In all the circumstances, I am driven to the conclusion that the subpoena was issued for an improper purpose and therefore amounts to an abuse of the process of this court, which falls to be set aside as such.

Order

72]For the reasons set out above, it is ordered as follows:

(a) **The subpoena issued by the Registrar of this Court on 13 January 2004 under Case No 4923/03, requiring the Applicant to appear before this Court on 3 May 2004 and to produce and deliver documents specified in the Schedule to the said subpoena, is set aside.**

b) **The First Respondent is ordered to pay the applicant's costs occasioned by this application.**

c) **No order is made with regard to the Second Respondent's costs herein.**

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74]_____

75]B M GRIESEL

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