Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Case no. 3609/2023

Before: The Hon. Mr Justice Binns-Ward

Hearing: 7 March 2023

Judgment: 9 March 2023

In the matter between:

AMINA MOODLEY N.O.	First Applicant
GAAMIEM COLBIE N.O.	Second Applicant
3 LAWS CAPITAL SOUTH AFRICA (PTY) LTD	Third Applicant
SAGARMATHA TECHNOLOGIES LIMITED	Fourth Applicant
SEKUNJALE CAPITAL (PTY) LTD	Fifth Applicant

and

PUBLIC INVESTMENT CORPORATION SOC LIMITED	First Respondent
GOVERNMENT EMPLOYEES PENSION FUND	Second Respondent
AYO TECHNOLOGIES SOLUTIONS LIMITED	Third Respondent
THE REGISTRAR, HIGH COURT (W. CAPE DIVISION)	Fourth Respondent

JUDGMENT

BINNS-WARD J:

[1] The plaintiffs in case no. 9141/2019, the Public Investment SOC Limited Corporation (the PIC) and the Government Employees Pension Fund (the GEPF), respectively, have brought an action against Ayo Technologies Solutions Ltd (Ayo) for payment of the sum of almost R4,3 billion, which was the subscription price paid by the PIC, in its capacity as the GEPF's investment manager, for shares in Ayo at the time of the latter's listing on the Johannesburg Stock Exchange. Three causes of action are pleaded in the particulars of claim, namely (i) that the PIC's decision to invest in Ayo fell foul of the principle of legality and falls to be reviewed and set aside (a 'self-review', in other words), that the person or persons purporting to represent the PIC in entering into the transaction had lacked authority to do so and (iii) that the transaction had been induced by material misrepresentations by the persons representing Ayo.

[2] One of the pleaded issues in the action, bearing on the third of the forementioned causes of action, is the use by Ayo of the funds generated by the transaction. It is the plaintiffs' case that it had been represented by Ayo that the funds would be applied in furtherance of the strategy to grow Ayo's position in the information and communications technology sector. The forecast achievement of significant market share growth pursuant to the indicated strategy had played a material role in the representations made to the PIC to Ayo in support of the private placement of the shares at a price of R43 per share. The PIC alleges that that the funds were used instead, at least in material part, to settle the outstanding liabilities of certain of Ayo's related companies.

[3] In paragraph 15.9 of their particulars of claim in the action, the plaintiffs have pleaded the following allegation:

> '*In the course of … negotiations, AYO omitted to disclose to the PIC that ("the undisclosed facts"):*
>
> *9. AYO did not intend to use the entire proceeds of the private placement for the purposes reflected in the pre-listing statement but intended to divert*

certain of the funds to related party companies to facilitate the repayment of existing debts and/or for alternative purposes.'

[4] The plaintiffs in the action, who are the first and second respondents in the application currently before me, caused subpoenas *duces tecum* to be issued and served on Ms Amina Moodley, who is a director of 3 Laws Capital South Africa (Pty) Ltd and Sagarmatha Technologies Ltd, and on Mr Gamiem Colbie, who is a director of Sekunjalo Capital (Pty) Ltd. Those companies are related companies to the defendant, Ayo. The subpoenas required the recipients to produce to the registrar certain '*documents and communications*' in relation to dealings between the companies of which they are directors and Ayo.

[5] Ms Moodley and Mr Colbie and the three companies on whose boards of directors they serve have applied in the current proceedings, in case no. 3609/2023, for the setting aside of the subpoenas. The application was set down for hearing by me on the same day as the commencement before me of the trial in the action. I heard argument immediately before the commencement of the trial and reserved judgment. The trial has proceeded in the meantime.

[6] A number of complaints were advanced in the applicants' supporting affidavits but, at the hearing, the argument advanced by Mr *Katz* SC focussed on the alleged over-broadness and lack of specificity of the subpoenas. In this regard, the applicants' counsel stressed the requirement of specificity in rule 38(1)(a)(iii). Owing to the conclusion to which I have come on the application, this is the only issue I need to address determinatively. I should mention, however, that there was also a dispute between the applicants and the respondents as to whether one of the subpoenas served on Ms Moodley had called on her to produce documentation related to a company known by the acronym AEEI (of which she is not a director) rather than 3 Laws Capital. Mr *Katz* agreed, however, that the court could decide the application on the basis that Ms Moodley had been served with a subpoena in respect of the documentation of 3 Laws Capital, as contended by the first and second respondent. It is accordingly not necessary for me to determine that dispute.

[7] The material part of each of the three subpoenas was identical save, of course, for the mention of the name of the relevant related company. I shall use the wording of the subpoena served on Ms Moodley in respect of 3 Laws Capital South Africa (Pty) Ltd for illustrative purposes. It called on her, as recipient, to produce the following documents:

> '*All documents and communications in relation to all transactions and agreements between the Defendant and 3 Laws Capital South Africa (Pty) Ltd entered* [?into] *or considered from November 2017 to date.*'

To contextualise the dates mentioned in the subpoena, it bears noting that the agreement in terms of which the PIC subscribed for the shares in Ayo was concluded in December 2017. A prelisting statement, as required in terms of the rules of the Johannesburg Stock Exchange, had been issued on 13 December, and a preceding draft prelisting statement had been under consideration by relevant employees and executives of the PIC in the weeks preceding that.

[8] Rule 38(1)(a) of the Uniform Rules of Court provides as follows in relevant part::

> '***Procuring Evidence for Trial***
>
> *(1)(a)(i) 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.*
>
> *(ii) ….*

(iii) If any witness is in possession or control of any deed, document, book, writing, tape recording or electronic recording (hereinafter referred to as a 'document') or thing which the party requiring the attendance of such witness desires to be produced in evidence, the subpoena shall specify such document or thing and require such witness to produce it to the court at the trial.'

[9] In their answer to the application, the plaintiffs contended that the material sought to be obtained through the subpoenas was relevant in the action by reason of the allegation in para 15.9 of the particulars of claim quoted above. In answer to a question directed from the bench, Mr *Maleka* SC confirmed, as I expected he would, that the agreements or transactions related to the pleaded allegation in para 15.9 could be only agreements or transactions in terms of which funds raised through the PIC's subscription for the shares in Ayo were diverted or channelled, for any purpose not concerned with Ayo's growth strategy, from Ayo to the three related companies concerned. It is quite clear, however, if regard is had to the wording of the subpoenas, that their reach extends well beyond that. In fact, their reach is unlimited.

[10] Mr *Maleka* also conceded, quite reasonably, that the pleader of paragraph 15.9 of the particulars of claim (they were drafted by different counsel) must have had certain already identified transactions in mind in order to be able to plead the allegation concerned. Indeed, the identity of at least some of the transactions concerned appears to have emerged in the inquiries that have recently been undertaken into various aspects of the investment by the PIC into Ayo. There was so the so-called 'Mpati Commission', being the Judicial Commission of Inquiry into Allegations of Impropriety regarding the Public Investment Corporation, presided over by a former president of the Supreme Court of Appeal, the Hon. Lex Mpati, and another undertaken by the Johannesburg Stock Exchange. The subpoenas could, and in my view should, have specified that it was any documents related to those identified transactions that was required. The reach of the subpoenas could legitimately have been extended by reference also to any other transactions in terms of which funds raised by the private placement were channelled from Ayo to the company concerned.

[11] As long as the transactions were identified, either specifically or with reference to reasonably clear defining criteria, I do not consider that the breadth of the direction implicit in the use of the word '*all*' would have been objectionable. The use of the determiner '*all*', to which Mr *Katz* took exception on the grounds that it was the very antithesis of specificity could, in my view, be sufficiently 'specific' in the relevant context if the thing or class of things to which it relates is clearly enough defined or identified. It is the complete absence of such specificity in the impugned subpoenas that makes them non-compliant with the requirement of rule 38(1)(a)(iii).

[12] It is readily conceivable that there could have been any number of agreements or transactions of all manner of types between Ayo and its named related companies during the 5-year period involved that have no connection or relevance whatsoever to the issues involved in the action, yet the plain tenor of the subpoenas requires any documentation related to them to be produced. It might be argued that that is an unbusinesslike construction of the subpoenas and that the recipient might be expected to understand that relevance was implied. But even on that approach, the subpoenas would still be objectionable because the effect would be to leave it to the recipient's judgment to determine what was relevant or not. The appeal court has made it clear that such a situation is unacceptable; *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 735G-H.

[13] It has been remarked that, as a matter of judicial policy, courts should be cautious about upholding applications to set aside subpoenas and be exacting in their scrutiny of them. The rationale for that policy was explained in the following way in *Beinash* supra, at 734-5:

'*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. (Sher and Others v Sadowitz 1970 (1) SA 193 (C); S v Matisonn 1981 (3) SA 302 (A).)'

[14] '*Abuse of process*' is a term that bears with it the stigma of conscious misuse of the court's processes. I do not think that the judgment in *Beinash* should be read to suggest that it is only in cases of that sort that a court will be persuadable to set aside a subpoena. A court will also do so in other less opprobrious circumstances, such as when the subpoena is prejudicially non-compliant with the rules of court, or when it calls for the production or documents or things that are not relevant to the issues in a case, or where the material might more reasonably be obtained from a party to the proceedings (say though discovery) than from a third party. Those situations can occur even where there is no intention by the procurer of the subpoena to abuse the court's process. Where they do occur, the court will intervene irrespective of the procuring party's bona fides.

[15] The setting aside of the subpoenas will not affect the plaintiffs' ability, if they were so advised, to issue fresh subpoenas in a more directed and rule-compliant form. That can be done at any stage of the trial when it is still open to the plaintiff to lead its own evidence or cross-examine the defendant's witnesses. I mention this because another of the applicants' complaints was that the time allowed between the service of the subpoenas and the required production of the documents was so short that compliance would impose on them unfairly. Whether the time allowed is unfairly tight or not cannot be decided in the abstract. It might be if the volume of material is vast and the documents are difficult to collate. It would not be if the documentation was limited and readily available. It would be for the recipient to explain in the given circumstances of the case why he or she did not have sufficient time to be able to produce what was demanded by the subpoena.

[16] It follows from my finding that the subpoenas are non-compliant that an order will be made setting them aside. Mr *Katz* submitted that the applicants should be awarded their costs inclusive of the fees of two counsel. Mr *Maleka*, hoping for a more propitious outcome for the plaintiffs than has eventuated, also asked for the

costs of two counsel if the applications were dismissed. His contention was based on other considerations, however; namely, that the team engaged by the plaintiffs was heavily engaged in the final preparation for the trial when the urgent application to set aside the subpoenas imposed disruptively on their time. Had the plaintiffs' opposition prevailed, the argument might have carried the day. Comparable exigencies did not apply in respect of the applicants' position. I am not persuaded that the issues involved reasonably necessitated the engagement by the applicants of more than one counsel. A cogent argument could be made to the taxing master that the engagement of senior counsel for the purpose was reasonable, but that is not a matter for my determination.

[17] An order will issue in the following terms:

1. The subpoenas *duces tecum* served on the first and second applicants in relation to the action in case no. 9141/2019 are set aside.

2. The first and second respondents shall be liable, jointly and severally, to pay the applicants' costs of suit.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Applicant's counsel:	**A. Katz SC** **K. Perumalsamy** **B. Prinsloo**
Applicant's attorneys:	**Hanekom Attorneys Inc.** **Cape Town**
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First and Second respondents counsel:	**V. Maleka SC** **P. Ngcongo** **D. Wild**

	E. van Heerden
First and Second respondents' attorneys:	**Gwina Attorneys Inc** **Sandton** **Dunster Attorneys** **Cape Town**