

SOUTH AFRICA / JUDGMENT

R.S N.O and Others v C.M.S and Others (6837 / 2020) [2021] ZAWCHC 6 (21 January 2021)

[2021] ZAWCHC 6

COURT

Western Cape High Court, Cape Town

BEFORE

Wille

CASE / FILE NUMBER

6837 / 2020

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IN

THE HIGH COURT OF SOUTH AFRICA
(WESTERN
CAPE DIVISION, CAPE TOWN)

Case

Number: 6837 / 2020

In

the matter between:

R[...]
S[...] N
O First
Applicant
T[...]
S[...] N
O
Second
Applicant
J[...]
S[...] N
O Third
Applicant

M[...]
S[...] N
O
Fourth
Applicant
(as
trustees for the time being of the Regardt Trust (IT1483/92)
and
C[...]
M[...]
S[...] First
Respondent
R[...]
S[...]
Second
Respondent
THE
MASTER OF THE HIGH COURT
OF
SOUTH
AFRICA (WESTERN CAPE DIVISION)
Third
Respondent
In

re:

C[...]
M[...]
S[...] Plaintiff
R[...]
S[...] First
Defendant
R[...]
S[...] N
O
Second
Defendant
T[...]
S[...] N
O Third
Defendant
J[...]
S[...] N
O
Fourth
Defendant
M[...]
S[...] N
O Fifth
Defendant
SOUTH
AFRICA (WESTERN CAPE DIVISION)

	Sixth Defendant
Coram:	Wille, J Heard: 7th of December 2020
Delivered:	21st of January 2021

JUDGMENT

WILLE, J:

[1] This is an opposed application launched by the trustees of the Regardt Trust[1], for an order setting aside a subpoena issued out by the plaintiff against Investec Bank.[2] The subpoena, in essence, sought the production of certain financial documentation in connection with the affairs of the trust. Investec[3], indicated their willingness to comply with the terms of the subpoena, unless same was set aside by way of an order of court.

[2] For the purposes of clarity and ease of reference, the parties will be referred to as they were cited in the action proceedings and the trustees of the trust, in turn, will be referred to as the ‘trust’,

unless otherwise indicated. The plaintiff, the first defendant and the trust are embroiled in divorce proceedings, pending in the above court.

[3] The plaintiff is seeking, inter alia, the following relief; a decree of divorce; maintenance for herself and the (4) minor children born of her marriage to the first defendant; an order declaring that the assets acquired by the trustees of the trust (which they ostensibly hold in their capacities as trustees of the trust) are in effect owned by the first defendant; an order that when calculating the joint estate (alternatively, any accrual that has taken place in the first defendant’s estate), the net value of the assets referred to above (at the time of the dissolution

of the marriage), must be taken into account as forming part of the joint estate (alternatively, the first defendant’s estate).

[4] Further, in the alternative, an order is sought for damages against the first defendant, inasmuch as it is alleged, that he breached the terms of the ante-nuptial contract, by acquiring assets in the name of the trust (so as to place these beyond any claim that the plaintiff may have in regard to the joint estate and/or any accrual) and, an order that should the first defendant hold insufficient assets to satisfy the order made against him, that sufficient assets be transferred from the trust, to satisfy such order.

- [5] On the 12th of August 2020, the plaintiff caused a subpoena to be issued against the trust, which was served upon Investec. The trust launched an application to prevent Investec from complying with this subpoena insofar as it related to the bank records of the trust held by Investec. The trust advanced that the basis for the setting aside of the subpoena was that it was pre-mature, irregular, irrelevant and vexatious.
- [6] The trust lists the several grounds on which it confronts the subpoena, which are, inter alia, the following namely; that the information sought from Investec is irrelevant at this stage of the proceedings; that the information sought from Investec is private and confidential; that the trust intends to file a special plea of misjoinder; that the allegations against the trust have not yet been proven; that the plaintiff will only be entitled to the documentation once she is successful in her claims; that - nothing in law - requires the trust to make available to the plaintiff the documents requested from Investec; that the documents sought by way of the subpoena are currently needed solely for the purposes of mediation and or settlement negotiations and, that the plaintiff is on a fishing expedition for information to - try and use - against the first defendant (this, seemingly in the mediation process).
- [7] The plaintiff, in turn, advances that the trust does not have the requisite - locus standi
- to have launched the application and that it should have been launched by the first defendant, or at the very least, should have

been procedurally supported by the first defendant. It is submitted that no case has been made out (by the trust), that the

subpoena is an abuse of the court process and, that it has been brought for any purpose, other than to facilitate the pursuit of the truth.

- [8] The argument is that the plaintiff is, at any stage of the proceedings, entitled to seek documents that will assist her with her case, so to pursue the truth. Further, that the trust has failed to set out the - extraneous purpose - for which the subpoena was issued. The fact that the documents may or may not assist in the mediation process, does not - per se
- mean that the subpoena is an abuse of the court process or, has been issued out for the purpose of obtaining some illegitimate

tactical or other advantage, ulterior to the purposes of the court rules.

- [9] This argument is somewhat inextricably linked to the position taken by the trust that the documentation sought by the plaintiff is not relevant at this stage of the proceedings. I disagree because, relevance is essentially determined with regards to the - issues

- that are in dispute on the pleadings. A party who wishes to subpoena documents (that are relevant to the issues in dispute on the pleadings), may do so at any stage of the proceedings. It is also clear to me from a reading of the pleadings, that the first defendant and the trust, both vehemently deny the allegations made by the plaintiff against the trust in the divorce action.
- [10] The plaintiff takes the position that the financial information it seeks from the trust, may tend to prove the allegations made as against the trust, which, inter alia, are; that the first defendant contributed to the financing of the acquisition of certain trust assets, from assets of the joint estate; that the first defendant caused the growth in the value of the trust assets through his personal endeavours; that the first defendant assisted in the financing of the maintenance and running costs of the trust assets via the medium of the joint estate; that the first defendant caused the trustees of the trust to acquire some of the assets of the trust (and facilitated the financing of the acquisition of such assets), and that at the time that the first defendant caused the trustees of the trust to acquire assets, the first defendant intended to retain control of such assets for his personal benefit and to treat them as his personal assets. This, notwithstanding the provisions of the trust deed to the contrary.
- [11] Finally, it is submitted by the plaintiff that at all material times during her marriage to the first defendant and, (with the acquiescence of his trustees), the first defendant conducted the affairs of the trust and treated the trust assets as his personal assets and that he has been in effective control of such assets, since their acquisition. In summary, it is alleged that the first defendant utilised trust assets, without remuneration to the trust, for his own personal gain. Further, the plaintiff benefited from the trust, in that she received a motor vehicle that was purchased for her by the first defendant for her 40th birthday, but which remained registered in the name of the trust.
- [12] Historically, the first defendant received a monthly distribution from the trust. The plaintiff further submits that the bank statements subpoenaed are very relevant, principally having regard to the fact that the plaintiff has a claim for maintenance against the first defendant.
- [13] The trust also asserts that the documents sought in the subpoena are not relevant at this stage of the proceedings as they intend to raise a - special plea - of misjoinder and that, should they be successful, the trust will no longer be a party to the proceedings. This approach, I find somewhat irreconcilable with the argument on behalf of the trust, to the effect that the trust has the relevant and necessary locus standi to set aside the subpoena. This, because no exception has been filed against the plaintiff's particulars of claim. In addition, the amended particulars of claim clearly demonstrate that the plaintiff's case has not changed in connection with the relief that she seeks against the trust.
- [14] Further, the plaintiff in any event will retain her claim as against the first defendant for maintenance[4] and will retain her alternative claim for damages for an alleged breach of the terms of their ante-nuptial contract. It is not the subject of any dispute that the first defendant is a trustee and beneficiary of the trust and that he draws an income from the

trust. Accordingly it seems to me that as far as the plaintiff's claim for maintenance is concerned, she is - prima facie - entitled to the information and the documentation that she seeks in terms of the subpoena.

[15] Confidentiality

- per se - is also not a basis to seek to avoid a disclosure of documentation relevant to the proceedings. The plaintiff has undertaken to limit the dissemination of the documentation to her legal representatives, the experts to be appointed in the divorce action and to the mediator. No peculiar privilege is claimed by the trust and in any event, in my view, any privilege that may sought to be claimed, falls to be the subject of a claim by the first defendant and, not by the trust.

[16] Further, this claim of privilege seems to be somewhat diluted in view of the fact that the first defendant has furnished the plaintiff's attorneys with certain statements from another financial institution, in connection with the affairs of the trust. An argument is also raised that - nothing in law - requires it to make available the documentation held by Investec. On this score, it is however significant to note that the trust is not being requested to make the documentation available, it is Investec upon whom the demand is made in accordance with the subpoena.

[17] The trust also takes the position that because the bank statements were requested by the plaintiff's attorneys on the 30th of July 2020 (this before the subpoena was issued on the 12th August 2020), this chronology lends some confidence to the argument that the subpoena was issued for an ulterior purpose.

[18] In HG[5], a similar argument was employed and was rejected and it was held, inter alia, that:

'It may well be that the evidence obtained under the subpoena might be of use to the wife in any interlocutory proceedings related to the interim maintenance regime pending the determination of the divorce action, but if that is incidentally so, so be it. It would not make obtaining the evidence at this stage an abuse. The collection of evidence at any early stage is ordinarily a legitimate exercise in the preparation for a trial. It may even be conducive to an early settlement of the case – something that, were it to be achieved, would generally be in the interests not only of the parties themselves, but also in the interests of administration of justice because it would alleviate pressure on the trial rolls'

[19] It is the plaintiff's case that she has only resorted to the issuing a subpoena due to the refusal by the first defendant and the trust to provide her with the documentation she had requested. Significantly, after the service of the summons upon the first defendant, the trustees passed a resolution to cease making any further payments to the first defendant. This to me, is a clear signal that the financial position of the first defendant is inextricably linked to the financial position and financial affairs of the trust.

- [20] The plaintiff takes the position that the first defendant has not launched any application to set aside the subpoena on the grounds contended for on behalf of the trust. It is only the trust requesting the relief that the subpoena be set aside. The onus accordingly falls squarely on the applicant trust to establish an abuse of the court process.
- [21] The plaintiff claims, inter alia, life-long maintenance from the first defendant and accordingly advances that the financial status of the trust, vis a vis, the extent and nature of its payments to the first defendant, is one of the core issues to be traversed, in both the mediation process and, if that fails, in the subsequent trial. The first defendant is remunerated by the trust and also receives certain benefits from the trust. The plaintiff herself acquired the use of a motor vehicle, via the medium of the trust.
- [22] As mentioned, after the commencement of the action proceedings by the plaintiff against the first defendant and the trust, the trust resolved[6], to cease making any distributions to the first defendant which, in turn, directly impacted upon the first defendant's ability to make any payments to the plaintiff and the (4) minor children, born of their marriage.
- [23] In a letter from the plaintiff's attorneys[7], the plaintiff re-affirmed her resolve to attempt not only to settle the matter via the process of mediation, but also emphasized that the process of mediation, would run as a parallel process to and with, the action proceedings. A rule (43) application has also been launched in the interim.
- [24] The plaintiff also contends for the position that the trust does not have the necessary -locus standi
- to apply to set aside the subpoena, absent any application from the first defendant in this connection. More importantly, it is submitted that the trust can hardly raise the argument that the provisions of the subpoena are too wide, absent any intervention and participation by the first defendant himself. On this aspect, I agree. I cannot imagine or foreshadow any prejudice to the trust in this connection. Further, Investec has not raised that the provisions of the subpoena are too wide so that they are unable to comply therewith. To the contrary, they advise that they have complied with the subpoena and are in a position to collate and hand over the documentation as requested under and in terms of the subpoena.
- [25] It does not appear to me how the rights of the trust may in any manner be affected or violated, should the subpoena be complied with by Investec. The plaintiff has in any event tendered the necessary safeguards in this connection (regarding the dissemination of the documentation sought to be obtained). Further, notably the first defendant has never offered up any complaints in this connection.
- [26] Section 35 of the Superior Courts Act[8], grants a litigant a right to secure the attendance of a witness or the production of any document or thing, which the litigant may require in terms of the rules of court.

‘(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’

[27] Rule 38 of the Uniform Rules of Court, in turn provides that:

(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...’

‘(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’

[28] In *Beinash*[9], Mahomed CJ, set out the approach to be adopted by the courts in the setting aside of a subpoena. It was held that:

‘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...’

[29] In *South African Coaters*[10], it was held that in order to succeed in an application where an applicant, who is not the recipient of a subpoena, seeks to set it aside, the applicant will have to demonstrate that the subpoena is an abuse of process. In my view, the trust has failed, on these papers, to exhibit that the subpoena issued out by the plaintiff is an abuse of the process and they have also failed to demonstrate that they have a sufficient or adequate interest in the outcome of the application.[11]

[30] Finally, as mentioned before, a belated argument, raised for the first time in the applicants’ heads of argument, is that the wording in the subpoena is too wide and does not specify the specific documents that the witness, so subpoenaed, is required to produce. I disagree, because although the wording of the subpoena may be open to some criticism, Investec itself had no difficulty in complying with the terms of the subpoena. Further, and in any event, this objection was not raised by the first defendant, but rather by the trust, which trust, has clearly suffered no prejudice, due to these alleged formulation defects.

[31] For these reasons, the application falls to be dismissed and the following order is granted:-

1. That the applicants’ application is dismissed.
2. That the costs of and incidental to the application, including the costs of two counsel (where so employed), shall be paid by the applicant trust, on the scale as between party and party, as taxed or agreed.

E D WILLE

Judge of the High Court

[1] The trust

[2] Investec

[3] By way of a letter

[4] Both personal maintenance and maintenance for her children

[5] HG v AG; AG v HG and Another (2331/2017; 3487/19) [2019] ZAWCHC 125 (20 September 2019), para 52

[6] On the 15th of July 2020

[7] Dated the 26th of August 2020

[8] Act 10 of 2013

[9] Beinash v Wixley 1997

(3) SA 721(SCA), par 28

[10] South African Coaters (Pty) Ltd v St Paul Insurance Co (SA) Ltd and Others 2007

(6) SA 628 (D)

[11] Four Wheel Drive Accessory Distributors CC v Leshni Rattan NO 2018 JDR 2203 (SCA)

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